A TREATISE

ON

THE LAW AND PRACTICE

OF

Foreclosing Mortgages

ON REAL PROPERTY

AND OF

REMEDIES COLLATERAL THERETO

WITH FORMS

BY

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A New Work

SUPERSEDING THE AUTHOR'S ORIGINAL MONOGRAPH

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To

FRANCIS A. MACOMBER, LL. D.,

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK.

This Book is Respectfully Inscribed

By THE AUTHOR.

PREFACE.

THE generous and appreciative reception given by the legal profession to the author's original monograph on *Parties to Mortgage Foreclosures and Their Rights and Liabilities*, has been his chief encouragement during the past two years in preparing this treatise, and he bespeaks for this more elaborate endeavor the same kind treatment that was given to his first work. In presenting this treatise, it is desired to call the special attention of the profession to the fact that the original monograph on *Parties* has been included in, and superseded by this work. The general plan and style of the monograph have been followed in these pages. The same original and exhaustive investigation which was given to that narrow part of the general subject of the law and practice of foreclosing mortgages, has here been devoted to every part of the subject.

This work is not a second edition of the first one, but is distinctively a new treatise—covering every part of the law and practice of foreclosing mortgages, from the complaint through the distribution of surplus moneys, and including such collateral remedies as the appointment of a receiver.

It is adapted to the practice of every state in the Union, and especially of those states where foreclosures are conducted by equitable actions and sales. Over eight thousand cases have been cited; about one-third of these have been taken from the reports of the state of New York. Every

case cited has been tested and examined three different times, with a view to making the work accurate in details, as well as exhaustive, and as far as possible original. Digests and general text-books have been used very little. The work has been written up from the decisions of the courts as contained in the state reports; consequently, a great amount of new matter has been obtained that can be found in no other text-book.

In the foot-notes the limitations and modifications of general principles, and the special and peculiar instances are given in full. The practicing attorney—for whom this book has been written—is familiar with general principles; what he wants are the peculiar and special cases. The date of every case has been placed after its citation at the suggestion of the publishers, a feature that it is believed will add greatly to the convenient use of the book.

The author desires to acknowledge his great indebtedness to JAMES M. KERR, Esq., for assistance in preparing a large part of the work; indeed, without his assistance it would hardly have been possible for the author to have found time from the duties of an active practice to prepare the book with that exhaustiveness, completeness and accuracy which he hopes the legal profession will find to characterize it. FREDERICK B. HALL, Esq., also has rendered valuable assistance in testing and verifying nearly every citation in the book, and in preparing the appendix of forms.

ROCHESTER, N. Y., May, 1889.

TABLE OF CONTENTS.

CHAPTER I.

Page

NATURE AND OBJECT OF FORECLOSURE, ... 1

CHAPTER II.

COURTS, JURISDICTION AND VENUE, ... 14

CHAPTER III.

WHEN FORECLOSURE MAY BE COMMENCED, ... 28

CHAPTER IV.

WHEN RIGHT OF ACTION BARRED, ... 57

CHAPTER V.

PARTIES PLAINTIFF, ... 80

CHAPTER VI.

PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE.

Owners of the Fee Title, ... 132

CHAPTER VII.

PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE.

Subsequent Mortgagees and Lienors, ... 187

CHAPTER VIII.

PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE.

Parties Holding Part or Equitable Interests in the Mortgage Under Foreclosure, or in Liens Contemporary therewith, Not Joining as Plaintiffs, Necessary Defendants, 213

CHAPTER IX.

PARTIES DEFENDANT.

Page
PRIOR MORTGAGEES AND ADVERSE CLAIMANTS, ... 225

CHAPTER X.

PARTIES DEFENDANT—LIABLE FOR THE MORTGAGE DEBT.

GENERAL PRINCIPLES—POINTS IN PRACTICE, ... 235
PARTIES ORIGINALLY LIABLE, ... 249

CHAPTER XI.

PARTIES DEFENDANT—LIABLE FOR THE MORTGAGE DEBT.

PARTIES SUBSEQUENTLY LIABLE, ... 265

CHAPTER XII.

COMMENCEMENT OF ACTION, ... 292

CHAPTER XIII.

THE COMPLAINT, ... 326

CHAPTER XIV.

LIS PENDENS—NOTICE OF PENDENCY OF ACTION, . 359

CHAPTER XV.

ANSWERS AND DEFENCES.

WHO MAY ANSWER—DEFECT IN PARTIES—ACTION AT LAW ON BOND—DEFECTIVE EXECUTION OF MORTGAGE—INFANCY, INSANITY, IGNORANCE, ALTERATION, ... 380

CHAPTER XVI.

ANSWERS AND DEFENCES.

CONSIDERATION—USURY—DEFENCES AGAINST ASSIGNEE OF MORTGAGE, AND AGAINST PURCHASER OF NEGOTIABLE PAPER SECURED BY MORTGAGE, ... 403

CHAPTER XVII.

ANSWERS AND DEFENCES.

Page

FRAUD, MISREPRESENTATION, MISTAKE AND DURESS, ... 428

CHAPTER XVIII.

ANSWERS AND DEFENCES.

COUNTER-CLAIMS AND ESTOPPELS, ... 450

CHAPTER XIX.

ANSWERS AND DEFENCES.

RIGHT OF ACTION NOT ACCRUED — MORTGAGE DEBT NOT DUE — PAYMENT AND DISCHARGE — DENIAL OF PERSONAL LIABILITY —RELEASE OF PART OF MORTGAGED PREMISES, ... 475

CHAPTER XX.

ANSWERS AND DEFENCES.

ADVERSE AND PARAMOUNT CLAIMS OF TITLE — DEFECTIVE TITLE —FIXTURES — EVICTION — OUTSTANDING TITLE — WANT OF TITLE, ... 500

CHAPTER XXI.

PRACTICE ON FAILURE TO ANSWER—DEFAULT—PRACTICE ON TRIAL AFTER ISSUE JOINED.

REFERENCE TO COMPUTE AMOUNT DUE—POWERS AND DUTIES OF REFEREE — REPORT OF REFEREE — DECREE OF FORECLOSURE AND SALE—PROCEEDINGS ON TRIAL, ... 528

CHAPTER XXII.

SALE OF MORTGAGED PREMISES.

DECREE OF SALE — OFFICER MAKING SALE — NOTICE OF SALE — TIME OF SALE—PLACE OF SALE—TERMS OF SALE—STAY OF SALE, ... 563

CHAPTER XXIII.

SALE OF MORTGAGED PREMISES IN PARCELS.

DISCRETION OF COURT—WHEN TO BE MADE—PART ONLY DUE—SALE FOR AN INSTALLMENT—STAYED ON PAYMENT—FUTURE DEFAULTS, ... 585

CHAPTER XXIV.

SALE IN INVERSE ORDER OF ALIENATION.

Page

General Rule—Determining Order of Sale—Court Directing Order — Equitable Rights Between Subsequent Grantees and Lienors, ... 603

CHAPTER XXV.

CONDUCT OF SALE.

Personal Attendance of Referee—Discretionary Powers on Sale—Adjournments — Who May Purchase — Report of Sale by Referee—Confirmation Thereof, ... 624

CHAPTER XXVI.

SETTING SALE ASIDE AND RESALE.

General Principles — Who May Apply for — Grounds for —Effect of—Terms Imposed—Resale, ... 638

CHAPTER XXVII.

CONFIRMING SALE AND ENFORCING PURCHASE.

Confirmation of Sale—Enforcing Bid Against Purchaser—Defects in Title—Marketable Title—When Purchaser Will be Excused from Completing Purchase, ... 670

CHAPTER XXVIII.

DELIVERING DEED — PASSING TITLE — OBTAINING POSSESSION.

Referee's Deed — Estate Conveyed — Requisites of Deed—Title of Purchaser — Fixtures — Emblements — Rents — Appeal and Reversal—Delivery of Possession—Writ of Assistance—Summary Proceedings, ... 692

CHAPTER XXIX.

JUDGMENT FOR DEFICIENCY.

Reporting Deficiency—Who Liable for—Liability on Bond —Guaranty and Assumption—Intention of Parties Governs — How Amount of Determined — Execution for— Miscellaneous Matters, ... 721

CHAPTER XXX.

RECEIVER—PRACTICE ON APPOINTMENT.

Page

NATURE AND OBJECT OF OFFICE—MODES OF APPOINTMENT—APPLICATION FOR—WHAT MUST BE SHOWN—APPOINTMENT BY REFEREE—ORDER APPOINTING—RIGHTS, POWERS, DUTIES, 744

CHAPTER XXXI.

RECEIVER—WHEN WILL BE APPOINTED.

CAUSES FOR APPOINTMENT—INADEQUACY OF SECURITY—INSOLVENCY OF MORTGAGOR—PART ONLY OF DEBT DUE—WHEN RECEIVER DENIED—MORTGAGEE IN POSSESSION—ACCOUNTING BY RECEIVER—DISCHARGE, ... 780

CHAPTER XXXII.

PROCEEDINGS ON SURPLUS MONEYS.

PAYING SURPLUS INTO COURT—CHARACTER OF SURPLUS, REALTY OR PERSONALTY—ADJUSTING CLAIMS AND EQUITIES—QUESTIONS OF PRIORITY—LIENS ON SURPLUS—DOWER—MECHANICS' LIENS, . 820

CHAPTER XXXIII.

PROCEEDINGS ON SURPLUS MONEYS.

PRACTICE—DISTRIBUTION BY SURROGATE'S AND SUPREME COURTS—APPLICATION FOR SURPLUS—APPOINTING REFEREE—HIS POWERS AND DUTIES—WHAT MAY BE LITIGATED—TESTIMONY SIGNED—REFEREE'S REPORT—CONFIRMATION—ORDER FOR DISTRIBUTION—APPEAL, ... 859

CHAPTER XXXIV.

STATUTORY FORECLOSURE OR FORECLOSURE BY ADVERTISEMENT.

POWER OF SALE—NOTICE OF SALE—PUBLISHING, POSTING, SERVING—CONTENTS OF NOTICE—CONDUCT OF SALE—SETTING ASIDE—ENJOINING—EFFECT OF SALE—AFFIDAVITS OF PROCEEDINGS—RECORDING SAME—OPERATE AS DEED TO PASS TITLE—U. S. LOAN COMMISSIONERS' MORTGAGES, ... 878

CHAPTER XXXV.

STRICT FORECLOSURE, ... 923

CHAPTER XXXVI.

FEES, COSTS AND DISBURSEMENTS.

Page

FEES OF REFEREE SELLING—COSTS IN GENERAL—WHEN DISCRETIONARY—WHO MAY HAVE—PRIOR AND JUNIOR LIENORS—GUARDIAN AD LITEM—STIPULATION FOR COUNSEL FEE—STATUTORY FORECLOSURE—COSTS IN DISTRIBUTING SURPLUS, 935

APPENDIX OF FORMS, ... 967

GENERAL INDEX, ... 1025

MORTGAGE FORECLOSURES.

CHAPTER I.

NATURE AND OBJECT OF FORECLOSURE.

§ 1. Definition.
2 History.
3. Methods of foreclosure.
4. Foreclosure by entry and possession.
5. Strict foreclosure.
6. Statutory foreclosure.
7. Action in equity.
8. Statutory regulations—terms of mortgage contravening.
§ 9. Early practice in New York.
10. Concurrent remedies.
11. Results of foreclosure.
12. Effects of foreclosure and sale on title.
13. Who barred by foreclosure.
14. Subsequent incumbrancers.
15. Foreclosure as payment of debt.

§ 1. **Definition.**—The foreclosure of a mortgage is one of the remedies of the mortgagee, to enforce the payment of his debt, and has been defined in general terms as "the process by which the mortgagee acquires or transfers to a purchaser an absolute title to the property of which he has previously been only a conditional owner, or upon which he has previously had a lien or incumbrance."[1]

When it is familiarly said that a foreclosure invests the mortgagee with the title and interest of the parties foreclosed, a practical effect is described rather than a legal proposition defined. As between the parties plaintiff and defendant an action or proceeding for foreclosure passes the mortgagor's title as effectually as a judicial sale, because it extinguishes his entire title and interest. All that is formally accomplished however, is the extinction of a right and the interposition of a perpetual bar against the parties foreclosed; the

[1] 2 Hill. Mort. 1. See Packer v. Rochester & S. R. R. Co., 17 N. Y. 283, 287 (1858); Goodman v. White, 26 Conn. 317, 322 (1857); McCormick v. Wilcox, 25 Ill. 274 (1861); Weiner v. Heintz, 17 Ill. 259 (1855); Campbell v. Carter, 14 Ill. 286 (1853).

decree only professes to close a door which equity had before kept open, not to confer a right or to pass a title. It has been said for this reason that the foreclosing creditor by his action succeeds to nothing, acquires no estate, and purchases no right.[1] The decree merely extinguishes the mortgagor's equity of redemption, and does not affect a title superior to the mortgage.[2] But a statute giving perfect titles to purchasers upon mortgage foreclosure sales does no injustice to general creditors,[3] and is not necessarily contrary to the general principles of equity.

Every foreclosure has a point of time at which the title to the mortgaged premises is transferred absolutely from the mortgagor and his subsequent lienors to a purchaser or to a party who sustains the relations of a purchaser to the premises, whether the foreclosure be conducted by action and judicial sale, entry and possession, advertisement or otherwise. The principal object of a foreclosure is accomplished only when such a transfer has been effected. Other ends may also be sought, as a personal judgment of deficiency, but the extinguishment of the mortgage and the production of a perfect title is the first purpose of every method of foreclosure.

§ 2. **History.**—The process of foreclosure has been coordinate in development with the law of mortgages. Some writers find traces of the principles of hypothecation, redemption and foreclosure among the early Israelites. But the civil law of the Roman lawyers is the earliest known system of jurisprudence in which the rights connected with pledges were fully and accurately defined.

Civil Law Doctrines.—*Pignus* was the technical term for a pledge which passed into the possession of the creditor, and gradually came to be applied only to movables or chattels: while *hypotheca* referred to a pledge which continued to be held by the debtor, and was applied only to immovables or landed property. These were the two methods known to

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[1] Goodman v. White, 26 Conn. 317, 322 (1857).
[2] McCormick v. Wilcox, 25 Ill. 274, 276 (1861).
[3] Cook v. Detroit G. H. & M. Ry. Co., 43 Mich. 349 (1880).

the Roman law for the transfer of property as collateral security. No title to the property passed. Failure of payment at the appointed time did not work a forfeiture. Principles of equity favored the debtor so that his misfortune should not become the fortune of his creditor. A well regulated procedure or practice of foreclosure, founded upon notice to parties interested, open decrees of court and publicity of sale or entry, grew up with the law of pledges, so that the loss to both debtor and creditor would be the least possible[1]. The civil law of *pignus* and *hypotheca* is the root of the law of mortgages and of the procedures for foreclosure among all the Latin races of the present time.

Common Law Doctrines.—The ablest historians are at variance as to whether the Anglo-Saxons recognized pledges of real property. The law of feuds and tenures was decidedly opposed to mortgages. The Norman conquest and the apportionment of the kingdom of England by the Conqueror rendered them practically impossible until the reign of Edward I., when tenures and alienations of land were greatly simplified.

With the later development of the common law and its doctrines of landed estates, two kinds of realty pledges came to be recognized. The *vivum vadium* contained a continuous right of redemption, and permitted the creditor to enter into immediate possession and to collect the rents and profits for the reduction and payment of the debt; the debtor could re-enter at any time on liquidation of the debt. This form of mortgage never came into general use. The *mortuum vadium* was always made upon definite and exact terms of forfeiture; and if the conditions were not punctually kept, the title passed absolutely and forever from the debtor to the creditor. This form of landed security was extremely severe and often grossly unjust to the debtor. The spirit of the common law was inexorable, and allowed no redress to the unfortunate debtor. It firmly held that contracts of hypothecation with definite terms of forfeiture should be enforced, and it allowed no remedy to restore the debtor to

[1] Story's Eq. Jur. §§ 1005, 1009–1024.

his estate or to have the estate sold at public vendue to the highest bidder. But with the appearance of the courts of of chancery these severe rules were greatly modified and ultimately fell into entire disuse.[1]

Growth of Equity.—The *mortuum vadium* is doubtless the root from which our modern mortgage has grown. Its severity and unjustness, however, rendered it odious and unpopular until the appearance of that new jurisdiction which was exercised by the learned chancellors of England. These jurists sought continually to engraft the enlightened and equitable principles of the civil law of mortgages upon the severe rules of the common law. It is believed that the first encroachments by the courts of chancery were in the reign of Queen Elizabeth; but their powers were not fully exercised until the time of James I. Great confusion resulted from these concurrent jurisdictions for a number of years, but the justness and equity of the decrees of the chancellors gradually came to be recognized by the courts of common law and were acquiesced in by them. The rule came to be fixed and settled as part of the law of the Kingdom, that "once a mortgage, always a mortgage," and that no mortgage could be enforced without a decree of the chancellors. The common law courts waived entirely their former exclusive jurisdiction over mortgages, and the "equity of redemption" became a fixed right in every mortgagor. To foreclose or extinguish this right, the earliest method used was entry and possession, and from it have been developed the various procedures and practices used in the several states.[2]

§ 3. **Methods of foreclosure.**—There are four principal methods by which mortgages may be foreclosed in the United States, all depending upon equitable principles in their origin and proceeding upon equitable principles in their practice. 1. *Foreclosure by entry and possession* originally required the actual entry upon and possession of the mortgaged premises; this procedure has been greatly

[1] Coote on Mortgages, 4-22.

[2] Coote on Mortgages, 4–22; 4 Kent Com. 158.

assisted by the writ of entry, which is much in the nature of an equitable action, though nominally an action at law. Foreclosure by entry, however, is mainly confined to the New England and a few of the southern states. 2. *Strict foreclosure*, or foreclosure without a sale, was a procedure greatly used in England at one time, and its purpose was to perfect in the mortgagee an absolute title, instead of to obtain a decree of sale; the courts in most states recognize this method, but allow its use only in exceptional cases, owing to its severity upon the rights of the owner of the equity of redemption. 3. *Statutory foreclosure, or foreclosure by advertisement*, is a procedure provided in nearly every state by its legislature, all the steps in which are specifically prescribed by statute. Owing to its extreme technicality and insufficiency of remedy, it is seldom practiced where an equitable action is allowed. 4. *An equitable action* is now the almost universal procedure among the English-speaking races, for the foreclosure of a mortgage. So broad and comprehensive is the process of foreclosure by an equitable action, that a consideration of foreclosures with reference to that procedure, will also cover the subject where the procedure is by entry and possession or by strict foreclosure, so that attention need not be given separately to those two methods; while in statutory procedure special provisions are made as to each step. Where no provisions are made, equitable rules control. The subject of this work is thus reduced substantially to mortgage foreclosures by equitable action. Such variations as may exist in the other methods will be noticed in their proper connections.

§ 4. **Foreclosure by entry and possession.** — The earliest procedure under this form of foreclosure required an open and visible entry and possession by the mortgagee or his agent, upon the premises in the presence of witnesses, but the present practice requires only a constructive entry. The purpose of the entry, whether actual or constructive, is to give *notice* to the mortgagor, and others interested, that the equity of redemption will be extinguished unless the debt secured is paid and the terms of the mortgage are fulfilled. Constructive entry is now generally made by recording

a certificate or declaration of entry in the proper public office and by publishing notice of the same in a newspaper. At the expiration of from one to three years of undisputed peaceable possession, the title of the mortgagee becomes an absolute fee.

In form this procedure is a suit at law, though controlled by equitable rules, except where statutory provisions have prescribed an exact practice. The various details of practice in the several states will be noticed in their proper connections.

§ 5. **Strict foreclosure.**—This is a practice of estoppel upon the mortgagor. It is technically and literally a foreclosure or extinguishment. It permits neither a sale nor redemption; it requires payment of the debt within a certain time after notice or the absolute and final forfeiture of the title. It is the severest of all processes upon the mortgagor; strictly legal, rather than equitable principles, control the practice. It is rarely used in those states where courts of equity have a strong influence. Indeed, it is a serious question in New York whether strict foreclosures have not been abolished by the Code of Civil Procedure.[1]

In most states, where allowed at all, the practice is used only to remedy defective foreclosures, as where necessary parties have been omitted in an equitable action. The decree is generally to the effect that the defendants shall redeem within a certain time fixed by the court, or be absolutely barred of every interest in the property and of all right to redeem.

§ 6. **Statutory foreclosure.**—Nearly every state prescribes in its statutes a method of foreclosure by advertisement and sale, pursuant to the power of sale contained in nearly all mortgages. This is in addition to the procedure by an equitable action which is practiced in nearly every state.

In colonial times sale under power contained in the mortgage was the only practice employed, and so deeply rooted did it become in the real estate law and titles of that period that it has ever remained as a method of foreclosure. The statutes regulating the practice have varied greatly at

[1] N. Y. Code Civ. Proc. § 1626.

different times and are alike in no two of the states. The procedure is generally simple and cheap, but not so quick and certain in results as an equitable action. Being statutory it is extremely technical and liable to produce defective titles. It is employed most frequently in pioneer sections and in localities where real estate has but little value and is of slow sale.

§ 7. **Action in equity.**—An equitable action is now the almost universal procedure in the United States for the foreclosure of a mortgage. It is the most direct and certain practice, affords the largest opportunities for the adjustment and enforcement of the rights of all parties interested, is the quickest in final results, produces the strongest and firmest titles, and does the greatest justice to both mortgagor and mortgagee. The law of mortgages and of equitable foreclosures is, indeed, as has been remarked by Chancellor Kent, "one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law."[1] The history of equitable foreclosures is the history of mortgages. Every development and advancement in the principles of equity law and practice have resulted in corresponding improvements in equitable foreclosures.

It is to this method of foreclosure that this work will be principally devoted.

§ 8. **Statutory regulations—Terms of mortgage contravening.**—All of the above methods of foreclosure are greatly modified in the different states by statutory provisions. Where such provisions are in force, a power of sale or other agreement in the mortgage, that it shall be foreclosed in any other manner than that prescribed by the statute, will be void;[2] the statute in such cases must be strictly followed.[3]

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[1] 4 Kent Com. 158.

[2] Chase v. McLellan, 49 Me. 375, 378 (1861).

[3] Sherwood v. Reed, 7 Hill, (N. Y.) 431 (1844); Williamson v. Doe, 7 Blackf. (Ind.) 12 (1843); Pease v. Benson, 28 Me. 336 (1848); Robbins v. Rice, 73 Mass. (7 Gray) 202 (1856).

§ 9. **Early practice in New York.**—In New York it was formerly the rule that a mortgagee had three remedies, all or either of which he could pursue until his debt was satisfied. He could (1) maintain an action at law on the bond; (2) obtain possession of the rents and profits of the mortgaged lands by ejectment; or, (3) file a bill in chancery to foreclose the mortgagor's equity of redemption and sell the lands to pay the debt.[1] He could even pursue all these remedies at the same time. But these remedies have been greatly modified by statute; and the action of ejectment can no longer be maintained by the mortgagee for the recovery of the mortgaged premises.[2]

From the notes of the revisors we learn that the object of this statute was to compel the mortgagee to resort to equity to enforce his security, and to prevent the unnecessary multiplicity of suits.[3]

He may still, however, bring a personal action to recover the amount of the mortgage debt, but on judgment in such suit he will not be permitted to sell the equity of redemption of the mortgagor.[4]

§ 10. **Concurrent remedies.**—In addition to the remedy by an action to foreclose his mortgage, the mortgagee may bring a suit on the bond, which the mortgage was given to secure and which is the primary instrument of indebtedness. He may, at his option, proceed by suit on the bond, or by an action to foreclose the mortgage, but he can not avail himself of both remedies at the same time; and the commencement of an action of foreclosure prevents a subsequent suit on the bond, except in extraordinary cases, and by express permission of the court.[5] But an action of

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[1] Jackson v. Hull, 10 Johns.(N.Y.) 481 (1813); Jones v. Conde, 6 Johns. Ch. (N. Y.) 77 (1822); Dunkley v. VanBuren, 3 Johns. Ch. (N. Y.) 330 (1818); Hughes v. Edwards, 22 U.S. (9 Wheat.) 489 (1824); bk. 6 L. ed. 142.

[2] See 2 N. Y. Rev. Stat. 312, 321, § 57; Hubbell v. Moulson, 53 N. Y. 225 (1873); s. c. 13 Am. Rep. 519; Fiedler v. Darrin, 50 N. Y. 437, 444 (1872).

[3] 3 N. Y. Rev. Stat. 673.

[4] 2 N. Y. Rev. Stat. 368, §31. See also Tice v. Annin, 2 Johns. Ch. (N. Y.) 125 (1816).

[5] 2 N. Y. Rev. Stat. 191, 199, §153; N. Y. Code Civ. Proc. §§ 1628–1630. See Nichols v. Smith, 42 Barb. (N. Y.) 381 (1864); Suydam v. Bartle,

foreclosure may be commenced after a suit on the bond, provided it is brought before judgment in such suit. The consequences of bringing a suit to foreclose while one is pending on the note or bond, will be to stay all proceedings in the former suit, unless special permission of the court, to proceed, is obtained.[1] Thus where an action was commenced in the Superior Court of New York City to recover the amount of interest coupons upon bonds secured by a trust mortgage, and afterwards, but before the determination of the suit, the trustee commenced an action in the Supreme Court to foreclose the mortgage for the benefit of all the bond-holders, who, including the plaintiff in the former action, were made parties, it was held that the Supreme Court had power, in its discretion, to stay the proceedings in the Superior Court suit until the determination of the foreclosure suit.[2]

§ 11. **Results of foreclosure.**—Two purposes are now generally sought to be accomplished in foreclosures; first, the extinguishment of the title in the mortgagee and the mortgagor, and those claiming under them, so as to offer a perfect title at the sale, or such a title as a court will compel a bidder to accept; this purpose aims at exhausting every remedy against the land for collecting the mortgage debt, and when foreclosures were merely actions *in rem*, as originally, they had no other purpose or result; second, the recovery of a personal judgment, for any deficiency that may remain after the proceeds of a sale are applied to the payment of the mortgage debt, against all who have in any way become liable for the money secured by the mortgage,—a purpose accomplished originally only in actions *in personam*. The union of these two results in one judgment is quite

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9 Paige Ch. (N. Y.) 294 (1841); Williamson v. Champlin, 8 Paige Ch. (N. Y.) 70 (1839); s. c. 1 Clarke Ch. (N. Y.) 9; Marx v. Davis, 56 Miss. 745 (1879).

[1] See Engle v. Underhill, 3 Edw. Ch. 249 (1838); Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294 (1841); Shufelt v. Shufelt, 9 Paige Ch. (N. Y.) 137 (1841); s. c. 37 Am. Dec. 381; Williamson v. Champlin, 8 Paige Ch. (N. Y.) 70 (1839); s. c. 1 Clarke Ch. (N. Y.) 9 (1839); Pattison v. Powers, 4 Paige Ch. (N. Y.) 549 (1834).

[2] Cushman v. Leland, 93 N. Y. 652 (1883).

recent, and is allowed only by special statute. The effect of the first purpose is declared in most states by statute. In New York it is provided that "a conveyance upon a sale, made pursuant to a final judgment, in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate only, that would have vested in the mortgagee, if the equity of redemption had been foreclosed. Such a conveyance is as valid as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last section."[1]

The title and possession remain in the mortgagor until such conveyance upon sale; the interest of the mortgagee remains until then that of a mere lienor. The commencement of a foreclosure gives him no title, as his mortgage is only a security for a debt; the title and seizure remain in the mortgagor until the referee's deed upon sale is actually delivered to the purchaser.[2]

§ 12. **Effects of foreclosure and sale on title.**—The effect of a foreclosure by an equitable action and the sale of the premises is to bar the equity of redemption.[3] The deed passes to and vests in the purchaser the estate which would have passed to and vested in the mortgagee if there had been a strict foreclosure, no more and no less;[4] and a sale made pursuant to a decree or judgment of a competent court having jurisdiction of the subject-matter and of the parties, passes title to the purchaser even though the judgment should afterwards, on appeal, be set aside for error or irregularity.[5] The deed of the officer of the court conveying

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[1] N. Y. Code Civ. Proc. § 1632.

[2] Gardner v. Heartt, 3 Den. (N. Y.) 232 (1846); Hubbell v. Moulson, 53 N. Y. 225 (1873); s. c. 13 Am. Rep. 519; Bryan v. Butts, 27 Barb. (N. Y.) 503 (1857); National Fire Ins. Co. v. McKay, 5 Abb. (N. Y.) Pr. N. S. 445 (1867).

[3] See Palmer v. Mead, 7 Conn. 149 (1828); Broome v. Beers, 6 Conn. 198 (1826); Anonymous, 2 Cas. in Ch. 24 (1679).

[4] Lawrence v. Delano, 3 Sandf. (N. Y.) 333 (1849).

[5] See Blakeley v. Calder, 15 N. Y. 617 (1857); Holden v. Sackett, 12

the property will be as valid as if it had been executed by the mortgagor and mortgagee, and will be an entire bar against each of them, and against all parties to the suit in which the decree for such sale was made, and against their heirs and representatives, and all parties claiming under them or their heirs,[1] as well as against an assignee in bankruptcy,[2] who has notice of a suit pending against the bankrupt to foreclose the mortgage, although he was not made a party to the action;[3] and such a deed will be a complete bar to the equity of redemption where the mortgagee becomes the purchaser the same as where the property is purchased by a stranger.[4]

§ 13. **Who barred by foreclosure.**—The forclosure and sale will be a bar under the statute against those persons who were properly made parties to the action, that is, the mortgagor and the mortgagee, and all subsequent incumbrancers, and against such rights as were properly the subject of litigation in the action. It will not bar the rights of persons who were not properly made parties to the litigation, and whose rights are paramount to those of the mortgagor and mortgagee.[5] Thus a claim of dower in the premises was not barred by a foreclosure and sale under a mortgage executed by the husband alone during coveture, although the widow was made a party to the foreclosure suit, and the bill, which was taken as confessed against her, alleged that she claimed

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Abb. (N. Y.) Pr. 473 (1861); Lewis v. Smith, 11 Barb. (N. Y.) 152 (1851); LeGuen v. Gouverneur, 1 Johns. Cas. (N. Y.) 436 (1800); Breese v. Bangs, 2 E. D. Smith (N. Y.) 474 (1854); Wood v. Jackson, 8 Wend. (N. Y.) 9 (1831); s. c. 22 Am. Dec. 603; Buckmaster v. Carlin, 4 Ill. (3 Scam.) 104 (1841); Bank of United States v. Voorhees, 1 McL. C. C., 221 (1834).

[1] Blakeley v. Calder, 15 N. Y. 617 (1857); Holden v. Sackett, 12 Abb. (N. Y.) Pr. 473 (1861); Breese v. Bangs, 2 E. D. Smith (N. Y.) 474 (1854); Wood v. Jackson, 8 Wend. (N. Y.) 9 (1831); s. c. 22 Am. Dec. 603; Buckmaster v. Carlin, 4 Ill. (3 Scam.) 104 (1841); Bank of United States v. Voorhees, 1 McL. C. C., 221 (1834); 2 N. Y. Rev. Stat. 192, § 158.

[2] Under Acts of Congress, 1841; 5 Stat. at Large, 446.

[3] Cleveland v. Boerum, 24 N. Y. 613 (1862).

[4] Lansing v. Goelet, 9 Cow. (N. Y.) 346 (1827).

[5] Lewis v. Smith, 9 N. Y. 502 (1854); s. c. 41 Am. Dec. 706.

some interest in the premises "as subsequent purchaser, or incumbrancer, or otherwise."[1]

§ 14. **Subsequent incumbrancers.**—The decree of foreclosure and the sale thereunder, are a bar only against persons who were made parties to the action, their heirs and assigns, and those claiming under them;[2] consequently where the mortgage is foreclosed without joining the holder of a subsequent incumbrance upon or interest in the premises, whose title appears of record, the decree will not be binding upon such incumbrancer.[3]

§ 15. **Foreclosure as payment of debt.**—The principle is well settled that the foreclosure of a mortgage, by whatever method, operates as a payment of the mortgage debt, to the extent of the value of the property;[4] and this is true even though the foreclosure is brought by an assignee, holding only a part of the mortgage debt;[5] therefore, where a mortgagee forecloses his mortgage his debt becomes by that act extinguished to the extent of the value of the land at the time of the foreclosure, and whatever he may hold as collateral security for the debt in addition to the mortgage on the land, will thereby become discharged to the same extent.[6] Where the property is not sufficient to discharge the mortgage debt, the mortgagee may maintain an action at law

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[1] Lewis v. Smith, 9 N. Y. 502 (1854); s. c. 41 Am. Dec. 706. See Banks v. Walker, 3 Barb. Ch. (N. Y.) 438 (1848); Hallett v. Hallett, 2 Paige Ch. (N. Y.) 15 (1829); Devonsher v. Newenham, 2 Schoales & Lef. 199 (1804).

[2] 2 N. Y. Rev. Stat. 192, § 138; N. Y. Code Civ. Proc. § 1632

[3] Walsh v. Rutgers Fire Ins. Co., 13 Abb. (N. Y.) Pr. 33 (1861). See Vanderkemp v. Shelton, 11 Paige Ch. (N. Y.) 28 (1844); Slee v. Manhattan Co., 1 Paige Ch. (N. Y.) 48 (1828).

[4] See Vansant v. Allmon, 23 Ill. 30 (1859); Wilson v. Wilson, 4 Iowa 309 (1856); Hurd v. Coleman, 42 Me. 182 (1856); Southard v. Wilson, 29 Me. 56 (1848); Briggs v. Richmond, 27 Mass. (10 Pick.) 391 (1830); s. c. 20 Am. Dec. 526; Hunt v. Stiles, 10 N. H. 466 (1839); Paris v. Hulett, 26 Vt. 308 (1854); Lovell v. Leland, 3 Vt. 581 (1831). *Contra* Strong v. Strong, 2 Aik. (Vt.) 373 (1827).

[5] Johnson v. Candage, 31 Me. 28 (1849). See Brown v. Tyler, 74 Mass. (8 Gray) 135 (1857); s. c. 69 Am. Dec. 239.

[6] Smith v. Packard, 19 N. H. 575 (1849).

for the debt after deducting the value of the premises or the amount for which they were sold;[1] because in such a case the foreclosure only extinguishes the debt to the extent of the money produced by the sale.[2] The reason is said to be the fact that the mortgage is but a mere security for the debt and collateral to it; that the debt has an independent existence and remains with all its original validity, notwithstanding a release of the mortgage; that the former is the principal and the latter an incident, though not an indispensable incident.[3] But where the value of the property mortgaged exceeds the amount of the debt, foreclosure will operate as full payment even at law.[4]

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[1] Globe Ins. Co. v. Lansing, 5 Cow. (N. Y.) 380 (1825); s. c. 15 Am. Dec. 474; Porter v. Pillsbury, 36 Me. 278 (1853); Andrews v. Scotton, 2 Bland. Ch. (Md.) 629 (1830); Amory v. Fairbanks, 3 Mass. 562 (1793); Hatch v. White, 2 Gall. C. C. 154 (1814); Omaly v. Swan, 3 Mason C. C. 474 (1824); Briggs v. Richmond, 27 Mass. (10 Pick.) 391, 396 (1830); West v. Chamberlin, 25 Mass. (8 Pick.) 336 (1829); Lansing v. Goelet, 9 Cow. (N. Y.) 346 (1827); Case v. Boughton, 11 Wend. (N. Y.) 106, 109 (1833); Morgan v. Plumb. 9 Wend. (N. Y.) 287, 292 (1832); Spencer v. Hartford, 4 Wend. (N. Y.) 384, 386 (1830); Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 (1824); bk. 6 L. ed. 142; Aylet v. Hill, 2 Dick. 551 (1779); Took v. ——, 2 Dick. 785 (1784); s. c. *sub nom.* Tooke v. Hartley, 2 Bro. C. C. 125 (1786); Perry v. Barker, 13 Ves. 198, 204 (1806); Dashwood v. Blythway, 1 Eq. Cas. Ab. 317 (1729); 4 Kent Com. 183.

[2] Globe Ins. Co. v. Lansing, 5 Cow. (N. Y.) 380 (1826); s. c. 15 Am. Dec. 474; Dunkley v. Van Buren, 3 Johns. Ch. 331 (1818).

[3] Hatch v. White, 2 Gall. C. C. 152, 154 (1814).

[4] Bassett v. Mason, 18 Conn. 131 (1846).

CHAPTER II.

COURTS, JURISDICTION AND VENUE.

§ 16. In General—Courts of equity.
17. Foreclosure—Trial by jury.
18. Decree in chancery—Fraudulent.
19. Jurisdiction of State Courts—Supreme Court.
20. County Courts.
21. City Courts.
22. Terms of New York City Courts.
23. In Missouri.
24. Jurisdiction of Federal Courts.
§ 25. Venue—Provisions of the New York Code where the land lies within the state.
26. Debt payable in one county; land in another.
27. Action brought in improper county.
28. Motion for change of venue.
29. Where property situated in two states.
30. Where the land lies out of the state.
31. Where the parties reside in another state.
32. Transitory action.

§ 16. **In General.—Courts of Equity.**—Courts of equity have inherent original jurisdiction of actions to foreclose mortgages, and authority to render such judgment or decree as substantial justice between the parties may require. And although this power is conferred by statute upon courts of law in several states,[1] yet courts of equity, where they have not been suspended by codes of practice, doing away with all distinctions between actions at law and actions in equity, still have concurrent jurisdiction of the foreclosure of mortgages and are frequently resorted to in particular cases because, it is said, they afford a more complete and certain remedy.[2]

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[1] Statutes regulating mortgage foreclosures have been enacted in California, Florida, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oregon, South Carolina and Wisconsin. And see State Bank of Illinois v. Wilson, 9 Ill. 57 (1847); Warehime v. Carroll Co. Building Assoc., 44 Md. 512 (1876); Chouteau v. Allen, 70 Mo. 290 (1879); Byron v. May, 2 Chand. (Wis.) 103 (1850).

[2] Shaw v. Norfolk Co. R. R. Co., 71 Mass. (5 Gray) 162 (1855); McElrath v. Pittsburgh & S. R. R. Co., 35 Pa St. 189 (1867).

Where a mortgage contains a power of sale, such power will not deprive courts of equity of their jurisdiction to foreclose.[1] It is said that the reason for retaining jurisdiction in a court of equity is, that the mortgagee is incapable of purchasing at his own sale under a power in the mortgage,[2] but that at a sale made by an officer under a decree of foreclosure the mortgagee may become a purchaser.[3]

§ 17. **Foreclosure—Trial by jury.**—In an action to foreclose a mortgage brought under a statute providing for such proceedings, the court may, in its discretion, direct a reference, or ask the aid of a jury to inform its conscience, or it may decide the case without such aid; but the defendant can not ask as a matter of right to have the issues framed and tried at law.[4] And a jury trial can not be demanded as a matter of right in an action to recover upon a promissory note, and to foreclose a mortgage executed to secure the same, where the pleadings admit the right to recover the amount due upon the note, and nothing is left in controversy but the right to foreclose the mortgage, and to subject the property mortgaged to the payment of the amount admitted to be due.[5]

The fact that in an action to foreclose a mortgage, the sale of the mortgaged premises may result in a deficiency, for which a money judgment may be docketed against the defendant liable for such deficiency, does not entitle him, as a matter of right, to a jury trial; the action is in equity and is triable by the court.[6]

Should the court in such a case direct any matter of fact to be tried by a jury as authorized by the New York Code

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[1] Alabama Life Ins. & T. Co. v. Pettway, 24 Ala. 544 (1854); Carradine v. O'Connor, 21 Ala. 573 (1852); Warehime v. Carroll Co. Building Assoc., 44 Md. 512 (1876); Morrisson v. Bean, 15 Tex. 267 (1855); Walton v. Cody, 1 Wis. 420 (1853); Byron v. May, 2 Chand. (Wis.) 103 (1850).

[2] Marriott v. Givens, 8 Ala. 694 (1845); McGowan v. Branch Bank of Mobile, 7 Ala. 823 (1845).

[3] Benjamin v. Cavaroc, 2 Wood, C. C. 168 (1875).

[4] Knickerbocker Life Ins. Co. v. Nelson, 8 Hun (N. Y.) 21 (1876); Carmichael v. Adams, 91 Ind. 526 (1883); N. Y. Code Civ. Proc. §§ 968, 969.

[5] Morgan v. Field, 35 Kan. 162 (1886).

[6] Carroll v. Deimel, 95 N. Y. 252 (1884).

of Civil Procedure,[1] and after such trial disregard the verdict and make its own findings, the case may be reviewed on appeal, on the findings and decisions of the court, the same as if there had been no submission of any fact to the jury.[2]

But it seems that where a mortgagee brings an action under the New York Code of Civil Procedure upon a covenant in a deed against the grantees of the mortgagor to recover the deficiency arising on the foreclosure of the mortgage, which they had in their deed covenanted to repay as a part of the purchase price, and demands a money judgment against them, the action is triable by a jury.[3]

§ 18. **Decree in Chancery. — Fraudulent.** —Where a mortgage is foreclosed in a court of equity the decree should determine the rights and liabilities of all the parties to the action.[4] And where a decree in chancery foreclosing a mortgage is obtained by fraud, it is void and will be so declared on a bill filed by the party whose rights are injuriously affected by it ; a title founded upon such sale is also void.[5]

§ 19. **Jurisdiction of State Courts.—Supreme Court.—** The New York Constitution as amended in 1869,[6] vests the supreme court with general jurisdiction both in law and in equity ; and this court thereby succeeded to the old chancery powers and therefore has jurisdiction in all actions for the foreclosure of mortgages. The Code of Civil Procedure[7] provides that the general jurisdiction in law and in equity which the supreme court possessed under the provisions of

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[1] §§ 823, 971, 1003.

[2] Carroll v. Deimel, 95 N. Y. 252 (1884). Where, therefore, in such a case, upon the trial before the jury on which trial the same judge who made the findings presided, improper evidence was received under objection and exception, the appellant will be entitled to the benefit of the exception. *Id.*

[3] Hand v. Kennedy, 83 N. Y. 149 (1880) ; aff'g s. c. 45 N. Y. Super. Ct. (13 J. & S.) 385 (1879).

[4] Thus where a bill was filed to foreclose a mortgage executed by A. and wife and B. and wife, all of whom were made parties' defendant, a decree directing the sale of the interest of A. alone was held erroneous. Hurtt v. Crane, 36 Md. 29 (1872). See Contee v. Dawson, 2 Bland. Ch (Md.) 264, 292 (1832).

[5] Eslava v. Eslava, 50 Ala. 31, 32 (1873).

[6] Article 6, § 6.

[7] § 217.

the constitution, including all the jurisdiction which was possessed and exercised by the supreme court of the colony of New York at any time, and by the court of chancery in England on the 4th day of July, 1776, with the exceptions, additions, and limitations, created and imposed by the constitution and laws of the state shall be possessed and exercised by that court under the Code.

It was recently held by the supreme court of New York, as regards mortgaged property situated within the state and subject to the jurisdiction of its courts, that the parties to the mortgage can not, by their agreement, deprive the courts of the jurisdiction, which they would otherwise have, to enforce the rights acquired under the mortgage; but that they can by such agreement provide the method for the enforcement of their rights in those cases where the property mortgaged is situated out of the state and beyond the jurisdiction of its courts, unless such agreement is contrary to some statutory regulation upon the subject.[1]

§ 20. **County Courts.**—By the provisions of the New York Code of Civil Procedure,[2] the county courts are given jurisdiction of actions for the foreclosure of mortgages, and for the collection of any deficiency on the mortgage which may remain unpaid after the sale of the premises has been made, where such mortgaged premises are situated in the county. County courts are not courts of general jurisdiction, but of limited statutory jurisdiction, and it must appear upon the face of the pleadings that the action is within their jurisdiction.[3]

But it has been held that where by mistake the land intended to be covered by the mortgage, is described so vaguely and uncertainly as to render it impossible to identify and locate it, a county court will not have jurisdiction of an

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[1] Farmers' Loan & Trust Co. v. Bankers' & M. Telegraph Co., 44 Hun (N. Y.) 400 (1887).

[2] § 340. See also Code Proc. § 30; Code of Rem. Just. § 340. See Arnold v. Reese, 18 N. Y. 57 (1858); s. c. 17 How. (N. Y.) Pr. 35; overruling Hall v. Nelson, 23 Barb. (N. Y.) 88 (1856).

[3] Kundolf v. Thalheimer, 12 N. Y. 593 (1855); aff'g s. c. 17 Barb. (N. Y.) 506; Frees v. Ford, 6 N. Y. 176 (1852). See VanDeusen v. Sweet, 51 N. Y. 378 (1873).

action to reform the mortgage by correcting the error in the description and to foreclose the mortgage as thus reformed, because such court has no jurisdiction of an action to reform a mortgage.[1]

§ 21. **City Courts.**—The Code also provides for the foreclosure of mortgages on real property situated within their respective jurisdictions by the Court of Common Pleas of the City and County of New York,[2] the Superior Court of the City of New York,[3] the Superior Court of Buffalo,[4] the City Court of Brooklyn,[5] the Mayor's Court of the City of Hudson and the Recorder's Courts of Utica and Oswego.[6]

§ 22. **Terms of New York City Courts.**—It is provided by the rules of the Superior Court of New York City that there shall be a special term of that court for the trial of issues of law and of issues of fact without a jury, in actions for the foreclosure of mortgages, and for the hearing of motions and the granting of *ex parte* orders, held during each month of the year, commencing on the first Monday of each month and terminating on the Saturday immediately preceding the first Monday of the succeeding month. During the months of July, August and September, no trial shall be had unless ordered by the presiding judge.[7] And a similar rule of the Court of Common Pleas of the City of New York provides that there shall be a special term of that court for the trial of actions for the foreclosure of mortgages and for the hearing of motions and the granting of *ex parte* orders, held during each month, commencing on the first Monday of

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[1] Avery v. Willis, 24 Hun (N. Y.) 548 (1881); Thomas v. Harmon, 46 Hun (N. Y.) 75 (1887). See Crosby v. Dowd, 61 Cal. 603 (1882).

County courts have original jurisdiction only in certain specified cases. Constitution, article 6, § 15; Code Civ. Proc. § 340. An action or procceding to obtain the reformation of a defective deed, mortgage, or other instrument, is not among these specified cases, and the Code of Civ. Proc. § 348 does not cover it.

[2] Code Civ. Proc. § 263; Code of Rem. Just. § 263.

[3] Code Civ. Proc. § 263; Code of Rem. Just. § 263.

[4] Laws of 1873, Ch. 239; Code of Rem. Just. § 263.

[5] Laws of 1873, Ch. 239; Code of Rem. Just. § 263.

[6] Code Civ. Proc. § 263; Code of Rem. Just. § 263.

[7] Rule 12, New York Superior Court.

each month and terminating on the Saturday immediately preceding the first Monday of the succeeding month.[1]

§ 23. **In Missouri.**—In Missouri the circuit court has general jurisdiction over the foreclosure of mortgages, and objection to the jurisdiction of the court in any given action, based upon the fact that the mortgaged premises are not situated in the county where the suit is brought, must be taken by the proper plea, and will be waived by pleading to the merits.[2]

§ 24. **Jurisdiction of Federal Courts.**—The circuit courts of the United States have concurrent jurisdiction with the state courts over all suits of a civil nature in law or in equity where the United States is a party and the matter in dispute, exclusive of costs, exceeds the sum of $500, or where the parties to the suit are citizens of different states; and over all actions where an officer of the United States brings suit under an act of Congress. They have jurisdiction of all suits in equity to enforce a mortgage or other equitable lien or claim against real or personal property within the district where the suit is brought when any defendant is not a resident of or found within such district.[3] And circuit courts of the United States have jurisdiction to foreclose mortgages where the mortgaged premises lie within the jurisdiction of the court and one of the parties to the action does not reside in the state.[4] This equity jurisdiction of the circuit courts of the United States to foreclose mortgages on lands lying within the district where the suit is brought will not be affected by the fact that the state legislature has conferred upon the courts of law of the state authority to enforce equitable rights by statutory proceedings, because the federal courts can not be interfered with in any degree by state legislation.[5] The constitution of the United States

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[1] Rule 21, N. Y. Common Pleas.

[2] Chouteau v. Allen, 70 Mo. 290 (1879).

[3] 17 U. S. Stat. 193.

[4] Benjamin v. Caveroc, 2 Woods C. C. 168 (1875).

[5] Case of Broderick's Will, 88 U. S. (21 Wall.) 503, 520 (1874); s. c. *sub nom.* Kelly v. McGlynn, bk. 22 L. ed. 599; Thompson v. Central Ohio R. R. Co., 73 U. S. (6 Wall.) 134, 137 (1867); bk. 1 L. ed. 765; Bennett v. Butterworth, 52 U. S. (11 How.) 669, 674, 675 (1850); bk. 13 L. ed. 859; Benjamin v. Cavaroc, 2 Woods C. C. 168 (1875).

and the acts of Congress recognize and establish the distinction between law and equity; and the remedies in the United States courts are at law or in equity in accordance with the practice of the state courts and according to the principles of common law and equity as distinguished and defined in the country from which we derive our knowledge of these principles.[1] And although the state forms of practice may have been adopted in the circuit courts of the United States for the jurisdiction in which the states lie, yet this adoption of the state practice does not confound the principles of law and equity as established in such courts.[2] The equity jurisdiction of the federal courts is the same in all states and the rule of decision is the same in all; their remedies are not regulated by the state practice, for they are independent of the local law of any state.[3]

After the commencement of an action in a United States court to foreclose a mortgage, and the acquiring of jurisdiction by that court of the subject and parties, an action can not subsequently be commenced in a state court to foreclose the same mortgage.[4] The attachment of a bond and mortgage, assigned during the pendency of an action in the United States court from which the warrant of

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[1] Thompson v. Central Ohio R. R. Co., 73 U. S. (6 Wall.) 134, 137 (1867); bk. 18 L. ed. 765; Robinson v. Campbell, 16 U. S. (3 Wheat.) 212 (1818); bk. 4 L. ed. 372.

[2] Bennett v. Butterworth, 52 U. S. (11 How.) 669, 674 (1850); bk. 13 L. ed. 859.

[3] Barber v. Barber, 62 U. S. (21 How.) 582 (1858); bk. 16 L. ed. 226; Dodge v. Woolsey, 59 U. S. (18 How.) 331, 347 (1855); bk. 15 L. ed. 401; United States v. Howland, 17 U. S. (4 Wheat.) 108 (1819); bk. 4 L. ed. 526; Cropper v. Coburn, 2 Curt. C. C. 465 (1855); Gordon v. Hobart, 2 Sumn. C. C. 401 (1825).

[4] Levy v. Haake, 53 Cal. 267 (1878). Thus where a creditor of a bankrupt, whose claim is secured by a mortgage, has gone into the United States district court as a court of bankruptcy, proved his claim and subjected it to the jurisdiction of that court; and the bankruptcy court has, by an order to which the creditor was a party, made on application of another creditor having a prior lien on the mortgaged premises, directed a sale of the premises, the proceeds thereof, beyond the sum admitted to be secured by the prior lien, "to abide a further hearing" between the two claimants; the mortgagee can not, after the sale, foreclose his mortgage in a district court of the state, while the proceedings in respect to the disposition of the proceeds of the sale are still pending in the bankruptcy court.

attachment was issued, will not prevent the foreclosure of the mortgage by the assignee thereof in a state court.[1] Thus after the commencement of an action by the United States in a United States circuit court, the defendant therein executed an assignment of a bond and mortgage which was recorded; an attachment was thereafter levied on the mortgage debt, plaintiff claiming that the assignment was fraudulent and void. An action was then brought by the assignee to foreclose the mortgage. Upon application of the owners of the equity of redemption the United States circuit court directed the levy to be discharged, unless the United States consented to appear and submit to the jurisdiction of the state court. Upon motion thereupon made in the foreclosure suit an order was granted substituting the United States as defendant, discharging the original defendant from liability, and directing the plaintiff to satisfy the mortgage, upon payment into court of the amount due with costs, with provision for the appearance of the United States, its submission to the jurisdiction of the court, and consent that the title to the mortgage debt be determined in the action; on default of such appearance and submission, the money so paid in was directed to be paid to the plaintiff. The court held that the order was proper because the United States had no judgment against the defendant, and might never have.[2]

§ 25. Venue. — Provisions of the New York Code where the land lies within the state.—Under the provisions of the New York Code of Civil Procedure, where the land lies within the state, an action to foreclose a mortgage on real property must be brought and tried in the county in which the land is situated,[3] subject to the power of the court to change the place of trial in the cases provided for in the Code.[4] And this is true although

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[1] See Johnson v. Stimmel, 89 N.Y. 117 (1882); Thurber v. Blanck, 50 N. Y. 80 (1872).

[2] Johnson v. Stimmel, 89 N. Y. 117 (1882). See Thurber v. Blanck, 50 N. Y. 80 (1872).

[3] N. Y. Code Civ. Proc. § 982. See also Gould v. Bennett, 59 N. Y. 124 (1874); s. c. 49 How. (N. Y.) Pr. 57.

[4] N. Y. Code Civ. Proc. § 987.

the money may have been loaned and the mortgage executed in a county other than that in which the mortgaged premises are situated.[1] The appointment of a referee residing in a different county from that in which the venue is laid, will not necessarily change the place of trial; but the referee can not, without the consent of the parties, try the case elsewhere than in the county where the mortgaged premises are situated.[2]

§ 26. **Debt payable in one county; land in another.**—In Iowa where a note made payable in one county is secured by a mortgage on land located in another county, the court of the county where the note is payable has no jurisdiction of an action to foreclose a mortgage where the notice to the maker is served by publication only. The action in such a case is strictly *in rem* and must be brought in the county where the land lies; but if such service is had upon the maker of the note and the action is so brought, as to enable the court of the county where the note is payable, to render a personal judgment against the maker thereof, under the Code,[3] then that court may also render a decree foreclosing the mortgage, although the land lies in another county.[4] This right, however, depends upon the particular provisions of the Code, and until its passage a different rule prevailed.[5]

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[1] Miller v. Hull, 3 How. (N. Y.) Pr. 325 (1848); s. c. 1 Code Rep. 113; Vallejo v. Randall, 5 Cal. 461 (1855); Hackenhull v. Westbrook, 53 Ga. 285 (1876); Owings v. Beall, 3 Litt. (Ky.) 103 (1823). *Compare* Broome v. Beers, 6 Conn. 198 (1826); Caufman v. Sayre, 2 B. Mon. (Ky.) 202 (1841).

[2] Brush v. Mullany, 12 Abb. (N. Y.) Pr. 344 (1861); Wheeler v. Maitland, 12 How. (N. Y.) Pr. 35 (1855); Gould v. Bennett, 59 N. Y. 124 (1874); s. c. 49 How. (N. Y.) Pr. 57.

In this case, a justice holding a special term in the county of Westchester, at which an action for the foreclosure of a mortgage upon real estate, situated in that county was upon the calendar, adjourned the term to his chambers in the county of Kings, and proceeded to try the action at the adjourned term against the objections of the defendant. This was held to be error.

[3] Iowa Code, § 2581.

[4] Iowa Loan & Trust Co. v. Day, 63 Iowa, 459 (1884); Equitable Life Ins. Co. v. Gleason, 56 Iowa, 47 (1881).

[5] Iowa Loan & Trust Co. v. Day, 63 Iowa, 459 (1884); Chadbourne v. Gilman, 29 Iowa, 181 (1870).

§ 27. **Action brought in improper county.**—Placing the venue and having the trial in a county different from that in which the property is situated, is not an irregularity,[1] because where the county designated in the complaint as the place of trial is not the proper county, the action may, notwithstanding, be tried therein unless the place of trial is changed to the proper county, upon the demand of the defendant, followed by the consent of the plaintiff or by the order of the court.[2] But where the county designated in the complaint as the place of trial is not the proper county, the defendant may demand, as a matter of right, that the trial be had in the proper county.[3]

Where the defendant demands that the action be tried in the proper county, his attorney must serve upon the plaintiff's attorney, with the answer, or before service of the answer, a written demand accordingly, which must specify the county where the defendant requires the action to be tried. If the plaintiff's attorney does not serve his written consent to the change, as requested by the defendant, within five days after service of demand, the defendant's attorney may, within ten days thereafter, serve notice of a motion to change the place of trial.[4]

§ 28. **Motion for change of venue.**—Before a motion can be made for changing the place of trial, on the ground that neither the plaintiff nor the defendant resides in the county where the venue is laid, a demand must be made therefor upon the attorney who has appeared in the action as provided for by the Code.[5] Where the plaintiff's attorney fails to consent to the change demanded, an application to the court by motion must be made by the defendant within

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[1] Brush v. Mullany, 12 Abb. (N. Y.) Pr. 344 (1861); Marsh v. Lowry, 26 Barb. (N. Y.) 197 (1857); s. c. *sub nom.* March v. Lowry, 16 How. (N. Y.) Pr. 41 (1857).

[2] N. Y. Code Civ. Proc. § 985.

[3] Leland v. Hathorne, 42 N. Y. 547 (1870); s. c. 9 Abb. (N. Y.) Pr. N. S. 97; Bush v. Treadwell, 11 Abb. (N. Y.) Pr. N. S. 27 (1871), Stark v. Bates, 12 How. (N. Y.) Pr. 465 (1854); N. Y. Code Civ. Proc. § 986.

[4] N. Y. Code Civ. Proc. § 986.

[5] VanDyck v. McQuade, 18 Hun (N. Y.) 376 (1879); N. Y. Code Civ Proc. § 421.

ten days after the expiration of the five days given to the plaintiff to consent to the change, or within fifteen days after the demand has been made by the defendant; otherwise the right to the change will be waived.[1] But it seems that under the Code,[2] the court has power to change the place of trial, on the ground that the county where the venue is laid is not the proper county, to the proper county upon application of the defendant, although he may have lost the right by laches.[3]

A motion for a change of the place of trial to the proper county made by the defendant before answer, can not be opposed by the plaintiff on the ground that he has witnesses in the county named in the complaint and that a change of the place of trial will greatly inconvenience them,[4] because the place of trial must be located in the proper county irrespective of the convenience of witnesses,[5] and where it is not so laid the right of the defendant to have the place of trial changed to the proper county is an absolute one.[6] Where the convenience of witnesses requires a change of the place of trial, the proper practice is first to order a change to the proper county upon the defendant's motion, and then if the plaintiff desires a change to any other county on the

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[1] Duche v. Buffalo Grape Sugar Co., 63 How. (N. Y.) Pr. 516 (1882).

Under the Code, (§ 126 of the original Code), there was no limitation of the time in which the motion to change the place of trial to the proper county could be made, and accordingly it was held under that statute that such a motion could be made at any time before trial.

Hubbard v. National Protection Ins. Co., 11 How. (N. Y.) Pr. 149 (1855); Conroe v. National Protection Ins. Co., 10 How. (N. Y.) Pr. 403 (1855). But a change was made by the new section (986) requiring the service of notice of motion to compel the change to be made within ten days after the expiration of the five days.

[2] N. Y. Code Civ. Proc. § 987.

[3] Clark v. Campbell, 54 How. (N. Y.) Pr. 166 (1877).

[4] Veeder v. Baker, 83 N. Y. 156 (1880); Gifford v. Town of Gravesend, 8 Abb. (N. Y.) N. C. 246 (1879); Wood v. Hollister, 3 Abb. (N. Y.) Pr. 14 (1856); Starks v. Bates, 12 How. (N. Y.) Pr. 465 (1854); Hubbard v. National Protection Ins. Co., 11 How. (N. Y.) Pr. 149 (1855); Moore v. Gardner, 5 How. (N. Y.) Pr. 243 (1851). See Supreme Court Rule 48.

[5] Gifford v. Town of Gravesend, 8 Abb. (N. Y.) N. C. 246 (1879); Moore v. Gardner, 5 How. (N. Y.) Pr. 243 (1851).

[6] Veeder v. Baker, 83 N. Y. 156, 162 (1880).

grounds stated in the Code,[1] he must make his motion upon affidavits, which the defendant may prepare to oppose.[2] The motion for a change of venue on the ground that the plaintiff laid his action originally in the wrong county should be made before issue is joined;[3] but a motion for a change of venue based on the convenience of the witnesses should not be made before issue has been joined.[4]

§ 29. **Where property situated in two states.**—It has been said that where mortgaged property is situated partly in one state and partly in another, that a court possessing equity jurisdiction may entertain a suit to foreclose the mortgage as to the whole of the property.[5] It seems, however, that the better practice is to bring a separate suit in each state for the foreclosure of the mortgage on the portion of the property located in that state.[6]

§ 30. **Where the land lies out of the state.**—Where all the real property to which an action relates is situated without the state the action must be tried in the county in which one of the parties resides at the commencement thereof. If none of the parties reside in the state it may be tried in any county which the plaintiff designates for that purpose in the title of the complaint.[7]

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[1] N. Y. Code Civ. Proc. § 987.

[2] Veeder v. Baker, 83 N. Y. 156 (1880). See also International Life Assurance Co. v. Sweetland, 14 Abb. (N. Y.) Pr. 240 (1862); Hubbard v. National Protection Ins. Co., 11 How. (N. Y.) Pr. 149 (1855); Park v. Carnley, 7 How. (N. Y.) Pr. 355 (1852).

[3] See Wood v. Hollister, 3 Abb. (N. Y.) Pr. 14 (1856); Toll v. Cromwell, 12 How. (N. Y.) Pr. 79 (1855); Hubbard v. National Protection Ins. Co., 11 How. (N. Y.) Pr. 149 (1855); Schenck v. McKie, 4 How. (N. Y.) Pr. 245 (1849).

[4] Merrill v. Grinnell, 10 How. (N. Y.) Pr. 32 (1854); Hinchman v. Butler, 7 How. (N. Y.) Pr. 462 (1852); Lynch v. Mosher, 4 How. (N. Y.) Pr. 86 (1849). See also Hartman v. Spencer, 5 How. (N. Y.) Pr. 135 (1850); Mixer v. Kuhn, 4 How. (N. Y.) Pr. 409 (1850); Beardsley v. Dickerson, 4 How. (N. Y.) Pr. 81 (1848).

[5] Mead v. New York H. & N. R. R. Co., 45 Conn. 199, 223 (1877). See Toller v. Carteret, 2 Vern. 494 (1705); Penn v. Baltimore, 1 Ves. Sr. 444 (1750).

[6] *In re* U. S. Rolling Stock Co., 55 How. (N. Y.) Pr. 286 (1878). See Farmers' L. & T. Co. v. B. & M. T. Co. 44 Hun (N. Y.) 400 (1887).

[7] N. Y. Code Civ. Proc. §§ 982, 984. See House v. Lockwood, 40 Hun (N. Y.) 532 (1886).

§ 31. **Where the parties reside in another state.**—Some courts have held that equity acts only *in personam* and not *in rem*, and that if a bill to foreclose be filed in the state and county where the mortgaged lands are situated, all the parties being citizens of another state, jurisdiction of the action can be acquired by proper personal service of the process;[1] but the better doctrine would seem to be that an action to foreclose is an action purely *in rem* and not *in personam*, and that the mortgage may be foreclosed and the property sold to satisfy the mortgage debt without personal service of process on the defendant or his appearance in court regardless of the residence of the parties. If, however, there has been no personal service within the jurisdiction of the court and no appearance, the court will have no jurisdiction over the person of the defendant, and a judgment for deficiency can not, for that reason, be entered.[2]

§ 32. **Transitory action.**—Aside from statutory requirements an action to foreclose a mortgage is not a local but a transitory action, and a bill may be brought or a complaint filed wherever jurisdiction of the parties can be acquired.[3] And it has been said that a complaint for foreclosure of the equity of redemption in mortgaged lands, is transitory and that any court where a necessary defendant is served with process, has jurisdiction;[4] but that if a decree for sale only is asked

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[1] Grace v. Hunt, Cooke (Tenn.) 341 (1813).

[2] Ewer v. Coffin, 55 Mass. (1 Cush.) 23 (1848); Phelps v. Holker, 1 U. S. (1 Dall.) 261 (1788); bk. 1 L. ed. 128; Kilburn v. Woodworth, 5 Johns. (N. Y.) 37 (1809); Robinson v. Exrs. of Ward, 8 Johns. (N. Y.) 86 (1811); Bissell v. Briggs, 9 Mass. 461, 468 (1813); Ocean Ins. Co. v. Portsmouth Marine Ry. Co. 44 Mass. (3 Metc.) 420 (1841); Danforth v. Penny, 44 Mass. (3 Metc.) 564 (1842).

[3] Bates v. Reynolds, 7 Bosw. (N. Y.) 685 (1860); Porter v. Lord, 4 Duer (N. Y.) 682 (1856); Varian v. Stevens, 2 Duer (N. Y.) 635 (1853). See Broome v. Beers, 6 Conn. 198 (1826); Finnegan v. Manchester, 12 Iowa, 521 (1861); Cole v. Connor, 10 Iowa, 299 (1860); Caufman v. Sayre, 2 B. Mon. (Ky.) 202 (1841); Newman v. Stuart, Cooke (Tenn.) 339 (1813); Kinney v. McLeod, 9 Tex. 78 (1852); Paget v. Ede, L. R. 18 Eq. 118 (1874); Toller v. Carteret, 2 Vern. 494 (1705).

[4] Caufman v. Sayre, 2 B. Mon. (Ky.) 202 (1841). See also Paget v. Ede, L. R. 18 Eq. 118 (1874).

the court of the county where the land lies is the only court that has jurisdiction.[1] Thus where six different mortgages were given upon distinct parcels of land laying in six different counties, to secure a distinct portion of a promissory note therein described, and an action was brought in a county where one of the mortgaged tracts was located to forclose all six of the mortgages, it was held that as to the five mortgages on the lands lying in the counties other than that in which the action was commenced, the venue was wrong and that the court had no jurisdiction to try the issues arising thereon.[2] But in those cases where the land mortgaged consists of one tract laying in two or more different counties, a suit may be brought to foreclose in either of the counties in which the land is partly situated.[3] It is held in Connecticut, however, that a bill to foreclose a mortgage need not be brought in the county where the land lies, the title of the mortgagee not being in question.[4]

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[1] Chadbourne v. Gilman, 29 Iowa, 181 (1870); Owings v. Beall, 3 Litt. (Ky.) 104 (1823); Caufman v. Sayre, 2 B. Mon. (Ky.) 202 (1841).

[2] Chadbourne v. Gilman, 29 Iowa, 181 (1870).

[3] Owings v. Beall, 3 Litt. (Ky.) 103 (1823).

[4] Broome v. Beers, 6 Conn. 198 (1826). In this case the court say: The title to the land was not in question under the plaintiff's bill of foreclosure; and such suits have always been considered transitory, citing Austin v. Burbank, 2 Day (Conn.) 474, 477 (1807); s. c. 2 Am. Dec. 119; Owen v. Walter, Superior Court Hartford County (1816); Owen v. Granger, Superior Court Hartford County (1802); Anon. 2 Chan. Cas. 244 (1679); Pow. Mort. 1043; 2 Swift's Dig. 197.

CHAPTER III.

WHEN FORECLOSURE MAY BE COMMENCED.

§ 33. Right to foreclose.
34. When right to foreclose accrues.
35. When previous demand not necessary.
36. Interest clause—Breach making mortgage due.
37. Effect of such a condition.
38. Stipulation against forfeiture.
39. Note payable on demand.
40. Where the time of payment is not specified.
41. Mortgage payable in installments.
42. Failure to pay interest.
43. Failure to pay taxes.
44. Election of mortgagee that debt become due.
45. Notice of election.
46. Who may exercise option to declare the debt due.
47. Power of court to relieve from forfeiture.
48. Where mortgagee holds one mortgage securing several notes.
49. Where mortgagee holds more than one mortgage on the same property securing different debts.
50. Indemnity mortgage.
51. Parol agreement as to time of payment.
52 Agreement not to enforce mortgage.
53 Extension of time of payment.
54. Extension of time by parol.

§ 33. **Right to foreclose.**—With every mortgage there exists an inherent right of foreclosure, whether the foreclosure results in vesting an absolute title to the property in the mortgagee, as was formerly the case in England, or in a judicial sale of the premises, as is now the case in most of our states.[1] Such right of foreclosure is not an unrestrained one, for as long as the mortgagor keeps his covenants, the mortgagee can have no grievance to redress, and the mortgagor will be entitled to the undisturbed possession of the mortgaged premises; the right to foreclose arises only where the condition of the mortgage has been forfeited by failure to pay the principal or interest when due, or by some similar breach of contract.[2] The lapse of time, however,

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[1] Koch v. Briggs, 14 Cal. 256, 262 (1859); s. c. 73 Am. Dec. 651.

[2] Wilkinson v. Flowers, 37 Miss. 579, 584 (1859); s. c. 75 Am. Dec. 78; James v. Fisk, 17 Miss. (9 Smed. & M.) 144, 150 (1847); s. c. 47 Am. Dec. 111; Gladwyn v. Hitchman, 2 Vern. 135 (1689).

which usually determines the right to institute an action for foreclosure, is not always the criterion by which the complainant is to be governed, for that right may be made to depend upon other events or contingencies. This is especially the case where the mortgage declared upon is an indemnity mortgage, conditioned to protect the mortgagee against liability and to save him harmless from loss.[1] As a rule, however, the right of action does not accrue upon an indemnity mortgage until the mortgagee has paid the whole or a part of the debt, or his principal has defaulted upon the debt which the mortgage was given to secure.[2] This is particularly true where the condition of the covenant is simply to pay the obligation.[3]

The nature of the security may be such that an event not contemplated by the parties, nor provided for in their agreement, may render it impossible for the mortgagor to comply with the conditions of his mortgage. In such an event a right of action will accrue at once. Thus it has been held that where a mortgage was given by a manufacturing company to secure an executory contract running through a term of years, and the company subsequently failed and became wholly insolvent, a right of action accrued upon the mortgage forthwith, because it was evident that it would be impossible for the company to keep its engagements.[4]

§ 34. **When right to foreclose accrues.**—An action to foreclose a mortgage will not lie until the debt secured has

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[1] See Ellis v. Martin, 7 Ind. 652 (1856); Francis v. Porter, 7 Ind. 213 (1855); Lewis v. Richey, 5 Ind. 152 (1854); Butler v. Ladue, 12 Mich. 173 (1863); Dye v. Mann, 10 Mich. 291 (1862); Thurston v. Prentiss, 1 Mich. 193 (1849).

[2] Platt v. Smith, 14 Johns. (N. Y.) 368 (1817); Powell v. Smith, 8 Johns. (N. Y.) 249 (1811); Rodman v. Hedden, 10 Wend. (N. Y.) 500 (1833); Ketchum v. Jauncey, 23 Conn. 126 (1854); Beckwith v. Windsor Manuf. Co., 14 Conn. 594 (1842); Pond v. Clarke, 14 Conn. 334 (1841); Shepard v. Shepard, 6 Conn. 37 (1825); Francis v. Porter, 7 Ind. 213 (1855); McLean v. Ragsdale, 31 Miss. 701 (1856); Ohio Life Ins. & Trust Co. v. Reeder, 18 Ohio, 35 (1849); McConnell v. Scott, 15 Ohio, 401 (1846); s. c. 45 Am. Dec. 583; Kramer v. Trustees of Farmers' & Mechanics' Bank of Steubenville, 15 Ohio, 254 (1846).

[3] See *post* § 50.

[4] Harding v. Mill River Woolen Manuf. Co., 34 Conn. 458, 461 (1867).

matured,[1] or its conditions have in some way been broken, or their performance by the mortgagor or other party liable has been rendered impossible. Even where a mortgagee whose debt is not due, is made a defendant in the foreclosure of a subsequent mortgage securing a debt which is due, and files a cross-complaint setting up such prior mortgage and asking its foreclosure, the court will decree the foreclosure of the subsequent mortgage alone, and order the property to be sold subject to the lien of the prior mortgage; it seems that the court can not foreclose the prior mortgage nor order a sale to satisfy it under such cross-complaint.[2]

§ 35. **When previous demand not necessary.**—In the foreclosure of a mortgage given to secure a note payable on demand and not at a particular time or place, a demand of payment is not necessary before the commencement of the action.[3] Nor is it necessary to make a demand before bringing a suit to foreclose, where the note is payable on demand at a particular place; but if, in such a case, the defendant shows that he was ready at the appointed place to make payment, and brings the money into court, he will be relieved from interest and costs.[4] Where a mortgage was

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[1] Kelly v. Bogardus, 51 Mich. 522 (1883).

[2] Trayser v. Trustees of Indiana Asbury University, 39 Ind. 556 (1872).

[3] Locklin v. Moore, 57 N. Y. 362 (1874); Hills v. Place, 48 N. Y. 520 (1872); s. c. 8 Am. Rep. 568; 36 How. (N. Y.) Pr. 26; Pusey v. New Jersey & W. L. R. R. Co., 14 Abb. (N. Y.) Pr. N. S. 434, 439 (1873); Hirst v. Brooks, 50 Barb. (N. Y.) 334 (1867); Gillett v. Balcom, 6 Barb. (N. Y.) 370 (1849); Caldwell v. Cassidy, 8 Cow. (N. Y.) 271 (1828); Nelson v. Bostwick, 5 Hill (N. Y.) 37 (1843); s. c. 40 Am. Dec. 310; Wolcott v. VanSantvoord, 17 Johns. (N. Y.) 248 (1819); s. c. 8 Am. Dec. 396; Haxtun v. Bishop, 3 Wend. (N. Y.) 13 (1829); Burnham v. Allen, 67 Mass. (1 Gray) 496 (1854); Watkins v. Crouch, 5 Leigh (Va.) 522 (1834); Rumball v. Ball, 10 Mod. 38 (1712).

[4] Green v. Goings, 7 Barb. (N. Y.) 652, 655 (1850); Caldwell v. Cassidy, 8 Cow. (N. Y.) 271 (1828); Place v. Union Express Co., 2 Hilt. (N. Y.) 19, 31 (1858); Gay v. Paine, 5 How. (N. Y.) Pr. 108 (1850); Wolcott v. VanSantvoord, 17 Johns. (N. Y.) 248 (1819); s. c. 8 Am. Dec. 396; Foden v. Sharp, 4 Johns. (N. Y.) 183 (1809); Locklin v. Moore, 5 Lans. (N. Y.) 308 (1871); Nazro v. Fuller, 24 Wend. (N. Y.) 376 (1840); Haxtun v. Bishop, 3 Wend. (N. Y.) 13 (1829); Carley v. Vance, 17 Mass. 389 (1821); Fullerton v. Bank of United States, 26 U. S. (1 Pet.) 604 (1828); bk. 7 L. ed. 28; Bank of

given as collateral security for a bond to the treasurer of a state, payable on demand with annual interest at a specified date, it was held that a failure to pay the interest as stipulated was a breach of the bond, and that the mortgagee, or his assignee, could maintain a suit for the foreclosure thereof without pleading or proving a demand.[1]

§ 36. Interest clause—Breach making mortgage due. —In the form of mortgage generally used in the various states, there are provisions under which the mortgage may be foreclosed for the whole debt on the breach of a single condition or covenant.[2] The parties to a mortgage can lawfully agree to such conditions; and when they do so the conditions will be enforced by courts of equity.[3] The right to foreclose, upon failure to perform any of the conditions of a mortgage, need not be formally set forth in exact words, but may be gathered from the intention of the parties, as expressed in the instrument. Thus where it appears from the mortgage, that it was the intention of the parties that the mortgagee should have the right to foreclose for the whole debt on failure to pay an installment thereof or the interest when due, such intention will be upheld by the courts.[4] But where a mortgage payable in installments contained a power of sale conditioned that if any installment of principal or interest should remain unpaid for thirty days after it became due, the premises should be sold and the surplus, if any, arising from such sale should be paid to the mortgagor after deducting the interest and costs and the whole debt secured by the mortgage, the court held that such a condition was only intended to authorize a

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United States v. Smith, 24 U. S. (11 Wheat.) 171 (1826); bk. 6 L. ed. 443; Fenton v. Goundry, 13 East. 459 (1811).

[1] Austin v. Burbank, 2 Day (Conn.) 474 (1807): s. c. 2 Am. Dec. 119.

[2] See Holden v. Gilbert, 7 Paige Ch. (N. Y.) 208 (1838); McLean v. Pressley, Adm'rs, 56 Ala. 211 (1876); Pope v. Durant, 26 Iowa, 233 (1868); Bushfield v. Meyer, 10 Ohio St. 334 (1859); Hosie v. Gray, 71 Pa. St. 198 (1872).

[3] Richards v. Holmes, 59 U. S. (18 How.) 143 (1855); bk. 15 L. ed. 304.

[4] Holden v. Gilbert, 7 Paige Ch. (N. Y.) 208 (1838); Pope v. Durant, 26 Iowa, 233 (1868).

foreclosure in case of the non-payment of the interest or installment within the time prescribed, with the right to retain the whole debt in case such interest or installment and costs were not paid before the sale; but that mere failure to pay the interest or installment within the prescribed time did not of itself make the whole mortgage debt due and payable.[1]

§ 37. **Effect of such a condition.**—Such a stipulation in the mortgage is not regarded as a penalty, but as a provision for the earlier maturing of the debt upon the happening of certain contingencies.[2] If the mortgage does not contain such a stipulation in the form of an interest clause, the decree of foreclosure can direct the payment of such part of the debt only as is due at the time of the commencement of the action, or as may become due before the final hearing, and to effect that purpose, direct the sale of such part only of the mortgaged premises as may be necessary to pay that portion of the debt which has matured.[3] The reason for this is that a mortgage is merely a collateral security, and being, moreover, entitled to no other effect in equity, should not, as a matter of election by the mortgagee, be enforced by a court of equity for any other purpose than that of paying the debt,

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[1] Holden v. Gilbert, 7 Paige Ch. (N. Y.) 208 (1838).

[2] Stillwell v. Adams, 29 Ark. 346 (1874); Grattan v. Wiggins, 23 Cal. 16 (1863); Jones v. Lawrence, 18 Ga. 277 (1855); Morgenstern v. Klees, 30 Ill. 422 (1863); Taber v. Cincinnati L. & C. R. Co., 15 Ind. 459 (1860); Hunt v. Harding, 11 Ind. 245 (1858); Smart v. McKay, 16 Ind. 45 (1861). See Cecil v. Dynes, 2 Ind. 266 (1850); Hough v. Doyle, 8 Blackf. (Ind.) 300 (1846); Greenman v. Pattison, 8 Blackf. (Ind.) 465 (1847); Andrews v. Jones, 3 Blackf. (Ind.) 440 (1834); Mobray v. Leckie, 42 Md. 474 (1875); Schooley v. Romain, 31 Md. 575 (1869); Salmon v. Clagett, 3 Bland. Ch. (Md.) 125 (1828); Magruder v. Eggleston, 41 Miss. 284 (1866); Goodman v. Cincinnati & C. R. R. Co., 2 Disney (Ohio) 176 (1858); Baker v. Lehman, Wright (Ohio) 522 (1834); Richards v. Holmes, 59 U. S. (18 How.) 143 (1855); bk. 15 L. ed. 304.

[3] Suffern v. Johnson, 1 Paige Ch. (N. Y.) 450 (1829); s. c. 19 Am. Dec. 440; Mussina v. Bartlett, 8 Port. (Ala.) 277, 284 (1839); Greenman v. Pattison, 8 Blackf. (Ind.) 465 (1847); Adams v. Essex, 1 Bibb. (Ky.) 149 (1808); s. c. 4 Am. Dec. 623; Caufman v. Sayre, 2 B. Mon. (Ky.) 202 (1841); Magruder v. Eggleston, 41 Miss. 284 (1866); James v. Fisk, 17 Miss. (9 Smed. & M.) 144, 153 (1847); s. c. 47 Am. Dec. 111.

or so much thereof only as may be due and unpaid at the time of granting the decree, nor to any greater extent than the default of the mortgagor may require. The process of foreclosure being merely incidental to every mortgage, a court of equity will not enforce a technical default or forfeiture. It has been said that a court of equity, looking to the object and purpose rather than to the letter of the contract, treats a mortgage as collateral security merely, and will aid the mortgagee no farther than may be necessary for enforcing his debt upon equitable principles as it becomes due.

Therefore, whatever the merely legal rights of a mortgagee may be, if instead of enforcing them, he elects to resort to a court of equity for foreclosure, that court ought not to permit the action, either before there is a right of redemption of which the mortgagor could avail himself by plea, or to any greater extent, finally, than that to which the mortgagor has a right to redeem. A mortgagor has no right of redemption before default; and in a default that results only from the non-payment of the first of several installments his right of redemption would be limited to that installment; he could not anticipate nor be required to pay the other installments before they became due.[1] Courts of equity, without the aid of statutory provisions, but from the liberality of the principles and rules which govern them, have it in their power so to shape the terms of the decree of foreclosure, either as to a part or the whole of the demand, as to do complete justice to all parties interested, and have power to retain jurisdiction of the action for the purpose of making, from time to time, such further orders as justice may require.[2] This latitude of decision is indispensably necessary in the foreclosure of mortgages to secure the payment of annuities, jointures, money required to be raised annually for the maintainance and education of children, and in many other cases of a similar nature, in which, if it were required by law, that no proceeding should be had upon

[1] Caufman v. Sayre, 2 B. Mon. (Ky.) 202, 205-6 (1841).

[2] Adams v. Essex, 1 Bibb. (Ky.) 149 (1808); s. c. 4 Am. Dec. 623.

the mortgage to foreclose and enforce payment, until the last installment became due, the very object of the contract would be defeated.[1]

In those cases, however, where the good of all the parties concerned requires it, the decree may direct a sale of the whole mortgaged estate, though a sale of the entire estate may not be required for the payment of the installments already due. This may be done particularly where the mortgagor consents to the sale,[2] or the property is indivisible,[3] or where the court is satisfied from the character of the property, that it would sell to better advantage if sold in one parcel at one time, than if sold in separate parcels at different times.[4] Particularly is this the case where the property is of such a nature, or the circumstances of the mortgagor are such, that a single sale of the entire estate would either pay the whole debt or approximate more nearly to it than several sales of the premises in parcels at different times.[5]

But where the entire premises are sold on failure to pay an installment of principal or interest, such sale exhausts the mortgagee's remedy by foreclosure, and a second sale can not be had upon the maturity of the whole principal,[6] because such first sale of the mortgaged premises in pursuance of a decree of foreclosure, passes to the purchaser the entire title and interest of both the mortgagor and the mortgagee in the premises.[7]

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[1] Adams v. Essex, 1 Bibb. (Ky.) 149 (1808); s. c. 4 Am. Dec. 623.

[2] Gregory v. Campbell, 16 How. (N. Y.) Pr. 417, 422 (1858); Caufman v. Sayre, 2 B. Mon. (Ky.) 202, 209 (1841).

[3] Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835); Greenman v. Pattison, 8 Blackf. (Ind.) 465 (1847); Caufman v. Sayre, 2 B. Mon. (Ky.) 202, 209 (1841).

[4] Caufman v. Sayre, 2 B. Mon. (Ky.) 202, 209 (1841).

[5] Caufman v. Sayre, 2 B. Mon. (Ky.) 202, 209 (1841).

[6] Poweshiek Co. v. Dennison, 36 Iowa, 244 (1873); s. c. 14 Am. Rep. 521; Buford v. Smith, 7 Mo. 489 (1842).

[7] Holden v. Sackett, 12 Abb. (N. Y.) Pr. 473 (1861); Lansing v. Goelet, 9 Cow. (N. Y.) 346 (1827); Bradford v. Harper, 25 Ala. 337 (1854); Kelly v. Payne, 18 Ala. 371 (1850); Hobby v. Pemberton, Dudley (Ga.) 212 (1837); Poweshiek Co. v. Dennison, 36 Iowa, 244, 248 (1873); s. c. 14 Am. Rep. 521; Marston v. Marston, 45 Me. 412 (1858); Haynes v. Wellington, 25 Me. 458; Brown v. Tyler, 74 Mass. (8 Gray) 135 (1857); s. c. 69 Am. Dec. 239; Ritger v. Parker, 62 Mass. (8 Cush.) 145 (1851); s. c. 54 Am. Dec. 744; Clower v.

§ 38. **Stipulation against forfeiture.**—It is competent for the parties, at the time of executing a mortgage, to stipulate against its forfeiture;[1] and where a mortgage contains an absolute covenant, that the principal shall not be called in during a specified period, or until the happening of a certain event, a default in the payment of the interest in the meantime will not enable the mortgagee to foreclose. Thus where a mortgage provided that the principal should not be called in during the life-time of the mortgagor, it was held that the failure to pay a yearly interest, reserved during the life-time of the mortgagor, did not give a right to foreclose;[2] and where a mortgage, given to secure several notes maturing at different times, provides that none of them shall become payable and that the mortgage shall not be foreclosed, until the maturity of the note last due, a holder who purchases one or more of the notes with knowledge of such stipulation in the mortgage can not recover judgment thereon until the last note matures.[3] In such a case the notes and the mortgage, having been contemporaneously executed and relating to the same subject matter, are to be read together and considered as one instrument.[4]

And where, at the time a mortgage was executed and as a part of the consideration and agreement for the loan, the

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Rawlings, 17 Miss. (9 Smed. & M.) 122 (1847); s. c. 47 Am. Dec. 108; Stark v. Mercer, 4 Miss. (3 How.) 377 (1839); Carter v. Walker, 2 Ohio St. 339 (1853); West Branch Bank v. Chester, 11 Pa. St. 282 (1849); McCall v. Lenox, 9 Serg. & R. (Pa.) 302, 312 (1823); Pierce v. Potter, 7 Watts (Pa.) 477 (1838); Berger v. Heister, 6 Whart. (Pa.) 214 (1840); Hodson v. Treat, 7 Wis. 263 (1858); Tallman v. Ely, 6 Wis. 244 (1857); Hope v. Booth, 1 Barn. & Ad. 498 (1830).

[1] Brownlee v. Arnold, 60 Mo. 79 (1875).

[2] Burrowes v. Molloy, 2 Jones & LaT. 521 (1845); s. c. 8 Irish Eq. 482 (1845). But see Burt v. Saxton, 1 Hun (N. Y.) 551 (1874).

[3] Noell v. Gaines, 68 Mo. 649 (1878); s. c. 8 Cent. L. J. 353; Brownlee v. Arnold, 60 Mo. 79 (1875).

[4] See Church v. Brown, 21 N. Y. 315, 330 (1860); Hanford v. Rogers, 11 Barb. (N. Y.) 18 (1851); Gammon v. Freeman, 31 Me. 243 (1850); Hunt v. Frost, 58 Mass. (4 Cush.) 54 (1849); Brownlee v. Arnold, 60 Mo. 79 (1875); 2 Parsons on Contr. 553. See Clark v. Munroe, 14 Mass. 351 (1817); Harrison v. Trustees of Phillips' Academy, 12 Mass. 456 (1815); Gilliam v. Moore, 4 Leigh (Va.) 30 (1832); s. c. 24 Am. Dec. 704.

mortgagee indorsed upon the mortgage a stipulation on his part that "the loan will not be called in so long as the mortgagor continues punctually to pay the interest semi-annually, and the value of the estate pledged shall be double the amount of the debt, until the expiration of two years after the service of a written notice, stating the time when payment will be required," it was held that such stipulation became a part of the mortgage contract and that the mortgagee or his assignee could not maintain an action for foreclosure until two years after the service of the required notice.[1]

§ 39. **Note payable on demand.**—Where a note, to secure the payment of which a mortgage is given, is payable on demand, it is due immediately,[2] and the mortgagee has a right to foreclose at any time without making a previous demand.[3] It is well settled that when a right of action accrues upon the note, the mortgage securing it may be foreclosed. And even if a note on demand is payable at a particular place, no previous demand need be averred or shown; but if the defendant pleads that when the suit was commenced he was ready at the place mentioned in the note to make payment, and brings the money into court, he will thereby discharge himself from interest and costs.[4]

But where the conditions in a mortgage, given to secure a promissory note payable on demand, provide that if the note should be paid "within sixty days after such demand" the mortgage should be void, a demand of payment at least sixty days prior to the commencement of a foreclosure must be actually shown.[5] And where by the agreement of

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[1] Belmont County Branch Bank v. Price, 8 Ohio St. 299 (1858).

[2] Gillett v. Balcom, 6 Barb. (N. Y.) 370 (1849); Pullen v. Chase, 4 Ark. 210 (1842); Hill v. Henry, 17 Ohio, 9 (1848).

[3] Gillett v. Balcom, 6 Barb. (N. Y.) 370 (1849); Haxtun v. Bishop, 3 Wend. (N. Y.) 13, 21 (1829); Pullen v. Chase, 4 Ark. 210 (1842); Union Central Life Ins. Co. v. Curtis, 35 Ohio St. 343, 357 (1880); Hill v. Henry, 17 Ohio, 9 (1848); Darling v. Wooster, 9 Ohio St. 517 (1859); Rumball v. Ball, 10 Mod. 38, (1712); Bayley on Bills (5th ed.) 403; Chitt. on Bills (8th ed.) 590, 608, 609.

[4] Haxtun v. Bishop, 3 Wend. (N. Y.) 13, 21 (1829). See *ante* § 35.

[5] Union Central Life Ins. Co. v. Curtis, 35 Ohio St. 343, 357 (1880).

the parties at the time of the execution of a note payable on demand, it was orally stipulated that it should not be paid until a future specified time, the statute of limitations against such note will begin to run from the time when it was payable, according to the agreement, and not from the date of its execution.[1]

§ 40. **Where the time of payment is not specified.**— Where a note or bond secured by mortgage, is given for the payment of a specified sum of money, but no time is fixed for such payment, the law supplies the omitted element and makes the debt due immediately.[2] In a recent case,[3] where the mortgage did not distinctly identify the date or provide a time of payment, it was held to be due as soon as given; and in another case,[4] where the condition of a

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[1] Hale v. Pack, 10 W. Va. 145 (1877).

[2] Gillett v. Balcom, 6 Barb. (N.Y.) 370 (1849). See also Purdy v. Phillips, 11 N.Y. 406 (1854); affi'g 1 Duer. (N. Y.) 369; People v. County of New York, 5 Cow. (N. Y.) 331 (1826); Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 587 (1825); Reid v. Rensselaer Glass Factory, 3 Cow. (N. Y.) 393 (1824); Clark v. Barlow, 4 Johns. (N. Y.) 183 (1809); Selleck v. French, 1 Conn. 32 (1814); s. c. 6 Am. Dec. 185; Brown v. Brown, 103 Ind. 23 (1885); s. c. 1 West. Rep. 128; Green v. Drebilbis, 1 G. Greene (Iowa) 552 (1848); Francis v. Castleman, 4 Bibb. (Ky.) 282 (1815); Taylor v. Knox, 1 Dana (Ky.) 391 (1833); s. c. 5 Dana (Ky.) 466; Goodloe v. Clay, 6 B. Mon. (Ky.) 236 (1845); Swett v. Hooper, 62 Me. 54 (1873); Jillson v. Hill, 70 Mass. (4 Gray) 316 (1855); Dodge v. Perkins, 26 Mass. (9 Pick.) 369 (1830); Weeks v. Hasty, 13 Mass. 218 (1816); Eaton v. Truesdail, 40 Mich. 1, 6 (1879); Rhoads v. Reed, 89 Pa. St. 436 (1879); Heath v. Page, 63 Pa. St. 108 (1869); s. c. 3 Am. Rep. 533; Northern Pennsylvania R. R. Co. v. Adams, 54 Pa. St. 94 (1867); Hummel v. Brown, 24 Pa. St. 313 (1855); Lessee of Dilworth v. Sinderling, 1 Binn. (Pa.) 488 (1808); s. c. 2 Am. Dec. 469; Cheesborough v. Hunter, 1 Hill (S. C.) 400 (1833); Smetz v. Kennedy, Riley (S. C.) 218 (1837); Aikin v. Peay, 5 Strobh. (S. C.) 15 (1850); s. c. 53 Am. Dec. 684; Roberts v. Cocke, 28 Gratt. (Va.) 207 (1877); Young v. Godbe, 82 U. S. (15 Wall.) 562 (1872); bk. 21 L. ed. 250; Brewster v. Wakefield, 63 U. S. (22 How.) 118, 127 (1859); bk. 16 L. ed. 301; Sheehy v. Mandeville, 11 U. S. (7 Cr.) 208, 217 (1812); bk. 3 L. ed. 317; United States v. Gurney, 8 U. S. (4 Cr.) 333 (1808); bk. 2 L. ed. 638; Rapelie v. Emory, 1 U. S. (1 Dall.) 349 (1788); bk. 1 L. ed. 170; Farquhar v. Morris, 7 T. R. 124 (1797); Bayley on Bills (5th ed.) § 14 p. 59; Thompson on Bills, § 1, p. 32.

[3] Eaton v. Truesdail, 40 Mich. 1 (1879).

[4] Union Central Life Insurance Company v. Curtis, 35 Ohio St. 357 (1880).

mortgage, given to secure the payment of a promissory note payable on demand, was that if the mortgagor should pay such note or cause it to be paid, the mortgage deed should be void, the court held in an action to foreclose such mortgage, that a demand of payment of the note, before suit, was not a necessary condition precedent to a right of action on the mortgage.[1]

§ 41. **Mortgage payable in installments.**—It is a general rule that a forfeiture takes place and a right of action accrues when the principal of the debt or any part thereof or the interest thereon is not paid at the time agreed upon for the payment of the same,[2] unless there has been a new agreement upon a sufficient consideration for an extension of the time of payment,[3] in which case the right to foreclose will be suspended until the expiration of the extended time.[4] It is lawful for the parties at the time of executing a mortgage to stipulate, that upon a failure to pay an installment of the principal when the same becomes due, the whole principal shall immediately become due and payable; and under such a stipulation a neglect to pay an installment of the principal when it becomes due, will work a forfeiture of the mortgage,[5] and an action for the foreclosure and sale of the premises may be commenced forthwith.[6]

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[1] See also Darling v. Wooster, 9 Ohio St. 517 (1859); Hill v. Henry, 17 Ohio 9 (1848); Norton v. Ellam, 2 M. & W. 460 (1837).

[2] See Grattan v. Wiggins, 23 Cal. 16, 28 (1863); Jones v. Lawrence, 18 Ga. 277 (1855); Adams v. Essex, 1 Bibb. (Ky.) 149 (1808); s. c. 4 Am. Dec. 623; Caufman v. Sayre, 2 B. Mon. (Ky.) 202 (1841); West Branch Bank v. Chester, 11 Pa. St. 282 (1849); Richards v. Holmes, 59 U. S. (18 How.) 143 (1855); bk. 15 L. ed. 304; Stanhope v. Manners, 2 Eden. 197 (1763); Gladwyn v. Hitchman, 2 Vern. 135 (1689).

[3] See *post* §§ 53, 54.

[4] Reed v. Home Savings Bank, 127 Mass. 295 (1879). See Burt v. Saxton, 1 Hun (N. Y.) 551 (1874); but see Sharpe v. Arnott, 51 Cal. 188 (1875); Pendleton v. Rowe. 34 Cal. 149 (1867); Maher v. Lamfrom, 86 Ill. 513 (1877); Flynn v. Mudd, 27 Ill. 323 (1862); Redman v. Deputy, 26 Ind. 338 (1866); Lee v. West. Jersey Land Co., 29 N. J. Eq. (2 Stew.) 377 (1878); Tompkins v. Tompkins, 21 N. J. Eq. (6 C. E. Gr.) 338 (1871); Massaker v. Mackerley, 9 N. J. Eq. (1 Stockt.) 440 (1853); Union Central Life Ins. Co. v. Bonnell, 35 Ohio St. 365 (1880); Albert v. Grosvenor Investment Co., L. R. 3 Q. B. 123 (1867);

[5] Whitcher v. Webb, 44 Cal. 127 (1872); Ottawa Northern Plank R. Co. v. Murray, 15 Ill. 336 (1854);

Where a mortgage is given to secure a note payable in installments and any of the installments are not paid when they fall due, such non-payment will constitute a breach of the mortgage, and an action for foreclosure may thereupon be filed and a sale of the mortgaged premises had.[1]

If the mortgage contains a clause authorizing the mortgagee, upon the non-payment of interest for a specified number of days after it becomes due, to elect that the whole amount unpaid shall become due, he can not be compelled to accept the interest and to waive the stipulation after the default has occurred and he has exercised his option.[2] Nor is the mortgagee estopped from asserting his right of election by the commencement of an action to foreclose, prior to the expiration of the time within which the money was to be paid; neither does he waive his right of election by accepting the installment of principal due before filing an amended or supplemental complaint and proceeding in the action for the collection of the unpaid balance.[3]

Noell v. Gaines, 68 Mo. 649 (1878); Beisel v. Artman, 10 Neb. 181 (1880); Ackerson v. Lodi Branch R. R. Co., 31 N. J. Eq. (4 Stew.) 42 (1879); Voorhis v. Murphy, 26 N. J. Eq. (11 C. E. Gr.) 434 (1875); see, however, McLean v. Presley, 56 Ala. 211 (1876); Andrews v. Jones, 3 Blackf. (Ind.) 440 (1834); Indiana & I. C. R. Co. v. Sprague, 103 U. S. (13 Otto) 756 (1880); bk. 26 L. ed. 554.

[6] See Rubens v. Prindle, 44 Barb. (N. Y.) 336 (1864); Dwight v. Webster, 32 Barb. (N. Y.) 47 (1860); s. c. 19 How. (N. Y.) Pr. 349; 10 Abb. (N. Y.) Pr. 128; Ferris v. Ferris, 28 Barb. (N. Y.) 29 (1858); s. c. 16 How. (N. Y.) Pr. 102 (1858); Grattan v. Wiggins, 23 Cal. 16 (1863); Morgenstern v. Klees, 30 Ill. 422 (1863); Ottawa Northern Plank Road Co. v. Murray, 15 Ill. 336 (1854); Mobray v. Leckie, 42 Md. 474 (1875).

After a breach of the conditions of a mortgage or deed of trust, the *cestui que* trust may resort to a court of chancery for its enforcement, without alleging any other ground therefor than such breach. McDonald v. Vinson, 56 Miss. 497 (1879).

[1] See Estabrook v. Moulton, 9 Mass. 258 (1812).

[2] Malcolm v. Allen, 49 N. Y. 448 (1872); Rubens v. Prindle, 44 Barb. (N. Y.) 336 (1864); Ferris v. Ferris, 28 Barb. (N. Y.) 29 (1858).

[3] Malcolm v. Allen, 49 N. Y. 448 (1872); Lawson v. Barron, 18 Hun (N. Y.) 414 (1879); Odell v. Hoyt, 73 N. Y. 343 (1878). Respecting waiver, see Wilson v. Bird, 28 N. J. Eq. (1 Stew.) 353 (1877).

Where a note and mortgage are given for the payment of a sum of money in installments, with the stipulation that in case of default in the payment of any installment the whole principal sum shall become due and payable at the option of the mortgagee, it is necessary for the mortgagee to take his option and in some states to give notice thereof before an action can be brought to recover the whole principal sum.[1]

§ 42. **Failure to pay interest.**—It has been said that as a rule the non-payment of the principal debt or interest at the time agreed upon, works a forfeiture of the mortgage and entitles the mortgagee to bring an action for foreclosure.[2] The reason alleged by some of the cases for the rule as to interest, is that the interest is a part of the substance of the mortgage debt and belongs to it by tacking, and that it is not simply an incident to the debt, but *pro tanto* is the debt itself.[3] But it would seem that in the absence of a stipulation giving the power, there can be no foreclosure of a mortgage given as security for the payment of a promissory note and the interest thereon until the principal sum becomes due,[4] for the reason that the court can not shorten the time stated in an express agreement between the parties, as that would be altering the nature of the contract to the injury of the maker of the note.[5] But the parties may stipulate that upon failure to pay the interest promptly at the time specified, the principal shall become due, in which case, on non-payment of interest, a foreclosure may be filed and the whole debt collected.[6] In California, however,

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[1] Basse v. Callegger, 7 Wis. 442 (1859); s. c. 76 Am. Dec. 225. See *post* §§ 44, 45.

[2] West Branch Bank v. Chester, 11 Pa. St. 282 (1849); Richards v. Holmes, 57 U. S. (18 How.) 143 (1855); bk. 15 L. ed. 304; Stanhope v. Manners, 2 Eden. 197 (1763); Gladwyn v. Hitchman, 2 Vern. 135 (1689).

[3] West Branch Bank v. Chester, 11 Pa. St. 282 (1849).

[4] Brodribb v. Tibbets, 58 Cal. 6 (1881); Harshaw v. McKesson, 66 N. C. 266 (1872). But see Estabrook v. Moulton, 9 Mass. 258 (1812).

[5] Harshaw v. McKesson, 66 N. C. 266 (1872).

[6] See Malcolm v. Allen, 49 N. Y. 448 (1872); Rubens v. Prindle, 44 Barb. (N. Y.) 336, 344 (1864); Valentine v. VanWagner, 37 Barb. (N Y.) 60 (1862); Ferris v. Ferris, 28 Barb. (N. Y.) 29 (1858); Crane v. Ward, Clarke Ch. (N. Y.) 393 (1840); Jester v. Sterling, 25 Hun (N. Y.)

where a promissory note due to a corporation two years after date was secured by a mortgage which provided that "in case of default by the mortgagor in the payment of said note or interest or in the performance of any of the conditions hereof, then the mortgagee may at his option either commence proceedings to foreclose this mortgage in the usual manner or cause the said premises or any part thereof to be sold," it was held that the failure to pay the interest as it became due, authorized a foreclosure for such interest only, and not for the principal.[1]

The better doctrine seems to be that the interest falling due yearly, or at other stated periods, on a note secured by mortgage, is an installment of the debt, and that the mortgage may be foreclosed to enforce its payment, because the mortgage must have been given to secure the interest as well as the principal, and the law will not withhold a remedy until the period elapses for the maturity of the whole debt.[2] And where a condition is inserted in the mortgage which authorizes a sale to be made upon the happening of any default, the failure to pay interest when it is due is a default within the meaning of such a clause and will entitle the mortgagee to foreclose,[3] notwithstanding the fact that such

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344 (1881); Noyes v. Clark, 7 Paige Ch. (N. Y.) 179 (1838); s. c. 32 Am. Dec. 620; Mobray v. Leckie, 42 Md. 474 (1875); Schooley v. Romain, 31 Md. 574, 583 (1869); Chicago D. & V. R. R. Co. v. Fosdick, 106 U. S. (16 Otto) 47 (1882); bk. 27 L. ed. 47; James v. Thomas, 5 Barn. & Ad. 40 (1833); Gowlett v. Hanforth, 2 W. Bl. 958 (1774); Steel v. Bradfield, 4 Taunt. 227 (1811); Burrowes v. Molloy, 2 Jones & LaT. 521 (1845); s. c. 8 Ir. Eq. 482 (1843).

[1] Bank of San Louis Obispo v. Johnson, 53 Cal. 99 (1878). But see Whitcher v. Webb, 44 Cal. 127 (1872), in which case a promissory note payable at a future time provided for the payment of interest quarterly and contained a clause that in case default was made in the payment of interest quarterly, the note should immediately become due at the option of the holder, and that the failure to pay interest made the whole amount due absolutely at the option of the holder, if he so elected, without any notice from the holder to the maker.

[2] Brinckerhoff v. Thallhimer, 2 Johns. Ch. (N. Y.) 486 (1817); Morgenstern v. Klees, 30 Ill. 422 (1863).

[3] Goodman v. Cincinnati & C. R. R. Co., 2 Disney (Ohio) 176 (1858); West Branch Bank v. Chester, 11 Pa. St. 282 (1849); Stanhope v. Manners, 2 Eden. 197 (1763). See Burt v. Saxton, 1 Hun (N. Y.) 551 (1874).

failure to pay the interest was an over-sight on the part of the mortgagor.[1]

§ 43. **Failure to pay taxes.**—The parties to a mortgage may not only stipulate for forfeiture in case of failure to pay interest promptly at the times agreed upon, but they may also, and in fact usually do, provide that in case the mortgagor fails within a time designated to pay the taxes and assessments levied against the property, the mortgagee shall have the right to elect that the whole mortgage shall be forfeited, so that he may proceed to foreclose and sell the property to pay such taxes together with the mortgage debt and interest. Such an agreement is not prohibited by statute nor is it against public policy; it is not a hard contract which it would be unconscionable to enforce, because an investor may very properly insist that his security shall be kept intact, or that the loan shall mature. In fact such a provision is very analogous to an agreement, that a failure to pay the interest promptly shall render the whole principal due.

Such stipulations have almost invariably been upheld by the courts.[2] In deciding an Iowa[3] case brought for the foreclosure of a mortgage which contained such a tax clause the court say: "The power of sale for the non-payment of taxes was intended to cover more than accrued interest. The parties made their own agreement, and while the power to sell is derived from the instrument itself, it is equally true

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[1] Voorhis v. Murphy, 26 N. J. Eq. (11 C. E. Gr.) 434 (1875). See Dillett v. Kemble, 25 N. J. Eq. (10 C. E. Gr.) 66 (1874); Haggerty v. McCanna, 25 N. J. Eq. (10 C. E. Gr.) 48 (1874); Graham v. Berryman, 19 N. J. Eq. (4 C. E. Gr.) 29 (1868).

[2] See Valentine v. VanWagner, 37 Barb. (N. Y.) 60 (1862); Ferris v. Ferris, 28 Barb. (N. Y.) 29 (1858); Crane v. Ward, Clarke Ch. (N. Y.) 393 (1840); Hale v. Gouverneur, 4 Edw. Ch. (N. Y.) 207 (1843); O'Connor v. Shipman, 48 How. (N. Y.) Pr. 126 (1873); Noyes v. Clark 7 Paige Ch. (N. Y.) 179 (1838); s. c. 32 Am. Dec. 620; Ottawa Northern Plank Road Co. v. Murray, 15 Ill. 337 (1854); Pope v. Durant, 26 Iowa, 233, 240 (1868); Stanclift v. Norton, 11 Kan. 218, 222 (1873); The Contributors v. Gibson, 2 Miles (Pa.) 324 (1839); Richards v. Holmes, 59 U. S. (18 How.) 143 (1855); bk. 15 L. ed. 304; James v. Thomas, 5 Barn. & Ad. 40 (1833); Steel v. Bradfield, 4 Taunt. 227 (1811).

[3] Pope v. Durant, 26 Iowa, 233, 240 (1868).

that where it has been fairly made the courts have no right to make another agreement for them—no power to say that it would have been better if they had incorporated other terms and conditions. And nothing is clearer than that the object and design of the parties should be kept in view in determining the nature and extent of the power conferred."

Where a mortgage provides that the mortgagor shall pay all taxes and assessments levied upon the mortgaged premises, and stipulates that in default thereof the mortgagee may pay the same and collect the amount thus paid as a part of the mortgage debt, the failure of the mortgagor to pay the taxes and assessments is such a breach of the condition of the mortgage as to entitle the mortgagee to proceed to foreclose.[1] The fact that the mortgagee has the right to pay the taxes and to charge them to the mortgagor, the same to become a part of the mortgage lien, makes no difference, because the right to foreclose is not waived or lost nor the default condoned by the mortgagee on his paying the taxes or assessments, and charging the amount thereof to the mortgagor.[2] The failure of the mortgagor to pay such taxes or assessments, however, is not such a breach of the condition of the mortgage as will give the mortgagee a right to foreclose and collect the whole amount secured, unless there is a clause in the mortgage providing that the whole sum shall become due and payable on failure to pay the taxes and assessments.[3] The right to foreclose a mortgage, providing for the payment of taxes and assessments, will not accrue upon the mere failure of the mortgagor to pay them; to acquire that right it is essential that the holder of the mortgage shall have paid off and discharged the assessments or taxes; otherwise no debt will have accrued and no money will have become due which would entitle the mortgagee to proceed with an action.[4]

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[1] Williams v. Townsend, 31 N. Y. 411 (1865); Brickell v. Batchelder, 62 Cal. 623 (1882); Ellwood v. Wolcott, 32 Kan. 526 (1884).

[2] Brickell v. Batchelder, 62 Cal. 623 (1882).

[3] Williams v. Townsend, 31 N. Y. 411 (1865).

[4] Williams v. Townsend, 31 N. Y. 411 (1865).

§ 44. **Election of mortgagee that debt become due.**— Where a mortgage is conditioned that upon the failure to do certain things specified, as the payment of interest, taxes, assessments and insurance, the mortgage shall be forfeited at the option of the mortgagee, the mortgage debt does not become due and the right to foreclose does not arise until the mortgagee has exercised his option.[1] In exercising and making known his option to consider the entire debt matured on any default, however, it is not necessary that any particular form of words should be used. Thus where the record recited among other things that "the mortgagee having elected to declare said mortgage due and payable, as he was authorized to do according to the terms and conditions thereof, and having entered in and upon said premises and taken possession thereof, the said premises were duly advertised for public sale," etc., it was held to be sufficient.[2]

Where a mortgage contains a clause authorizing the mortgagee, upon non-payment of interest for thirty days after it becomes due, to elect that the whole amount of unpaid principal shall become due, he can not be compelled to accept the interest and to waive the stipulation after a default has occurred and he has made his election in accordance with the stipulation, nor will he be estopped from asserting his right of election, by the commencement of a foreclosure prior to the expiration of the thirty days, the complaint wherein simply sets up a default in the payment of an installment of principal and interest due. Nor will he waive his right to elect by accepting the installment of principal. He has the right to file an amended or supplemental complaint, and to proceed in the action for the collection of the balance unpaid.[3] And where in such a case, after tender of the interest and costs, the mortgagee, without amending his complaint obtains an order of sale for the interest only and perfects judgment, from which order and judgment no appeal is taken, the court will have power

[1] Randolph v. Middleton, 26 N. J. Eq. (110 C. E. Gr.) 543 (1875).
[2] Harper v. Ely, 56 Ill. 179, 189 (1870).
[3] Malcolm v. Allen, 49 N. Y. 448 (1872).

upon motion and notice to the mortgagor to make a supplemental order directing a sale and payment out of the proceeds, of the balance of the mortgage debt, with judgment against the mortgagor for any deficiency.[1]

§ 45. **Notice of election.**—Where a mortgage contains a provision that in case of failure to pay the installments of principal and interest, or the taxes and assessments levied against the property, for a certain number of days after they become due and payable, the whole mortgage debt shall become payable at the option of the holder of the mortgage, it is an unsettled question in some states whether notice of the exercise of such option must be given prior to the commencement of an action, or whether the commencement of a foreclosure is sufficient notice of the election. In New York,[2] Illinois,[3] Indiana,[4] North Carolina[5] and perhaps other states it is held that no notice of the mortgagee's election to consider the whole debt due, is necessary, but that his proceeding to enforce the mortgage sufficiently shows his election.[6] The question of notice of election arose in Michigan in the case of English v. Carney,[7] but was not decided. In California[8] and Wisconsin[9] it is held that the mortgagee must give notice of his election whether or not the whole principal shall become due and payable on account of a default made by the mortgagor, where the mortgage provides for such default and election.

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[1] Malcolm v. Allen, 49 N. Y. 448, 454 (1872). See also Livingston v. Mildrum, 19 N. Y. 443 (1859).

[2] Hunt v. Keech, 3 Abb. (N. Y.) Pr. 204 (1856). See also Howard v. Farley, 3 Robt (N. Y.) 599, 602 (1866).

[3] Hoodless v. Reid, 112 Ill. 105, 112 (1885); Marston v. Brittenham, 76 Ill. 611 (1875).

[4] Buchanan v. Berkshire Life Ins. Co., 96 Ind. 510, 520 (1884).

[5] Young v. McLean, 63 N. C. 576 (1869).

[6] See the Princeton Loan & Trust Co. v. Munson, 60 Ill. 371, 375 (1871); Heath v. Hall, 60 Ill. 344 (1871); Harper v. Ely, 56 Ill. 179, 189 (1870).

[7] 25 Mich. 178, 184 (1872).

[8] Dean v. Applegarth, 65 Cal. 391 (1884).

[9] Malcon v. Smith, 49 Wis. 200, 215-217 (1880); Marine Bank v. International Bank, 9 Wis. 57, 68 (1859); Basse v. Gallegger, 7 Wis. 442, 446 (1858); s. c. 76 Am. Dec. 225. See also Hall v. Delaplaine, 5 Wis. 206 (1856); s. c. 68 Am. Dec. 57.

A notice of election to consider the whole debt due by reason of a default in the payment of one of the installments of the principal or interest or of a failure to pay the taxes and assessments within the time limited, given by an attorney or other duly authorized agent in the name of the mortgagee or holder of the mortgage, will be sufficient.[1]

§ 46. **Who may exercise option to declare the debt due.**—The mortgagee has, of course, a right to exercise the option of declaring the whole debt due;[2] so also can any person for whose benefit the provisions for the forfeiture of credit are made, take advantage of them.[3] The assignee of the mortgagee may exercise this option in the same manner as the mortgagee himself.[4] But the right to exercise such option is an indivisible condition, and for this reason can not be exercised by an assignee of a part only of the notes, secured by such a mortgage; all the parties owning or holding such notes must unite in exercising the option.[5] It has been held in one case[6] that such a stipulation in a mortgage may be taken advantage of by the mortgagor, where he has transferred the property mortgaged to a grantee who assumed and agreed to pay the mortgage debt, according to the conditions of the mortgage, as part of the consideration of the conveyance.

§ 47. **Power of court to relieve from forfeiture.**—Where the mortgage contains a stipulation, providing that the whole debt shall become due at the option of the mortgagee in case of failure to make punctual payments, the court can not relieve the mortgagor from his defaults even on the payment of the installments due with costs, but is bound to give effect to the bond and mortgage according to its provisions and

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[1] Rosseel v. Jarvis, 15 Wis. 571, 578 (1862).

[2] See Princeton Loan and Trust Co. v. Munson, 60 Ill. 371 (1871); Heath v. Hall, 60 Ill. 344 (1871); Harper v. Ely, 56 Ill. 179 (1870).

[3] Mallory v. West Shore, H. R. R. R. Co., 35 N. Y. Super. Ct. (3 J. & S.) 174 (1873); Fellows v. Gilman, 4 Wend. (N. Y.) 414 (1830).

[4] Heath v. Hall, 60 Ill. 344, 349 (1871).

[5] The Marine Bank of Buffalo v. International Bank, 9 Wis. 57 (1859).

[6] First National Bank v. Peck, 8 Kan. 660 (1871).

the election of the mortgagee.[1] In an old New York case,[2] the court say: "The parties had an unquestionable right to make the extension of credit dependent upon the punctual payment of the interest at the times fixed for that purpose. And if, from the mere negligence of the mortgagor in performing his contract, he suffers the whole debt to become due and payable, according to the terms of the mortgage, no court will interfere to relieve him from the payment thereof, according to the conditions of his own agreement." [3]

If, however, the mortgagee or party holding the mortgage has been guilty of fraud, because of which the mortgagor was unable to ascertain who was the owner of the mortgage, or to find the mortgagee or such owner in order to make the stipulated payment, the court will relieve him from his default.[4] And it seems that such a foreclosure will not be enforced against one, who denies in good faith and upon reasonable grounds that he is liable to pay the interest in arrear, or who claims that he has paid it, even when it appears from the evidence that he is in error in regard to such liability or payment.[5] But where the only questions are as to the proper tender of the amount due, and whether the tender was made at the prescribed time, they must be determined upon the trial of the foreclosure action.[6]

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[1] See Bennett v. Stevenson, 53 N. Y. 508 (1873); Ferris v. Ferris, 28 Barb. (N. Y.) 29, 33 (1858); Hale v. Gouverneur, 4 Edw. Ch. (N. Y.) 207 (1843); O'Connor v. Shipman, 48 How. (N. Y.) Pr. 126 (1873); Noyes v. Clark, 7 Paige Ch. (N. Y.) 179 (1838); s. c. 32 Am. Dec. 620; Savannah & M. R. R. Co. v. Lancaster, 62 Ala. 555 (1878); Mobray v. Leckie, 42 Md. 474 (1875); Schooley v. Romain, 31 Md. 574 (1869); Magruder v. Eggleston, 41 Miss. 284 (1866).

[2] Noyes v. Clark, 7 Paige Ch. (N. Y.) 179 (1838); s. c. 32 Am. Dec. 620.

[3] See also Gowlett v. Hanforth, 2 W. Bl. 958 (1774); Steel v. Bradfield, 4 Taunt. 227 (1812).

[4] See Noyes v. Clark, 7 Paige Ch. (N. Y.) 179 (1838); s. c. 32 Am. Dec. 620.

[5] Wilcox v. Allen, 36 Mich. 160 (1877).

[6] Bennett v. Stevenson, 53 N. Y. 508, 510 (1873); Asendorf v. Meyer, 8 Daly (N. Y.) 278 (1879); Lynch v. Cunningham, 6 Abb. (N. Y.) 94 (1858); Thurston v. Marsh, 5 Abb. (N. Y.) 389 (1857); s. c. 14 How. (N. Y.) 572. See Spring v. Fisk, 21 N. J. Eq. 175 (1870).

§ 48. **Where mortgagee holds one mortgage securing several notes.**—Where a mortgagee holds a mortgage securing several notes maturing at different times, conditioned that the mortgagor shall pay the notes as they become due, a failure to pay any note when it becomes due is a breach of the condition and entitles the holder to foreclose.[1] But where a mortgage has been given to secure several notes maturing at different times, which provides that none of them shall become payable and that the mortgage shall not be foreclosed until the last note secured becomes due, and some of the notes have been transferred with a knowledge of such provisions in the mortgage, the holders of such transferred notes can not recover a judgment thereon until the last note matures.[2] In such a suit the notes and the mortgage, having been contemporaneously executed and both relating to the same subject matter, are to be considered as one instrument.[3]

§ 49. **Where mortgagee holds more than one mortgage on the same property securing different debts.** — Where the same mortgagor executes to the same mortgagee two or more mortgages upon the same premises to secure different debts, the mortgagee will not be permitted to commence separate actions to foreclose each mortgage, but in his complaint to foreclose the senior mortgage he must set forth all his junior incumbrances and ask to have them also foreclosed.[4] And it is said that if a second or subsequent

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[1] McLean v. Presley, 56 Ala. 211 (1876); Gibbons v. Hoag, 95 Ill. 45, 62 (1880); Fisher v. Milmine, 94 Ill. 328 (1880); Hunt v. Harding, 11 Ind. 245 (1858); Lacoss v. Keegan, 2 Ind. 406 (1850); Cecil v. Dynes, 2 Ind. 266 (1850); Greenman v. Pattison, 8 Blackf. (Ind.) 465 (1847).

In Indiana, prior to the statute of 1831, a bill to foreclose where the debt was payable in installments, would not lie until the day for the payment of the last installment had passed. See Hough v. Doyle, 8 Blackf. (Ind.) 300 (1846).

[2] Brownlee v. Arnold, 60 Mo. 79 (1875).

[3] Brownlee v. Arnold, 60 Mo. 79 (1875). See also Hanford v. Rogers, 11 Barb. (N. Y.) 18 (1851); Gammon v. Freeman, 31 Me. 243 (1850); Hunt v. Frost, 58 Mass. (4 Cush.) 54 (1849); 2 Pars. Cont. 553.

[4] Roosevelt v. Ellithorp, 10 Paige Ch. (N. Y.) 415 (1843); Hawkins v. Hill, 15 Cal. 499 (1860); s. c. 76 Am. Dec 499. See Homœopathic Mut. L. Ins. Co. v. Sixbury, 17 Hun (N. Y.) 424 (1879).

mortgage becomes due before the decree is entered on the senior mortgage, the defendant can not divide the action as to such junior mortgage by tendering the amount due on the first mortgage after the maturity of the second mortgage.[1] The supreme court of Massachusetts have held that the assignee of two mortgages on the same land, executed by the same mortgagor at different times to different mortgagees, may unite them in one action of foreclosure and recover thereon a conditional judgment, specifying the amount due on each and directing that unless both mortgages be paid within a time to be named by the court, the plaintiff shall have execution.[2] Yet it was held in an earlier case that where the same person had two different mortgages to secure two different debts against the same mortgagor, he could not unite them in one suit under the Massachusetts revised statutes, so as to recover one consolidated conditional judgment.[3]

A single mortgage given to secure two debts may be foreclosed in favor of both creditors at the same time, because such a foreclosure does not unite distinct and separate claims in the same action.[4]

§ 50. **Indemnity mortgage.**—Where a mortgage is given as an indemnity, and contains an express agreement by the mortgagor to pay the debt therein described, and to save the mortgagee harmless from all *liability*, it seems that there is a breach of such agreement when there is a failure to make the payment at the appointed time, and that the holder of such mortgage may at once, without having first paid the debt or any part thereof, maintain an action for the foreclosure of the mortgage and may recover judgment therein for his total probable loss.[5] But where a mortgage

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[1] Hawkins v. Hill, 15 Cal. 499 (1860); s. c. 76 Am. Dec. 499.

[2] Pierce v. Balkam, 56 Mass. (2 Cush.) 374 (1848).

[3] Peck v. Hapgood, 51 Mass. (10 Metc.) 172 (1845).

[4] Chamberlin v. Beck, 68 Ga. 346 (1883).

[5] Gilbert v. Wiman, 1 N. Y. 550 (1848); s. c. 49 Am. Dec. 359; Wright v. Whiting, 40 Barb. (N. Y.) 235 (1863); Thomas v. Allen, 1 Hill (N. Y.) 145 (1841), overruling Douglass v. Clark, 14 Johns. (N. Y.) 177 (1817); Port v. Jackson, 17 Johns. (N. Y.) 239 (1819). *In re* Negus, 7

is held as an indemnity simply, without such a clause stipulating to save harmless from all liability the mortgagee or his assignee will not be permitted to foreclose until he has paid the obligation, or has otherwise been injured.[1]

Thus where a surety receives a mortgage indemnifying him against all loss, cost, or damage, the condition of such mortgage will not be broken until after the surety has been obliged to pay the debt[2] or some part of it;[3] and an action can not be maintained to foreclose the mortgage until such breach. But where a surety has been obliged to pay the whole or a part of the debt, he may bring an action to foreclose the mortgage before the amount of his damages has been ascertained by a suit at law.[4] And where a mortgage is given to indemnify one against damages occasioned by the neglect or misconduct of the mortgagor or other person, the mortgagee can not maintain an action to foreclose such mortgage until after a judgment has been recovered for such negligence;[5] but where a mortgage was given as an indemnity to

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Wend. (N. Y.) 499 (1832); Reynolds v. Shirk, 98 Ind. 480 (1884). See Malott v. Goff, 96 Ind. 496 (1884); Loehr v. Colborn, 92 Ind. 24 (1883); Bodkin v. Merit, 86 Ind. 560 (1882); Durham v. Craig, 79 Ind. 117 (1881); Gunel v. Cue, 72 Ind. 34 (1880); South Side P. M. Ass'n. v. Cutler & S. Lumber Co., 64 Ind. 560 (1878); Devol v. McIntosh, 23 Ind. 529 (1864); Johnson v. Britton, 23 Ind. 105 (1865), overruling Tate v. Booe, 9 Ind. 13 (1857); Weddle v. Stone, 12 Ind. 625 (1859); Wilson v. Stilwell, 9 Ohio St. 467 (1859); s. c. 75 Am. Dec. 477; Holmes v. Rhodes, 1 Bos. & P. 638 (1797); Loosemore v. Radford, 9 Mees. & W. 657 (1842); Hodgson v. Bell, 7 T. R. 97 (1780).

[1] Ketchum v. Jauncey, 23 Conn. 126 (1854); Pond v. Clarke, 14 Conn. 334 (1841); Francis v. Porter, 7 Ind. 213 (1855); Lewis v. Richey, 5 Ind. 152 (1854); Butler v. Ladue, 12 Mich. 178 (1863); National State Bank v. Davis, 24 Ohio St. 190, 195 (1873); Ohio Life Ins. & Trust Co. v. Reeder, 18 Ohio, 35, 46 (1849); McConnell v. Scott, 15 Ohio, 401 (1846); s. c. 45 Am. Dec. 583; Kramer v. Farmers' & Mechanics' Bank of Steubenville, 15 Ohio, 253 (1846); Colvin v. Buckle, 8 Mees. & W. 680 (1840).

[2] See Platt v. Smith, 14 Johns. (N. Y.) 368 (1817); Powell v. Smith, 8 Johns. (N. Y.) 249 (1811); Rodman v. Hedden, 10 Wend. (N. Y.) 500 (1833); Pond v. Clarke, 14 Conn. 334 (1841); Shepard v. Shepard, 6 Conn. 37 (1825); McLean v. Ragsdale, 31 Miss. 701 (1856); Colvin v. Buckle, 8 Mees. & W. 680 (1840).

[3] Beckwith v. Windsor Manuf. Co., 14 Conn. 594 (1842).

[4] Rodgers v. Jones, 1 McC. (S. C.) Eq. 221 (1826).

[5] Grant v. Ludlow, 8 Ohio St. 1 (1857). See Tilford v. James, 7 B. Mon. (Ky.) 337 (1847); Planter's Bank v. Douglass, 2 Head (Tenn.) 699 (1859).

secure the performance of an executory contract running for a term of years, and the mortgagors became insolvent, so that it appeared to the court that it was impossible for them to fulfill their contract, it was held that the right to foreclose accrued at once.[1] An indorser for accommodation, who is secured upon his liability by a collateral mortgage, will not be required to wait until after the notes indorsed by him have been protested, before paying them and commencing a foreclosure, where the makers have declined to pay them and have informed the indorser of their inability to pay.[2]

Where the indemnifying mortgage deviates in the least degree from a simple contract to indemnify against liability, even when indemnity is the sole object of the contract, and where, in consequence of the primary liability of other persons, actual loss may not be sustained, the mortgage can not be foreclosed for its face, but will be limited to actual compensation for probable loss.[3]

§ 51. **Parol agreement as to time of payment.**—While as a rule the plain meaning of a bond, mortgage or other written instrument can not be altered or varied by parol proof,[4] yet it would seem that where it is made to appear that it was the oral agreement of the parties at the time of executing a note or bond payable on demand, which was secured by mortgage, that the claim should not be sued nor the mortgage foreclosed until a future specified time, the statute of limitations will be considered as commencing to run only from the time agreed upon for payment.[5]

§ 52. **Agreement not to enforce mortgage.**—An agreement between the mortgagee and the mortgagor upon a valid consideration, that the mortgage shall not be enforced, will

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[1] Harding v. Mill River Manuf. Co., 34 Conn. 461 (1867.)

[2] National Bank of Newark v. Davis, 24 Ohio St. 190, 196 (1873).

[3] Gunel v. Cue, 72 Ind. 34, 38, 39 (1880). See Gilbert v. Wiman, 1 N. Y. 550 (1848); s. c. 49 Am. Dec. 359; Wright v. Whiting, 40 Barb. (N. Y.) 235 (1863); Loehr v. Colborn, 92 Ind. 24 (1883); Weddle v. Stone, 12 Ind. 625 (1859).

[4] Watson v. Hurt, 6 Gratt. (Va.) 633 (1850). See *post* § 54.

[5] Hale v. Anderson, 10 W. Va. 145 (1877).

estop the mortgagee from foreclosing.[1] And the mortgagee may be estopped from foreclosing even without a positive agreement, if he intentionally leads the mortagagor or other person similarly interested to do or to abstain from doing anything involving labor or the expenditure of a considerable sum of money, by giving him to understand that he would be relieved from the burden of the mortgage.[2]

Thus in Burt v. Saxton,[3] the defendants being desirous of purchasing certain lands upon which the plaintiff held a mortgage, but not being able to make the payments at the time specified in such mortgage, applied to the mortgagee who agreed by parol that if the defendant would purchase the premises, pay a given amount the ensuing spring and the interest on the sums remaining unpaid annually thereafter, and would put upon the lands certain specified improvements, he would extend the time of payment of the mortgage for twenty years. Under this agreement the defendant purchased the premises, assuming by his deed the payment of the mortgage debt, paid the sum named and made the specified improvements, but failed for two years to pay the interest. In an action brought to foreclose the mortgage, the court held that the time of payment was extended by the verbal contract, and that there was no default in the payment of the principal; that the payment of the interest annually was a condition which the defendant must perform, but that its non-payment was not such a breach of that condition as rendered the whole principal due.

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[1] Faxton v. Faxton, 28 Mich. 159 (1873); Fausel v. Schabel, 22 N. J. Eq. (7 C. E. Gr.) 126 (1871).

[2] See Faxton v. Faxton, 28 Mich. 159 (1873); Harkness v. Toulmin, 25 Mich. 80 (1872); Truesdail v. Ward, 24 Mich. 117, 134 (1871). See also Thompson v. Blanchard, 4 N. Y. 303 (1850); Skinner v. Dayton, 19 Johns. (N. Y.) 513, 561 (1822); s. c. 10 Am. Dec. 286; Shafer v. Niver, 9 Mich. 253 (1861); Calkins v. State, 13 Wis. 389 (1861); Swain v. Seamens, 76 U. S. (9 Wall.) 254 (1869); bk. 19 L. ed. 554; Gregg v. Von Phul, 68 U. S. (1 Wall.) 274 (1863); bk. 17 L. ed. 536; Cairncross v. Lorimer, 7 Jur. N. S. 149 (1861); Parrott v. Palmer, 3 Myl. & K. 632 (1834); Nicholson v. Hooper, 4 Myl. & C. 179 (1838); Duke of Leeds v. Earl of Amherst, 2 Phill. 117 (1846); Raw v. Pote, 2 Vern. 239 (1691).

[3] 1 Hun (N. Y.) 551 (1874).

§ 53. Extension of time of payment.—An agreement for the extension of the time for the payment of a mortgage, where it is based upon a valid consideration, suspends the right to foreclose the mortgage until the expiration of the time to which payment is extended.[1] If the agreement for an extension of time is without consideration it will be void.[2] The court say in an Indiana case:[3] "We think that the facts stated in the answer showed that there was a valid agreement to extend the time of payment of the note, and that this action was brought in violation of such agreement. This is a chancery suit, and it is well settled that courts of chancery will not enforce a contract in opposition to an agreement, for a valuable consideration, to give an extension of time; to do so would be against conscience and good faith, and in fraud of the rights of the appellants."

To constitute a valid extension of time, the agreement must be based on a valid consideration, a mere naked promise not being sufficient.[4] The payment of legal interest upon a note in advance is a sufficient consideration

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[1] See Newsam v. Finch, 25 Barb. (N. Y.) 175 (1857); Fellows v. Prentiss, 3 Den. (N. Y.) 512 (1846); Burt v. Saxton, 1 Hun (N. Y.) 551 (1874); Maher v. Lanfrom, 86 Ill. 513 (1877); Flynn v. Mudd, 27 Ill. 323 (1862); Warner v. Campbell, 26 Ill. 282 (1861); Trayser v. Trustees of Indiana Asbury University, 39 Ind. 556, 567 (1872); Carlton v. Tardy, 28 Ind. 452 (1867); Calvin v. Wiggam, 27 Ind. 489 (1867); Redman v. Deputy, 26 Ind. 338 (1866); Loomis v. Donovan, 17 Ind. 198 (1861); Dickerson v. The Board, &c., 6 Ind. 128 (1855); s. c. 63 Am. Dec. 373; Harbert v. Dumont, 3 Ind. 346 (1852); Reed v. Home Sav. Bank, 127 Mass. 295 (1879); Fowler v. Brooks, 13 N. H. 240 (1842); Bailey v. Adams, 10 N. H. 162 (1839); Tompkins v. Tompkins, 21 N. J. Eq. (6 C. E. Gr.) 338 (1871); Massaker v. Mackerley, 9 N. J. Eq. (1 Stockt.) 440 (1853); Union Central Life Ins. Co. v. Bonnell, 35 Ohio St. 365 (1880); McComb v. Kittridge, 14 Ohio, 348 (1846); Austin v. Dorwin, 21 Vt. 38 (1848); Creath's Adm'r v. Sims, 46 U. S. (5 How.) 192 (1847); bk. 12 L. ed. 111. *In re* Betts, 4 Dill. C. C. 93 (1877); Albert v. Grosvenor Investment Co., L. R. 3 Q. B. 123 (1867).

[2] See Sharpe v. Arnott, 51 Cal. 188 (1875); Pendleton v. Rowe, 34 Cal. 149 (1867); Massaker v. Mackerley, 9 N. J. Eq. (1 Stockt.) 440 (1853).

[3] Trayser v. Trustees of Indiana Asbury University, 39 Ind. 556, 567 (1872).

[4] Gardner v. Watson, 13 Ill. 347 (1851); Massaker v. Mackerley, 9 N. J. Eq. (1 Stockt.) 440 (1853).

to support an agreement for the extension of the time of payment,[1] but the prompt payment of the interest on demand, when it falls due, will not prolong the term for the payment of the principal beyond the time specified in the note.[2] The giving of additional security, by a person not a party to a promissory note, is a valuable consideration for an agreement by the payee to extend the time of payment of such note, and is available as a defence to the maker;[3] and a payment on a note before it becomes due is a sufficient consideration to support an agreement between the holder and the maker that the time for the payment of the balance of the note shall be extended for a specified period.[4]

Where the holder of a mortgage agreed with a third person that, if he would purchase the mortgagor's equity of redemption, and pay a specified sum on the mortgage indebtedness, he would extend the time for the payment of the mortgage debt for a specified term, and in accordance with this agreement the equity of redemption was purchased and the amount designated paid, it was held that this was a sufficient consideration to support the contract for the agreement of extension, and that the right to foreclose was suspended until the expiration of the time for which it was agreed that the mortgage should be extended.[5] In a recent case in Massachusetts[6] the president of the defendant savings bank executed a written agreement, by the terms of which the

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[1] Maher v. Lanfrom, 86 Ill. 513, 517 (1877); Flynn v. Mudd, 27 Ill. 323 (1862); Warner v. Campbell, 26 Ill. 282 (1861); Redman v. Deputy, 26 Ind. 338 (1866).

[2] Pendleton v. Rowe, 34 Cal. 149 (1867).

[3] Trayser v. Trustees of Indiana Asbury University, 39 Ind. 556, 567 (1872).

[4] Newsam v. Finch, 25 Barb. (N. Y.) 175 (1857).

[5] Loomis v. Donovan, 17 Ind. 198 (1861). See to the same effect Fellows v. Prentiss, 3 Den. (N. Y.) 512 (1846); s. c. 45 Am. Dec. 484; Charlton v. Tardy, 28 Ind. 452 (1867); Galvin v. Wiggan, 27 Ind. 489 (1867); Redman v. Deputy, 26 Ind. 338 (1866); Dickerson v. Board of Com. of Ripley Co., 6 Ind. 128 (1855); s. c. 63 Am. Dec. 373; Harbert v. Dumont, 3 Ind. 346 (1852); Fowler v. Brooks, 13 N. H. 240 (1842); Bailey v. Adams, 10 N. H. 162 (1839); McComb v. Kittridge, 14 Ohio, 348 (1846); Austin v. Dorwin, 21 Vt. 38 (1848); Creath's Adm'r v. Sims, 46 U. S. (5 How.) 192 (1847); bk. 12 L. ed. 111.

[6] Reed v. Home Savings Bank, 127 Mass. 295 (1879).

bank, in consideration of a certain sum paid by A, on account of interest due from B on a mortgage loan upon an estate of which B was the owner in fee, and of a promise that the taxes for the previous year should be paid by either A or B, agreed to extend at B's request for five months the time of payment of the interest to become due on the loan. Before the expiration of the five months, the bank foreclosed the mortgage and took possession of the estate for breach of its conditions. The taxes referred to in the agreement were not paid by A or B. In an action subsequently brought against the bank by A on the agreement, it was held that whether the bank was bound by the agreement or not, A was not a party to it, and that he could not maintain an action upon it, nor recover back, under a count for money had and received, the amount paid by him for the extension, because, under the circumstances, the law raised no implied promise to repay the money. In a New Jersey case[1] it was held that a mortgagor was not entitled to any benefit from an agreement between the mortgagee and his assignee, extending the time of payment in consideration of the mortgagee's guaranty of the prompt payment of the interest.

§ 54. **Extension of time by parol.**—The time specified for the payment of a mortgage may be extended by parol,[2] when the agreement is founded upon a sufficient consideration.[3]

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[1] Lee v. West Jersey Land & Cranberry Co., 29 N. J. Eq. (2 Stew.) 377 (1878).

[2] Tompkins v. Tompkins, 21 N. J. Eq. (6 C. E. Gr.) 338 (1871). See also Flynn v. Mudd, 27 Ill. 323 (1862). See Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 429 (1815); s. c. 7 Am. Dec. 499; Lattimore v. Harsen, 14 Johns. (N. Y.) 330 (1817); Fleming v. Gilbert, 3 Johns. (N. Y.) 528 (1808); Covenhoven v. Seaman, 1 Johns. Cas. (N. Y.) 23 (1799); Langworthy v. Smith, 2 Wend. (N. Y.) 587 (1829); s. c. 20 Am. Dec. 652; Tompkins v Tompkins, 21 N. J. Eq. (6 C. E. Gr.) 338 (1871); Vanhouten v. McCarty, 4 N. J. Eq. (3 H. W. Gr.) 141 (1842); King v. Morford, 1 N. J. Eq. (1 Saxt.) 274, 280 (1831); Cox v. Bennet, 13 N. J. L. (1 J. S. Gr.) 165, 171 (1832). *In re* Betts, 4 Dill. C. C. 93 (1877); s. c. 7 Rep. 225.

[3] Dodge v. Crandall, 30 N. Y. 294 (1864); Dearborn v. Cross, 7 Cow. (N. Y.) 48 (1827); Townsend v. Empire Stone Dress. Co., 6 Duer (N. Y.) 208 (1856); Fish v. Hayward, 28 Hun (N. Y.) 456 (1882); Lattimore v. Harsen, 14 Johns. (N. Y.) 330 (1817); Fleming v. Gilbert, 3 Johns. (N. Y.)

notwithstanding the fact that, as a general rule, parol evidence is inadmissible to supply, vary, enlarge, or contradict the terms of a written instrument,[1] especially one under seal,[2] and is inadmissible to support an agreement set up in contradiction to a deed.[3] In Betts's case[4] the United States circuit court for the eastern district of Missouri, held that a mortgage deed or deed of trust is, in equity, only a lien on the land, and that an agreement to extend the time of payment of the debt thus secured, is not within the statute of frauds and therefore need not be in writing.

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528 (1808); Keating v. Price, 1 Johns. Cas. (N. Y.) 22 (1799); Delacroix v. Bulkley, 13 Wend. (N. Y.) 71 (1834).

[1] Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425 (1815); s. c. 7 Am. Dec. 499. See also Hill v. Syracuse, B. & N. Y. R. R. Co., 73 N. Y. 351 (1878); VanBokkelen v. Taylor, 62 N. Y. 105 (1875); Baker v. Higgins, 21 N. Y. 397 (1860); Brewster v. Silence, 8 N. Y. 207, 213 (1853); Cook v. Eaton, 16 Barb. (N. Y.) 439 (1853); Taylor v. Baldwin, 10 Barb. (N. Y.) 586 (1850); Egleston v. Knickerbacker, 6 Barb. (N. Y.) 464 (1849); Sayre v. Peck, 1 Barb. (N. Y.) 464 (1847); Pattison v. Hull, 9 Cow. (N. Y.) 747, 754 (1828); Austin v. Sawyer, 9 Cow. (N. Y.) 41 (1828); Wright v. Taylor, 1 Edw. Ch. (N. Y.) 226 (1831); Webb v. Rice, 6 Hill (N. Y.) 219 (1843); Hull v. Adams, 1 Hill (N. Y.) 601 (1841); Meads v. Lansingh, 1 Hopk. Ch. (N. Y.) 124, 134 (1824); Bayard v. Malcolm, 1 Johns. (N. Y.) 453, 467 (1806); Mann v. Mann, 1 Johns. Ch. (N. Y.) 231 (1814); Parkhurst v. VanCortlandt, 1 Johns. Ch. (N. Y.) 274 (1814); Crosier v. Acer, 7 Paige Ch. (N. Y.) 137 (1838); Jarvis v. Palmer, 11 Paige Ch. (N. Y.) 650 (1845); Lowber v. LeRoy, 2 Sandf. (N. Y.) 202 (1848); Russell v. Kinney, 1 Sandf. Ch. (N. Y.) 38 (1843); Evans v. Wells, 22 Wend. (N. Y.) 324, 337 (1839); Lee v. Evans, 8 Cal. 424, 432 (1857); Beckley v. Munson, 22 Conn. 299 (1853); Mann v. Smyser, 76 Ill. 365 (1875); Harlow v. Boswell, 15 Ill. 56 (1853); Cincinnati, U. & Ft. W. R. R. Co. v. Pearce, 28 Ind. 502 (1867); Pilmer v. State Bank, 16 Iowa, 321 (1864); Jack v. Naber, 15 Iowa, 450 (1863); Peers v. Davis, 29 Mo. 184 (1859); Reed v. Jones, 8 Wis. 392 (1859).

[2] Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425 (1815); s. c. 7 Am. Dec. 499. See also Austin v. Sawyer, 9 Cow. (N. Y.) 41 (1828); Webb v. Rice, 6 Hill (N. Y.) 219 (1843); Evans v. Wells, 22 Wend. (N. Y.) 324, 339 (1839); Powell v. Monson & B. Manuf. Co., 3 Mason C. C. 358 (1824).

[3] See Meads v. Lansingh, 1 Hopk. Ch. (N. Y.) 124 (1824); Movan v. Hays, 1 Johns. Ch. (N. Y.) 339 (1815); Mann v. Mann, 1 Johns. Ch. (N. Y.) 231 (1814); Russell v. Kinney, 1 Sandf. Ch. (N. Y.) 38 (1843).

[4] 4 Dill. C. C. 93 (1877); s. c. 7 Rep. 225.

CHAPTER IV.

WHEN RIGHT OF ACTION BARRED.

§ 55. Limitation of foreclosure actions.
56. Enforcing statutes of limitation in equity.
57. Adverse possession by mortgagor.
58. Presumption arising from mortgagor's possession.
59. Presumption as to payment—How rebutted.
60. Adverse possession by several successive owners.
61. When limitation begins to run against a mortgage.
§ 62. When foreclosure of mortgage barred.
63. Foreclosure of mortgage when debt barred.
64. Removal of bar of the statute.
65. Rights and liabilities of grantee of mortgagor.
66. Possession by mortgagee—Presumption of foreclosure.
67. Decree for deficiency when debt barred.
68. Right of mortgagee to retain possession after remedy barred.

§ 55. **Limitation of foreclosure actions.**—Civil actions can now be commenced only within the periods designated by the Code,[1] which provides that all actions upon sealed instruments must be commenced within twenty years after the cause of action has accrued.[2] An action to foreclose a mortgage is an action upon a sealed instrument within the meaning of the Code, and will not be barred until twenty years have elapsed from the time the mortgage became due and payable, or from the date of the last payment made upon it. Where the mortgagor has made payments upon the mortgage within twenty years from the time it became due, the presumption of payment declared by the statute to arise after the lapse of twenty years from the date when the right of action accrued, is not available as a defence in an action of foreclosure.[3]

But independent of written law there is a period after which, upon the common law principles from which the

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[1] N. Y. Code Civ. Proc. § 380.
[2] N. Y. Code Civ. Proc. § 381.
[3] New York Life Ins. & Trust Co. v. Covert, 3 Abb. Ct. App. Dec. (N. Y.) 350 (1867); s. c. 3 Trans. App. 24; 6 Abb. (N. Y.) Pr. N. S. 154; reversing s. c. 29 Barb. (N. Y.) 435.

statutes of limitation have been deduced, a demand founded upon a note, bond or judgment becomes irrecoverable. It is a general rule that forbearance for twenty years unexplained, unaccounted for and unrebutted will extinguish a judgment as well as all other pecuniary demands.[1]

§ 56. **Enforcing statutes of limitation in equity.**—While statutes of limitation are as a general rule applicable as such only in proceedings at law, yet courts of equity, acting by analogy, will, in proceedings where they have concurrent jurisdiction with courts of law, apply statutes of limitation and refuse to grant relief where it appears that the statutory period, within which an action might have been maintained at law, has elapsed.[2] This has been the settled rule of decision in the English courts of chancery for the last

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[1] Gulick v. Loder, 13 N. J. L. (1 J. S. Gr.) 68 (1832); s. c. 23 Am. Dec. 711. See also Boardman v. De Forest, 5 Conn. 1 (1823); Buchannan v. Rowland, 5 N. J. L. (2 South.) 72 (1820); Cohen v. Thomson, 2 Mills, (S. C. Const.) 146 (1818); Wells v. Washington, 6 Munf. (Va.) 532 (1820); Ross v. Darby, 4 Munf. (Va.) 428 (1815); Willaume v. Gorges, 1 Campb. 217 (1808); Flower v. Bolingbroke, 1 Str. 639 (1749).

[2] See Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90 (1823); s. c. 11 Am. Dec. 417; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287 (1820); s. c. 8 Am. Dec. 562; Morgan v. Morgan, 10 Ga. 297 (1851); Sloan v. Graham, 85 Ill. 26 (1877); Castner v. Walrod, 83 Ill. 171 (1876); Kane v. Herrington, 50 Ill. 232, 239 (1869); Manning v. Warren, 17 Ill. 267 (1855); Clay v. Clay, 7 Bush. (Ky.) 95 (1870); Bank of United States v. Dallam, 4 Dana (Ky.) 574 (1836); Fenwick v. Macey, 1 Dana (Ky.) 276 (1833); Thomas v. White, 3 Litt. (Ky.) 177 (1823); Smith v. Carney, 1 Litt. (Ky.) 295 (1822); Ashley v. Denton, 1 Litt. (Ky.) 86 (1822); Frame v. Kenny, 2 A. K. Marsh (Ky.) 145 (1819); s. c. 12 Am. Dec. 367; Breckenridge v. Churchill, 3 J. J. Marsh (Ky.) 12 (1829); Brunk v. Means, 11 B. Mon. (Ky.) 214 (1850); Rogers v. Moore, 9 B. Mon. (Ky.) 401 (1849); Ayres v. Waite, 64 Mass. (10 Cush.) 72 (1852); Ayer v. Stewart, 14 Minn. 97 (1869); McClane v. Shepherd, 21 N. J. Eq. (6 C. E. Gr.) 76 (1870); Neely's Appeal, 85 Pa. St. 387 (1877); Shelby v. Shelby, Cooke (Tenn.) 179 (1812); s. c. 5 Am. Dec. 686; Cocke v. McGinnis, 1 Mart. & Yerg. (Tenn.) 361 (1828); s. c. 17 Am. Dec. 809; Pitzer v. Burns, 7 W. Va. 63, 69 (1873); Carroll v. Green, 92 U. S. (2 Otto) 509 (1875); bk. 23 L. ed. 738; Wagner v. Baird, 48 U. S. (7 How.) 234, 258 (1849); bk. 12 L. ed. 681; Badger v. Badger, 2 Cliff. C. C. 137 (1862); Willis v. Robinson, 4 Bligh, 101, 119 (1830).

century and a half.[1] In some of the American states it is held that in equity the lapse of time operates only by way of evidence as affording a presumption of payment,[2] but other states hold that courts of equity are bound by the statutes of limitation as much as courts of law;[3] while in California,[4] Missouri,[5] Nevada[6] and Oregon[7] the statutes of limitation are expressly made applicable to all suits and actions.

Thus, following the analogy of the statutes of limitation, a debt is presumed to be paid after the lapse of twenty years.[8] The lapse of this period of time is held to be *prima facie* evidence of payment; and it must, it seems, be so accepted by a court and jury, unless there is other evidence to explain the delay and to rebut the presumption.[9] It has

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[1] See Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90 (1823); s. c. 11 Am. Dec. 417; Cocke v. McGinnis, 1 Mart. & Yerg. (Tenn.) 361 (1828); s. c. 17 Am. Dec. 809; Sturt v. Mellish, 2 Atk. 610 (1743); Lockey v. Lockey, Prec. Ch. 518 (1719); Hovenden v. Annesley, 2 Sch. & Lef. 607 (1805), a leading case in which all the American and English cases are distinguished; overruling Coster v. Murray, 5 Johns. Ch. (N. Y.) 522 (1821); Love v. Watkins, 40 Cal. 547 (1871).

[2] See Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287 (1820); s. c. 8 Am. Dec. 562.

[3] See Shelby v. Shelby, Cooke (Tenn.) 179 (1812); s. c. 5 Am. Dec. 686.

[4] Love v. Watkins, 40 Cal. 547 (1871); Boyd v. Blankman, 29 Cal. 19 (1865); Lord v. Morris, 18 Cal. 484 (1861).

[5] Kelly v. Hurt, 61 Mo. 463 (1875).

[6] White v. Sheldon, 4 Nev. 280 (1868).

[7] Anderson v. Baxter, 4 Oreg. 105 (1871); Oregon Code Civ. Proc. § 378.

[8] Bailey v. Jackson, 16 Johns. (N. Y.) 210 (1819); s. c. 8 Am. Dec. 309; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287 (1820); s. c. 8 Am. Dec. 562; Swart v. Service, 21 Wend. (N. Y.) 36 (1839); s. c. 34 Am. Dec. 211; Ludlow v. Van Camp, 6 N. J. Eq. (2 Halst.) 113 (1823); s. c. 11 Am. Dec. 529; Wanmaker v. VanBuskirk, 1 N. J. Eq. (1 Saxt.) 685 (1832); s. c. 23 Am. Dec. 748; Gulick v. Loder, 3 N. J. L. (1 J. S. Gr.) 68 (1832); s. c. 23 Am. Dec. 711; Henderson v. Lewis, 9 Serg. & R. (Pa.) 379 (1823); s. c. 11 Am. Dec. 733; Ordinary v. Steedman, Harp. (S. C.) L. 287 (1824); s. c. 18 Am. Dec. 652; Yarnell v. Moore, 3 Coldw. (Tenn.) 176 (1866); Carter v. Wolfe, 1 Heisk. (Tenn.) 700 (1870); Anderson v. Settle, 5 Sneed. (Tenn.) 203 (1857); Atkinson v. Dance, 9 Yerg. (Tenn.) 424 (1836); s. c. 30 Am. Dec. 422; Rogers v. Judd, 5 Vt. 236 (1833); s. c. 26 Am. Dec. 301.

[9] Brock v. Savage, 31 Pa. St. 410, 422 (1858); King's Ex'rs v. Coulder's Ex'rs, 2 Grant Cas. (Pa.) 77 (1853); Cope v. Humphreys, 14 Serg. & R.

been held that the lapse of even a less number of years than twenty will be sufficient to raise a presumption of payment.

Thus, it was said in Henderson v. Lewis,[1] that a presumption of the payment of a bond may be raised by a lapse of less than the statutory period of twenty years when taken in connection with other evidence, but that in the absence of other circumstances, the full statutory period must expire to raise the presumption.[2] And in another case,[3] the court say that "as to what amount of time alone, divested of other circumstances, shall be of weight sufficient to authorize a jury to presume payment, unless the presumption be rebutted, is necessarily arbitrary as a rule and based upon grounds of public policy. Sixteen years having, in the case referred to,[4] been adopted, and society having acted on it for many years, it would be improper we think to question the correctness of the rule."[5]

§ 57. **Adverse possession by mortgagor.**—Uninterrupted possession by a mortgagor for twenty years after condition broken without entry or claim by the mortgagee, raises the presumption that the mortgage has been paid, and will bar the right of the mortgagee to foreclose.[6] The

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(Pa.) 21 (1825); Lesley v. Nones, 7 Serg. & R. (Pa.) 410 (1821); Tilghman v. Fisher, 9 Watts (Pa.) 442 (1840); Bellas v. Lavan, 4 Watts (Pa.) 297 (1835).

[1] 9 Serg. & R. (Pa.) 379 (1823); s. c. 11 Am. Dec. 733.

[2] See also Lesley v. Nones, 7 Serg. & R. (Pa.) 410 (1821); Husky v. Maples, 2 Coldw. (Tenn.) 25 (1865); Leiper v. Erwin, 5 Yerg. (Tenn.) 97 (1833). Freeman on Judgments, §§ 464, 465; 2 Greenl. Ev. § 528.

[3] Atkins. v. Dance, 9 Yerg. (Tenn.) 424 (1836); s. c. 30 Am. Dec. 422.

[4] Blackburne v. Squib, Peck (Tenn.) 64 (1823).

[5] See also Yarnell v. Moore, 3 Coldw. (Tenn.) 176 (1866); Carter v. Wolfe, 1 Heisk. (Tenn.) 694, 700 (1870); Anderson v. Settle, 5 Sneed. (Tenn.) 203 (1857).

[6] Belmont v. O'Brien, 12 N. Y. 394 (1855); Jackson v. Shauber, 7 Cow. (N. Y.) 187, 198 (1827); Jackson v. Wood, 12 Johns. (N. Y.) 245 (1815); s. c. 7 Am. Dec. 312; Jackson v. Pratt, 10 Johns. (N. Y.) 38 (1813); Collins v. Torry, 7 Johns. (N. Y.) 278 (1810); s. c. 5 Am. Dec. 273; Giles v. Baremore, 5 Johns. Ch. (N. Y.) 550 (1821); Haskell v. Bailey, 22 Conn. 569 (1853); Elkins v. Edwards, 8 Ga. 326 (1850); Harris v. Mills, 28 Ill. 46 (1862); Chick v. Rollins, 44 Me. 104 (1857); Blethen v. Dwinal, 35 Me. 556 (1853); Boyd v. Harris, 2 Md. Ch. Dec. 210 (1849); Bacon v. McIntire, 49 Mass. (8 Metc.) 87 (1844); Howland v. Shurtleff, 43

general presumption, however, is that the mortgagor and his grantees hold subordinate to the mortgagee unless there is some act on the part of the mortgagor or his grantees showing affirmatively that the possession is not held in subordination to the mortgagee's title, and, consequently, until this is shown the bar of the statute of limitations will not begin to run in favor of the mortgagor or his grantees.[1] Recognition by the mortgagor or his grantees during the time of the existence of the mortgage, will rebut the presumption that the mortgage is barred even as to subsequent purchasers.[2]

Possession by the mortgagor for more than twenty years is, at best, but presumptive evidence that the debt has been satisfied.[3] The possession of the mortgagor or his grantee, in order to divest the mortgagee of his right to foreclose, must be hostile in its inception and must continue to be hostile, actual, visible and open;[4] because so long as the relation of mortgagor and mortgagee continues, the statute can not commence to run in favor of the mortgagor, his heirs or assigns.[5] The possession of the mortgagor, being consistent with and subject to the rights of the mortgagee at the inception of the mortgage, does not become antagonistic

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Mass. (2 Metc.) 26 (1840); s. c. 35 Am. Dec. 384; Thayer v. Mann, 36 Mass. (19 Pick.) 535 (1837); Inches v. Leonard, 12 Mass. 379 (1815); Nevitt v. Bacon, 32 Miss. 212, 226 (1856); s. c. 66 Am. Dec. 609; Tripe v. Marcy, 39 N. H. 439 (1859); Evans v. Huffman, 5 N. J. Eq. (1 Halst.) 354 (1846); Roberts v. Welch, 8 Ired. (N. C.) Eq. 287 (1852); Richmond v. Aiken, 25 Vt. 324 (1853); Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 (1824); bk. 6 L. ed. 141; Trash v. White, 3 Bro. Ch. 288, 291 (1791); Hillary v. Waller, 12 Ves. 265 (1806).

[1] Boyd v. Beck, 29 Ala. 703 (1857); Noyes v. Sturdivant, 18 Me. 104 (1841); Bacon v. McIntire, 49 Mass. (8 Metc.) 87 (1844); Tripe v. Marcy, 39 N. H. 439 (1859); Zeller v. Eckert, 45 U. S. (4 How.) 295 (1846); bk. 11 L. ed. 982; Hall v. Surtees, 5 B. & Ald. 687 (1827).

[2] Heyer v. Pruyn, 7 Paige Ch. (N. Y.) 465 (1839); s. c. 34 Am. Dec. 355; Drayton v. Marshall, Rice (S. C.) Eq. 383, 384 (1839); s. c. 33 Am. Dec. 84; Wright v. Eaves, 10 Rich. (S. C.) Eq. 582 (1858); Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 (1824); bk. 6 L. ed. 142.

[3] Cheever v. Perley, 93 Mass. (11 Allen) 584 (1866).

[4] Medley v. Elliott, 62 Ill. 532 (1872); Parker v. Banks, 79 N. C. 480 (1878); Martin v. Jackson, 27 Pa. St. 504 (1856).

[5] See Rockwell v. Servant, 63 Ill. 424 (1872); Jamison v. Perry, 38 Iowa, 14 (1873).

by his simple neglect or refusal to pay the interest. The mortgagor or his grantee must commit some act which amounts to a refusal to recognize the mortgage, or there must exist some other circumstance from which a jury will be induced to find the fact of adverse possession.[1] Yet it is held that the mortgagor's possession is to be termed adverse in law after a breach of the conditions of the mortgage.[2]

§ 58. **Presumption arising from mortgagor's possession.**—It has sometimes been questioned whether the doctrine of presumption, arising from the lapse of time and entire neglect to take any measure to enforce a claim, can properly be applied to the case of a mortgage of real estate; and in some of the earlier English cases the doctrine was advanced that the common law presumption applicable to bonds, judgments and similar instruments, arising from a delay of twenty years in enforcing them, did not apply to the case of a mortgage, because in such a case the legal estate was in the mortgagee and the mortgagor was a mere tenant at will, his possession of the premises being in theory the possession of the mortgagee. But this doctrine was early repudiated by Lord Thurlow[3] and by the Master of the Rolls[4] in very strong language, and it has not since been asserted in any case either in England or America. It is now the universal doctrine that debts secured by mortgages stand on the same footing as other demands, and are held to be defeated by the same presumptions arising from lapse of time and laches on the part of the mortgagee.[5]

While it is true that the mortgagor is not the tenant at will of the mortgagee in any such sense that his possession

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[1] Jones v. Williams, 5 Ad. & El. 291 (1836); Patridge v. Bere, 5 B. & Ald. 604 (1822).

[2] Wilkinson v. Flowers, 37 Miss. 579 (1859); s. c. 75 Am. Dec. 78.

[3] Trash v. White, 3 Bro. Ch. 289 (1791).

[4] Christopher v. Sparke, 2 Jac. & Walk. 223 (1820).

[5] See Jackson v. Wood, 12 Johns. (N. Y.) 245 (1815); s. c. 7 Am. Dec. 315; Jackson v. Pratt, 10 Johns. (N. Y.) 382 (1813); Collins v. Torry, 7 Johns. (N. Y.) 278 (1810); s. c. 5 Am. Dec. 273; Giles v. Baremore, 5 Johns. Ch. (N. Y.) 552 (1821); Howland v. Shurtleff, 43 Mass. (2 Metc.) 26 (1840); s. c. 25 Am. Dec. 344; Inches v. Leonard, 12 Mass. 379 (1815).

can not become adverse, yet while the mortgagor acknowledges his relation to the mortgagee by paying interest and installments of the debt, his possession is said to be the possession of the mortgagee.[1] But the mortgagor has a right to convey or to lease the mortgaged premises or to deal with them in any way he sees fit as owner, so long as he does not impair the security, without thus rendering his possession hostile to that of the mortgagee; and the constructive possession of the mortgagee will continue until the possession of the mortgagor or his grantee is in actual and open hostility to that of the mortgagee.[2]

Although the doctrine of presumption, arising from possession by the mortgagor for more than twenty years, has been frequently applied as against the mortgage debt, and may now be said to be fully established everywhere,[3] yet such a presumption is not conclusive, and circumstances may be shown sufficiently strong to repel the presumption.[4]

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[1] See Harris v. Mills, 28 Ill. 44 (1862).

[2] Boyd v. Beck, 29 Ala. 703 (1857); Roberts v. Littlefield, 48 Me. 61 (1860); Chick v. Rollins, 44 Me. 104 (1857); Howland v. Shurtleff, 43 Mass. (2 Metc.) 26 (1840); s. c. 35 Am. Dec. 384; Inches v. Leonard, 12 Mass. 379 (1815); Benson v. Stewart, 30 Miss. 49 (1855); Sheafe v. Gerry, 18 N. H. 245 (1846); Howard v. Hildreth, 18 N. H. 105 (1846); Bates v. Conrow, 11 N. J. Eq. (3 Stockt.) 137 (1856); Martin v. Jackson, 27 Pa. St. 504 (1856); Drayton v. Marshall, 1 Rice (S. C.) Eq. 383 (1839); Atkinson v. Patterson, 46 Vt. 750 (1874); Pitzer v. Burns, 7 W. Va. 63 (1873); Higginson v. Mein, 8 U. S. (4 Cr.) 415 (1808); bk. 2 L. ed. 664; Jones v. Williams, 5 Ad. & E. 291 (1836); s. c. 6 Nev. & M. 816; Hall v. Surtes, 5 B. & Ald. 687 (1822).

[3] Jackson v. Wood, 12 Johns. (N. Y.) 245 (1815); Jackson v. Pratt, 10 Johns. (N. Y.) 382 (1813); Collins v. Torry, 7 Johns. (N. Y.) 278 (1810); Giles v. Baremore, 5 Johns. Ch. (N. Y.) 552 (1821); Newcomb v. St. Peter's Church, 2 Sandf. Ch. (N. Y.) 636 (1845); McDonald v. Sims, 3 Ga. 383 (1847); Field v. Wilson, 6 B. Mon. (Ky.) 479 (1846); Bacon v. McIntire, 49 Mass. (8 Metc.) 87 (1844); Howland v. Shurtleff, 43 Mass. (2 Metc.) 26 (1840); s. c. 35 Am. Dec. 384; Inches v. Leonard, 12 Mass. 379 (1815); Holfman v. Harrington, 33 Mich. 392 (1876); Reynolds v. Green, 10 Mich. 355 (1862); Wilkinson v. Flowers, 37 Miss. 579 (1859); Nevitt v. Bacon, 32 Miss. 212 (1856); McNair v. Lot, 34 Mo. 285 (1863); Martin v. Bowker, 19 Vt. 526 (1847); Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 (1824); bk. 6 L. ed. 142.

[4] Moore v. Cable, 1 Johns. Ch. (N. Y.) 386 (1815); Cheever v. Perley, 93 Mass. (11 Allen) 584 (1866); Wanmaker v. VanBuskirk,

This presumption, arising from the policy of the law, does not necessarily proceed on the belief that payment has actually been made;[1] at most, the lapse of time and the neglect of the mortgagee to enforce his demand against the mortgagor, and the continuance of the latter in adverse possession, are grounds for a presumption of fact which may authorize a jury to infer the payment or satisfaction of the mortgage, and for that reason may be a sufficient answer in an action of foreclosure.[2] But there are some cases which hold that, where there has been no recognition of the mortgage debt for a period less than the statutory period of limitation, such possession will not raise a presumption of payment.[3]

The presumption as to payment by an adverse possession of twenty years may be rebutted by showing a payment of interest, a promise to pay, an acknowledgment of the debt by the mortgagor or some similar circumstance;[4] but in such cases parol evidence, in order to rebut the presumption as to payment, should show clearly some positive act within that time, which is an unequivocal recognition of the debt.[5] There must be a part payment[6] or a positive new promise,[7] in

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1 N. J. Eq. (1 Saxt.) 685 (1832); Booker v. Booker, 29 Gratt. (Va.) 605 (1877); s. c. 26 Am. Rep. 401; Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 (1824); bk 6 L. ed. 142.

[1] Hillary v. Waller, 12 Ves. 239, 252 (1806).

[2] Jackson v. Wood, 12 Johns. (N. Y.) 245 (1815); Jackson v. Pratt, 10 Johns. (N. Y.) 382 (1813); Collins v. Torry, 7 Johns. (N. Y.) 278 (1810); Jackson v. Hudson, 3 Johns. (N. Y.) 375 (1808); Demarest v. Winkoop, 3 Johns. Ch. (N. Y.) 135 (1817); Chick v. Rollins, 44 Me. 104 (1857); Crook v. Glenn, 30 Md. 55 (1868); Bacon v. McIntire, 49 Mass. (8 Metc.) 87 (1844).

[3] Boon v. Pierpont, 28 N. J. Eq. (1 Stew.) 7 (1877).

[4] Cook v. Parham, 63 Ala. 456 (1879); Coldcleugh v. Johnson, 34 Ark. 312 (1879); Locke v. Caldwell, 91 Ill. 417 (1879); Murphy v. Coates, 33 N. J. Eq. (6 Stew.) 424 (1881); Snavely v. Pickle, 29 Gratt. (Va.) 27 (1877); Pears v. Laing, L. R. 12 Eq. 41 (1871).

[5] Jarvis v. Albro, 67 Me. 310 (1877).

[6] Schmucker v. Sibert, 18 Kan. 104 (1877). See Pease v. Catlin, 1 Ill. App. 88 (1878).

An acknowledgment or part payment by an administrator or a demand not exhibited as required by law will not stop the running of the statute of limitations. Clawson v. McCune, 20 Kan. 337 (1878).

[7] Crone v. Citizen's Bank of La. 28 La. An. 449 (1876).

order to accomplish this purpose; a mere silent acquiescence in the mortgagee's demand of a payment, or an admission of the debt, is not of itself sufficient to repel the presumption. A new promise, to take the case out of the statute, need not specify the amount nor the time, if it otherwise indentifies the debt. Thus a written promise to renew a note and to give a new mortgage, whenever the exact amount due shall be ascertained, amounts to an equitable renewal.[1]

§ 59. **Presumption as to payment—How rebutted.**—The presumption of payment, arising from an uninterrupted possession by the mortgagor for twenty years after condition broken, may be rebutted[2] by circumstances explaining the delay, as by showing that the plaintiff was ignorant of the defendant's residence,[3] or that the plaintiff being an alien had been prevented from suing by the existence of war,[4] or by showing that the parties resided in a country whose commercial relations were disturbed by the presence of

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[1] Hart v. Boyt, 54 Miss. 547 (1877).

[2] Bailey v. Jackson, 16 Johns. (N. Y.) 210 (1819); s. c. 8 Am. Dec. 309; Cheever v. Perley, 93 Mass. (11 Allen) 584, 588 (1832); Creighton v. Proctor, 66 Mass. (12 Cush.) 437 (1853); Ayres v. Waite, 64 Mass. (10 Cush.) 76 (1852); Howland v. Shurtleff, 43 Mass. (2 Metc.) 26 (1840); s. c. 35 Am. Dec. 384.

[3] Bailey v. Jackson, 16 Johns. (N. Y.) 210 (1819); s. c. 8 Am. Dec. 309.

[4] As to when a debt or other liability will be presumed to be paid or discharged, see in addition to cases already cited in the foregoing notes: Central Bank of Troy v. Heydorn, 48 N. Y. 260, 272 (1872); Lynde v. Denison, 3 Conn. 392 (1820); Tripe v. Marcy, 39 N. H. 439, 449 (1859); Thorpe v. Corwin, 20 N. J. L. (1 Spen.) 317 (1844); Allen v. Everly, 24 Ohio St. 111 (1873); Foulk v. Brown, 2 Watts (Pa.) 215 (1834); Gwyn v. Porter, 5 Heisk. (Tenn.) 253 (1871); Brobst v. Brock, 77 U. S. (10 Wall.) 519, 535 (1870); bk. 19 L. ed. 1002.

But it must be remembered that there is a manifest difference between those cases where length of time operates as a bar to an action, and those in which it can be used only as matter of evidence. For in the former cases it may be pleaded in bar and is conclusive, though the debt be not paid; but in the latter cases being merely evidence, it only raises a presumptive fact, which may be repelled by other circumstances to be considered in arriving at the truth. Bailey v. Jackson, 16 Johns. (N. Y.) 210 (1819); s. c. 8 Am. Dec. 309; Shields v. Pringle, 2 Bibb. (Ky.) 387 (1811); Howland v. Shurtleff, 43 Mass. (2 Metc.) 28 (1840); Allen v. Everly, 24 Ohio St. 111 (1873); Bissell v. Jaudon, 16 Ohio St. 498 (1866); Brobst v. Brock, 77 U. S. (10 Wall.) 519, 535 (1870); bk. 19 L. ed. 1002.

hostile armies,[1] or by showing any other circumstances which raise an improbability of payment or discharge,[2] as well as by an express acknowledgment of the debt or by acts recognizing it. Thus also relationship between the parties will repel the presumption arising from the lapse of time, that there is no debt,—especially where the exaction of payment might have occasioned distress.[3] And in some states it is held that where the statutory period expires after the death of the debtor, an action may, under the statute, be commenced against his administrator, if brought within eighteen months after the decedent's death;[4] but in no case will the provisions of the statute of limitations be suspended until after administration, where it began to run against the decedent in his life-time, if the administrator could have taken out letters and sued earlier.[5]

When the statute of limitations has once commenced to run, its operation will not be suspended by any subsequent disability.[6]

§ 60. Adverse possession by several successive owners.—Adverse possession may be held by several successive owners. It is not necessary that the possession should continue for twenty years in the same person. If the time embraced by two or more possessions amounts to the period prescribed by the statute as a bar, it will be competent

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[1] Hale v. Pack, 10 W. Va. 145 (1877).

[2] Snavely v. Pickle, 29 Gratt. (Va.) 27 (1877); Brobst v. Brock, 77 U. S. (10 Wall.) 535 (1870); bk. 19 L. ed. 1002.

[3] Wanmaker v. VanBuskirk, 1 N. J. Eq. (1 Saxt.) 685 (1832); s. c. 23 Am. Dec. 748; Leman v. Newnham, 1 Ves. sr. 51 (1747).

[4] See Wenman v. Mohawk Ins. Co., 13 Wend. (N. Y.) 267 (1835); s. c. 28 Am. Dec. 464. See also Flagg v. Ruden, 1 Bradf. (N. Y.) 196 (1850); Scovil v. Scovil, 30 How. (N. Y.) Pr. 262 (1865).

[5] Nicks v. Martindale, 1 Harp. (S. C.) L. 135 (1824); s. c. 18 Am. Dec. 647.

[6] Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129 (1817); s. c. 8 Am. Dec. 467; Jackson v. Moore, 13 Johns. (N. Y.) 513 (1816); s. c. 7 Am. Dec. 398; Ruff's Adm'r v. Bull, 7 Harr. & J. (Md.) 14 (1826); s. c. 16 Am. Dec. 290; Thompson v. Smith, 7 Serg. & R. (Pa.) 209 (1821); s. c. 10 Am. Dec. 453; Adamson v. Smith, 2 Mill. (S. C. Const.) 267 (1818); s. c. 12 Am. Dec. 665; Faysoux v. Prather, 1 Nott. & McC. (S. C.) 296 (1818); s. c. 9 Am. Dec. 691; Fitzhugh v. Anderson, 2 Hen. & Munf. (Va.) 289 (1808); s. c. 3 Am. Dec. 625.

to join the one adverse possession to the others, in order to make the bar effectual; for it is immaterial whether the possession be held for the entire period by one party or by several parties in succession, each holding part of the time, and all together holding the entire period, provided the possession be continued and uninterrupted, and adverse to the claim of the plaintiff, during the whole period. But if a period of time intervenes in which the possession is not adverse, the statute will only run from the commencement of the last adverse possession.[1]

§ 61. When limitation begins to run against a mortgage.—The statute of limitations begins to run against a mortgage as soon as the right to foreclose it accrues, and not from the date or the delivery of the mortgage;[2] the time which would bar an action at law to recover possession of the mortgaged property, after condition broken, will in general bar an action in equity to foreclose the mortgage.[3] Generally the right of action to foreclose a mortgage accrues upon the forfeiture of the condition of the mortgage, and from this date the statute of limitations begins to run.[4] The condition of the mortgage having been forfeited, the mortgagor holds from that time subject to the rights of the mortgagee to foreclose; and if the latter sleeps upon his rights for the length of time fixed by the statute of limitations for barring an action for the recovery of the possession of the mortgaged premises, his rights will be lost.[5]

The absence from the state of the mortgagor or any one liable for the mortgage debt, will not prevent the statute of

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[1] Benson v. Stewart, 30 Miss. 49, 57 (1855). See also Emory v. Keighan, 88 Ill. 482 (1878).

[2] Prouty v. Eaton, 41 Barb. (N. Y.) 409 (1863).

[3] Wilkinson v. Flowers, 37 Miss. 579 (1859); s. c. 75 Am. Dec. 78; Nevitt v. Bacon, 32 Miss. 212 (1856); s. c. 66 Am. Dec. 609; Benson v. Stewart, 30 Miss. 49 (1855).

[4] Wilkinson v. Flowers, 37 Miss. 579 (1859); s. c. 75 Am. Dec. 78.

[5] Jackson v. Wood, 12 Johns. (N. Y.) 242 (1815); s. c. 7 Am. Dec. 315; Wilkinson v. Flowers, 37 Miss. 579 (1859); s. c. 75 Am. Dec. 78; Nevitt v. Bacon, 32 Miss. 212, 227 (1856); s. c. 66 Am. Dec. 609; Benson v. Stewart, 30 Miss. 49 (1855); 4 Kent Com. 402.

limitations from running against the mortgagee's right to foreclose. Limitations in equity act only by analogy to the rules of law; and a suit for foreclosure being, in effect, a proceeding *in rem*, there is no analogy in the application of the statute of limitations to such proceedings, so far as the effect of the defendant's absence from the state upon the running of the statute is concerned.[1]

Where the mortgage debt is payable in installments falling due at different times, the condition of the mortgage is a continuing one, and the mortgagee may await the maturity of the last note or installment before an entry and sale, or before treating the non-payment of the first installment as a forfeiture of the mortgage. And in such cases the mortgagor's possession will not be adverse to that of the mortgagee until the maturity of the last installment; for it is not until that date that the final breach of the condition of the mortgage occurs.[2]

§ 62. **When foreclosure of mortgage barred.**—The right to foreclose a mortgage is not barred by the same lapse of time which bars an action upon a note secured by a mortgage;[3] but it will be barred by that lapse of time which would bar an action for the recovery of the mortgaged premises.[4] Uninterrupted possession for the period of twenty years after condition broken, without any payment or demand of principal or interest,[5] or any claim on the part

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[1] Anderson v. Baxter, 4 Org. 105 (1871).

[2] Parker v. Banks, 79 N. C. 480 (1878).

[3] Nevitt v. Bacon, 32 Miss. 212 (1856); s. c. 66 Am. Dec. 609; Trotter v. Erwin, 27 Miss. 772 (1854); Bush v. Cooper, 26 Miss. 611 (1853); s. c. 59 Am. Dec. 270; Miller v. Trustees of Jefferson College, 13 Miss. (5 Smed. & M.) 651 (1846); Miller v. Helm, 10 Miss. (2 Smed & M.) 687, 697 (1843).

[4] Jackson v. Wood, 12 Johns. (N. Y.) 242 (1815); s. c. 7 Am. Dec. 315; Wilkinson v. Flowers, 37 Miss. 579 (1859); s. c. 75 Am. Dec. 78; Nevitt v. Bacon, 32 Miss. 212, 227 (1856); s. c. 66 Am. Dec. 609; Benson v. Stewart, 30 Miss. 49 (1855); 4 Kent Com. 402.

[5] Barned v. Barned, 21 N. J. Eq. (6 C. E. Gr.) 245 (1870); Hayes v. Whitall, 13 N. J. Eq. (2 Beas.) 242 (1861); Wanmaker v. VanBuskirk, 1 N. J. Eq. (1 Saxt.) 685 (1832); s. c. 23 Am. Dec. 748; Evans v. Huffman, 5 N. J. Eq. (1 Halst.) 360 (1846).

of the mortgagee, raises the presumption that the mortgage debt has been paid,[1] and, in the absence of circumstances excusing the delay, bars the right of the mortgagee to foreclose his mortgage.[2] But it has been said that no presumption of the payment of the mortgage will be raised from the lapse of a less period;[3] and this is particularly true where for a part of the time the business of the courts and the commercial intercourse of the country are interrupted by war.[4]

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[1] Harrington v. Slade, 22 Barb. (N. Y.) 161 (1856); Bailey v. Jackson, 16 Johns. (N. Y.) 210 (1819); s. c. 8 Am. Dec. 309; Giles v. Baremore, 5 Johns. Ch. (N. Y.) 545 (1821); Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287 (1820); s. c. 8 Am. Dec. 562; Heyer v. Pruyn, 7 Paige Ch. (N. Y.) 465 (1839); s. c. 34 Am. Dec. 355; Swart v. Service, 21 Wend. (N. Y.) 36 (1839); s. c. 34 Am. Dec. 211; Perkins v. Cartmell, 4 Harr. (Del.) 275 (1843); Records v. Melson, 1 Houst. (Del.) 139 (1855); VanDuyn v. Hepner, 45 Ind. 589 (1874); Jarvis v. Albro, 67 Me. 310 (1877); Baltimore & O. R. R. Co. v. Trimble, 51 Md. 99 (1879); Cheever v. Perley, 93 Mass. (11 Allen) 584 (1866); Creighton v. Proctor, 66 Mass. (12 Cush.) 437 (1853); Ayres v. Waite, 64 Mass. (10 Cush.) 76 (1852); Bacon v. McIntire, 49 Mass. (8 Metc.) 87 (1844); Howland v. Shurtleff, 43 Mass. (2 Metc.) 26 (1840); s. c. 35 Am. Dec. 384; Sheafe v. Gerry, 18 N. H. 245 (1846); Howard v. Hildreth, 18 N. H. 105 (1846); Downs v. Sooy, 28 N. J. Eq. (1 Stew.) 55 (1877); Barned v. Barned, 21 N. J. Eq. (6 C. E. Gr.) 245 (1870); Hayes v. Whitall, 13 N. J. Eq. (2 Beas.) 242 (1861); Wanmaker v. VanBuskirk, 1 N. J. Eq. (1 Saxt.) 685 (1832); s. c. 23 Am. Dec. 748; Evans v. Huffman, 5 N. J. Eq. (1 Halst.) 360 (1846); Todd's Appeal, 24 Pa. St. 429 (1855); Bank of United States v. Biddle, 2 Pars. Cas. (Pa.) 31; Drayton v. Marshall, Rice (S. C.) Eq. 373 (1839); s. c. 33 Am. Dec. 84; Atkinson v. Dance, 9 Yerg. (Tenn.) 424 (1836); s. c. 30 Am. Dec. 422; Booker v. Booker, 29 Gratt. (Va.) 605 (1877); s. c. 26 Am. Rep. 401; Whipple v. Barnes, 21 Wis. 327 (1867); Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 (1824); bk. 6 L. ed. 142; N. Y. Code Civ. Proc. §§ 365, 379.

[2] Belmont v. O'Brien, 12 N. Y. 394 (1855); Jackson v. Wood, 12 Johns. (N. Y.) 242 (1815); Jackson v. DeLancey, 11 Johns. (N. Y.) 365 (1814); s. c. 13 Johns. (N. Y.) 537 (1816); Jackson v. Pierce, 10 Johns. (N. Y.) 415 (1813); Collins v. Torry, 7 Johns. (N. Y.) 278 (1810); Jackson v. Hudson, 3 Johns. (N. Y.) 375 (1808); Giles v. Baremore, 5 Johns. Ch. (N. Y.) 545 (1821); Dunham v. Minard, 4 Paige Ch. (N. Y.) 441 (1834); Chick v. Rollins, 44 Me. 104 (1857); Blethen v. Dwinal, 35 Me. 556 (1853); Cheever v. Perley, 93 Mass. (11 Allen) 584 (1866); Gould v. White, 26 N. H. 178 (1852); Evans v. Hoffman, 5 N. J. Eq. (1 Halst.) 354 (1846).

[3] Boon v. Pierpont, 28 N. J. Eq. (1 Stew.) 7 (1877).

[4] Montgomery v. Bruere, 4 N. J. L. (1 South.) 266 (1818).

§ 63. **Foreclosure of mortgage when debt barred.**—While the lapse of time may afford presumptive evidence of the payment of a mortgage and bar a right to foreclose,[1] yet such presumption will not arise, and an action to foreclose a mortgage will not be barred by the same lapse of time, which bars an action upon a note secured by the mortgage;[2] but the right to foreclose will be barred by the same lapse of time only that would bar an action for the recovery of the possession of the mortgaged premises.[3] Thus, it is generally held that uninterrupted possession by the mortgagor for twenty years, after condition broken, without entry or claim on the part of the mortgagee, where such delay is not explained, will bar the right to foreclose the mortgage.[4] The running of the statute of limitations against a note secured by mortgage, or other lien, raises no presumption of payment so as to cut off the lien, and such mortgage or pledge may be resorted to in equity, notwithstanding the fact that the remedy on the note is barred;[5] consequently a mortgage may be foreclosed

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[1] Swart v. Service, 21 Wend. (N. Y.) 36 (1839); s. c. 34 Am. Dec. 211; Wanmaker v. VanBuskirk, 1 N. J. Eq. (1 Saxt.) 685 (1832); s. c. 23 Am. Dec. 748.

[2] Green v. Gaston, 56 Miss. 751 (1879); Wilkinson v. Flowers, 37 Miss. 579 (1859); s. c. 75 Am. Dec. 78; Nevitt v. Bacon, 32 Miss. 212 (1856); s. c. 66 Am. Dec. 609; Trotter v. Irwin, 27 Miss. 772 (1854); Bush v. Cooper, 26 Miss. 611 (1853); s. c. 59 Am. Dec. 270; Miller v. Trustees of Jefferson College, 13 Miss. (5 Smed. & M.) 651 (1846); Miller v. Helm, 10 Miss. (2 Smed. & M.) 697 (1843).

[3] Jackson v. Wood, 12 Johns. (N. Y.) 242 (1815); s. c. 7 Am. Dec. 315; Wilkinson v. Flowers, 37 Miss. 579 (1859); s. c. 75 Am. Dec. 78; Nevitt v. Bacon, 32 Miss. 212, 217 (1856); s. c. 66 Am. Dec. 609; Benson v. Stewart, 30 Miss. 49 (1855); 4 Kent Com. 402.

[4] Mayor, etc., of New York v. Colgate, 12 N. Y. 140 (1854); Gould v. Holland Purchase Ins. Co., 16 Hun (N. Y.) 540 (1879); Fisher v. Mayor, 3 Hun (N. Y.) 652 (1875); Heyer v. Pruyn, 7 Paige Ch. (N. Y.) 465 (1839); s. c. 34 Am. Dec. 359; Howland v. Shurtleff, 43 Mass. (2 Metc.) 28 (1840); s. c. 35 Am. Dec. 384.

[5] Brost v. Corey, 15 N. Y. 510 (1857); Waltermire v. Westover, 14 N. Y. 16 (1856); New York Life Ins. & T. Co. v. Covert, 29 Barb. (N. Y.) 441 (1859); Pratt v. Huggins, 23 Barb (N. Y.) 285 (1859); Gillette v. Smith, 18 Hun (N. Y.) 12 (1879) Heyer v. Pruyn, 7 Paige Ch. (N. Y.) 465 (1839); s. c. 34 Am. Dec. 355 Jones v. Merchants' Bank of Albany 4 Robt. (N. Y.) 227 (1867); Ware v.

and the premises sold to pay the mortgage debt, although the note secured by the mortgage is barred by the statute of limitations, because the mortgage has a legal import more

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Curry, 67 Ala. 274 (1883); Scott v. Ware, 64 Ala. 174 (1881); Bizzell v. Nix, 60 Ala. 281 (1877); s. c. 31 Am. Rep. 38; Birnie v. Main, 29 Ark. 591 (1874); Hough v. Bailey, 32 Conn. 289 (1864); Haskell v. Bailey, 22 Conn. 573 (1853); Belknap v. Gleason, 11 Conn. 160 (1836); s. c. 27 Am. Dec. 721; Browne v. Browne, 17 Fla. 607 (1880); s. c. 38 Am. Rep. 96; Elkins v. Edwards, 8 Ga. 325 (1850); Wright v. Leclaire, 3 Iowa, 231 (1856); Crooker v. Holmes, 65 Me. 195 (1875); Ozmun v. Reynolds, 11 Minn. 459, 473 (1866); Trustees of Jefferson College v. Dickson, Freem. Ch. (Miss.) 482 (1843); Savings Bank v. Ladd, 40 N. H. 463 (1860); Fisher v. Mossman, 11 Ohio St. 46 (1860); Gary v. May, 16 Ohio, 66 (1847); Sparhawk v. Buell, 9 Vt. 74 (1837); Coles v. Withers, 33 Gratt. (Va.) 186 (1880); Wayt v. Carwithen, 21 W. Va. 516 (1884); Pitzer v. Burns, 7 W. Va. 77 (1873); Knox v. Galligan, 21 Wis. 470 (1867); Wiswell v. Baxter, 20 Wis. 680 (1866); Almy v. Wilbur, 2 Woodb. & M. C. C. 404 (1846). See Waltermire v. Westover, 14 N. Y. 20 (1856); Jackson v. Sackett, 7 Wend. (N. Y.) 94 (1831); Baldwin v. Norton, 2 Conn. 163 (1817); Elkins v. Edwards, 8 Ga. 326 (1850); Kellar v. Sinton, 14 B. Mon. (Ky.) 307 (1853); Crain v. Paine, 58 Mass. (4 Cush.) 483 (1849); Eastman, v. Foster, 49 Mass. (8 Metc.) 19 (1844); Thayer v. Mann, 36 Mass. (19 Pick.) 536 (1837); Trotter v. Erwin, 27 Miss. 772 (1854); Wood v. Augustine, 61 Mo. 46 (1875); Cookes v. Culbertson, 9 Nev. 199 (1874); Mackie v. Lansing, 2 Nev. 302 (1866); Read v. Edwards, 2 Nev. 262 (1866); Henry v. Confidence Gold & Silver M. Co., 1 Nev. 619 (1865); Longworth v. Taylor, 2 Cin. Sup. Ct. Rep. (Ohio) 39 (1870); Myer v. Beal, 5 Oreg. 130 (1873); Harris v. Vaughn, 2 Tenn. Ch. 483 (1875); Richmond v. Aiken, 25 Vt. 324 (1853); Kennedy v. Knight, 21 Wis. 340 (1867); Whipple v. Barnes, 21 Wis. 327 (1867); Cleveland v. Harrison, 15 Wis. 670 (1862); Union Bank of La. v. Stafford, 53 U. S. (12 How.) 327, 340 (1851); bk. 13 L. ed. 1008; Townsend v. Jemison, 50 U. S. (9 How.) 413 (1850); bk. 13 L. ed. 880; McElmoyle v. Cohen, 38 U. S. (13 Pet.) 312 (1839); bk. 10 L. ed. 177; Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 (1839); bk. 6 L. ed. 142; Sturges v. Crowninshield, 17 U. S. (4 Wheat.) 122 (1819); bk. 4 L. ed. 529; Sparks v. Pico, 1 McAll. C. C. 497 (1859); Higgins v. Scott, 2 Barn. & Ad. 413 (1831); Spears v. Hartly, 3 Esp. 81. (1799).

The supreme court of Ohio say in the case of Fisher v. Mossman, *supra*, that: "A discussion of the question on principle, and a review of the authorities bearing upon it, would be a work of supererogation, after it has been so thoroughly done already in Belknap v. Gleason, and we content ourselves with saying, that it seems to us that that case was correctly decided, and that it is decisive of the one before us on the point under consideration." 11 Ohio St. 46 (1860).

extensive than the mere evidence of the debt,[1] and remains in full force until the debt, which it secures is paid,[2] except in those cases where, by negligence, the mortgagee has lost his rights.

In some of the states, however, the rule has been adopted that when an action upon a promissory note, which is secured by mortgage upon real property, is barred by the statute of limitations, the remedy of the mortgagee upon the mortgage is also barred.[3] Where such a rule prevails, a grantee of the the mortgagor, purchasing subsequently to the execution of mortgage, has a right to plead the statute of limitations as to that part of the claim of the plaintiff which asks for a decree foreclosing the mortgage and for a sale of the mortgaged premises, or at least that portion of such premises which has been transferred to the grantee.[4] Such a statute, however, simply takes away the remedy upon the mortgage; it does not discharge the debt nor in any way extinguish the right or

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[1] See Borst v. Corey, 15 N. Y. 506 (1857); Heyer v. Pruyn, 7 Paige Ch. (N. Y.) 465 (1839); Baldwin v. Norton, 2 Conn. 161 (1817); Elkins v. Edwards, 8 Ga. 325 (1850); Joy v. Adams, 26 Me. 330 (1846); Balch v. Onion, 58 Mass. (4 Cush.) 559 (1849); Thayer v. Mann, 36 Mass. (19 Pick.) 535 (1837); Michigan Ins. Co. v. Brown, 11 Mich. 265 (1863); Wilkinson v. Flowers, 37 Miss. 579 (1859); s. c. 75 Am. Dec. 78; Nevitt v. Bacon, 32 Miss. 212 (1856); s. c. 66 Am. Dec. 609; Trotter v. Erwin, 27 Miss. 772 (1854); Miller v. Trustees of Jefferson College, 13 Miss (5 Smed. & M.) 651 (1846); Richmond v. Aiken, 25 Vt. 324 (1853); Whipple v. Barnes, 21 Wis. 327 (1867); Wiswell v. Baxter, 20 Wis. 680 (1866). But see Haskell v. Bailey, 22 Conn. 569 (1853).

[2] Joy v. Adams, 26 Me. 330 (1846).

[3] Lent v. Morrill, 25 Cal. 492 (1864); McCarthy v. White, 21 Cal. 495 (1863); Lord v. Morris, 18 Cal. 482 (1861); Emory v. Keighan, 94 Ill. 543 (1880); Brown v. Rockhol, 49 Iowa, 282 (1878); Clinton Co. v. Cox, 37 Iowa, 570 (1873); Hubbard v. Missouri V. L. Ins. Co., 25 Kan. 172 (1881); Schmucker v. Sibert, 18 Kan. 104 (1877); s. c. 26 Am. Rep. 765; Hurley v. Cox, 9 Neb. 230 (1879); Blackwell v. Barnett, 52 Tex. 326 (1880); Ross v. Mitchell, 28 Tex. 150 (1866); Daggs v. Ewell, 3 Woods C. C. 344 (1879).

[4] Wood v. Goodfellow, 43 Cal. 185 (1872); Lent v. Shear, 26 Cal. 361 (1864); Grattan v. Wiggins, 23 Cal. 16 (1863); McCarthy v. White, 21 Cal. 495 (1863); Lord v. Morris, 18 Cal. 482, 490 (1861); Medley v. Elliott, 62 Ill. 532 (1872); Pollock v. Maison, 41 Ill. 517 (1866); Harris v. Mills, 28 Ill. 44 (1862); Schmucker v. Sibert, 18 Kan. 104 (1877); s. c. 26 Am. Rep. 765; Low v. Allen, 41 Me. 248 (1856).

destroy the obligation;[1] the debt still remains unsatisfied and unextinguished and is a sufficient consideration to support a new promise.[2]

The same rule applies to a special statute, limiting the time for instituting a suit, that applies to the general statute of limitations. Thus where a claim is barred by a special statute, limiting the time within which claims against the estate of a deceased person may be presented or sued, such claim is not paid or satisfied by a failure to present or sue it within the time thus limited; and in those instances where the claim is secured by mortgage, the mortgage may be foreclosed, notwithstanding the fact that an action on the debt is barred at law.[3]

§ 64. **Removal of bar of the statute.**—The bar of the statute of limitations may be removed by an acknowledgment of the debt.[4] The cases differ widely as to what constitutes a sufficient acknowledgment for this purpose, some of them holding that any acknowledgment, however slight, without a new promise to pay, is sufficient to remove the bar of the statute;[5] but other cases require a specific agreement to pay.[6]

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[1] Sichel v. Carrillo, 42 Call. 493 (1871).

[2] Sichel v. Carrillo, 42 Cal. 493 (1871).

[3] Sichel v. Carrillo, 42 Cal. 493 (1871); Duty v. Graham, 12 Tex. 427 (1854); Graham v. Vining, 1 Tex. 639 (1847).

[4] Danforth v. Culver, 11 Johns.(N. Y.) 146 (1814); s. c. 6 Am. Dec. 361; Lord v. Shaler, 3 Conn. 132 (1819); s. c. 8 Am. Dec. 160; Mellick v. DeSeelhorst, 1 Ill. (Breese) 171 (1827); s. c. 12 Am. Dec. 172; Bell v. Rowland, Hard. (Ky.) 301 (1808); s. c. 3 Am. Dec. 729; Seaward v. Lord, 1 Me. (1 Greenl.) 163 (1821); s. c. 10 Am. Dec. 50; Bangs v. Hall, 20 Mass. (2 Pick.) 379 (1824); s. c. 13 Am. Dec. 437; Jones v. Moore, 5 Binn. (Pa.) 573 (1813); s. c. 6 Am. Dec. 428; Fries v. Boisselet, 9 Serg. & R. (Pa.) 128 (1822); s. c. 11 Am. Dec. 683; Glenn v. McCullough, 1 Harp. (S.C.) L. 484 (1824); s. c. 18 Am. Dec. 661; Lee v. Perry, 3 McC. (S. C.) 552 (1826); s. c. 15 Am. Dec. 650; Burden v. McElhenny, 2 Nott. & McC. (S. C.) 60 (1819); s. c. 10 Am. Dec. 570; Olcott v. Scales, 3 Vt. 173 (1831); s. c. 21 Am. Dec. 585.

[5] Lord v. Shaler, 3 Conn. 132 (1819); s. c. 8 Am. Dec. 160; Glenn v. McCullough, 1 Harp. (S. C.) L. 484 (1824); s. c. 18 Am. Dec. 661; Burden v. McElhenny, 2 Nott. & McC. (S. C.) 60 (1819); s. c. 10 Am. Dec. 570.

[6] Danforth v. Culver, 11 Johns. (N. Y.) 146 (1814); s. c. 6 Am. Dec. 361; Bell v. Roland, Hard. (Ky.)

From a careful consideration of the cases it will be found that it is clearly established both in this country and in England, (1) that a debt barred by the statute of limitations may be revived by a new promise; (2) that such new promise may be either an express or an implied promise; (3) that the latter is created by a clear and unqualified acknowledgment of the debt; and (4) that if the acknowledgment be accompanied by such qualifying expressions or circumstances as repel the idea of an intention or a contract to pay, an implied promise will not be created.[1] Where the acknowledgment of a debt is accompanied by a promise to pay conditionally, it will be of no avail unless the condition upon which the promise is made by the defendant is complied with, or the event happens upon which the promise depends.[2] But the acknowledgment or promise, to take the case out of the statute of limitations, must be made by the debtor or by some one in his behalf, and must be made to the creditor or to some one acting for him and not to a mere stranger.[3]

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301 (1808); s. c. 3 Am. Dec. 729. See Newhouse v. Redwood, 7 Ala. 599 (1839); McCormick v. Brown, 36 Cal. 180 (1868); Kimmel v. Schwartz, 1 Ill. (Breese) 216 (1828); Gray v. Lawridge, 2 Bibb (Ky.) 285 (1811); Hopkins v. Stout, 6 Bush (Ky.) 384 (1869); Smith v. Dawson, 10 B. Mon. (Ky.) 114 (1849); Fischer v. Hess, 9 B. Mon. (Ky.) 617 (1849); French v. Frazier, 7 J. J. Marsh. (Ky.) 431 (1832); Head v. Manner, 5 J. J. Marsh. (Ky.) 259 (1831); Rochester v. Buford, 5 J. J. Marsh. (Ky.) 32 (1830); Hord v. Lee, 4 T. B. Mon. (Ky.) 36 (1826); Lansdale v. Brashear, 3 T. B. Mon. (Ky.) 332 (1826); McLean v. Thorp, 4 Mo. 259 (1836); Shaw v. Newell, 2 R. I. 269 (1852); Belote v. Wynne, 7 Yerg. (Tenn.) 541 (1835); Bell v. Morrison, 26 U. S. (1 Pet.) 351, 363 (1828); bk. 7 L. ed. 179.

[1] Blakeman v. Fonda, 41 Conn. 561 (1874); Wachter v. Albee, 80 Ill. 47 (1875); Carroll v. Forsyth, 69 Ill. 127 (1873); Collins v. Bane, 34 Iowa, 385 (1872); Gray v. McDowell, 6 Bush (Ky.) 475 (1869); Citizens' Bank v. Johnson, 21 La. An. 128 (1869); Parker v. Shuford, 76 N. C. 219 (1877); Miller v. Baschore, 83 Pa. St. 356 (1877); Senseman v. Hershman, 82 Pa. St. 83 (1876).

[2] Sedgwick v. Gerding, 55 Ga. 264 (1875); Carroll v. Forsyth, 69 Ill. 127 (1873). See Norton v. Colby, 52 Ill. 198 (1869); Parsons v. Northern Illinois Coal & I. Co., 38 Ill. 433 (1865); Ayers v. Richards, 12 Ill. 148 (1850).

[3] Wakeman v. Sherman, 9 N. Y. 85 (1853); Bloodgood v. Bruen, 8 N. Y. 362 (1853); Ringo v. Brooks, 26 Ark. 540 (1871); Farrell v. Palmer, 36 Cal. 187 (1868); Keener v. Crull, 19 Ill. 189 (1857); Collins v. Bane, 34 Iowa, 385 (1872); Roscoe v. Hale, 73 Mass. (7 Gray) 274 (1856); Taylor v. Hendrie, 8 Nev. 243 (1873);

Part payment of a debt is evidence of a promise to pay the remainder, and will prevent the operation of the statute of limitations as a bar;[1] and it is a universally recognized rule that a payment of the interest or of a part of the principal will remove the bar of the statute of limitations and renew a mortgage, so that an action may be brought to enforce it within twenty years after such last payment.[2] But it would seem that the payment of interest by a mortgagor, after he has sold the property to another, will not prevent or remove the bar of the statute of limitations so far as a subsequent purchaser is concerned.[3] Where there are several persons interested in the equity of redemption, however, a payment of interest by one of them will remove the bar or prevent the running of the statute as to all,[4] and a payment by a duly authorized agent of the mortgagor, or other person interested in the equity of redemption, will have the same effect;[5] but a payment by a mere stranger will not have such effect.[6]

Although the payment of interest by one party interested in the equity of redemption will be valid and binding upon all, yet where mortgaged lands are sold to different persons, one of whom pays the entire interest on the mortgage for

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Johns v. Lantz, 63 Pa. St. 324 (1869); Kyle v. Wells, 17 Pa. St. 286 (1851); s. c. 55 Am. Dec. 555; Christy v. Flemington, 10 Pa. St. 129 (1848); s. c. 49 Am. Dec. 590; F. & M. Bank v. Wilson, 10 Watts (Pa.) 261 (1840); Georgia Ins. & T. Co. v. Ellicott, Tanney C. C. 130 (1840); 3 Parsons on Cont. (5th ed.) 85. See Sibert v. Wilder, 16 Kan. 176 (1876); s. c. 22 Am. Rep. 280; Trammell v. Salmon, 2 Bail. (S. C.) 308 (1831); Robbins v. Farley, 2 Strobh. (S. C.) 348 (1847).

[1] Newlin v. Duncan, 1 Harr. (Del.) 204 (1832); s. c. 25 Am. Dec. 66; Hunt v. Bridgham, 20 Mass. (2 Pick.) 581 (1824); s. c. 13 Am. Dec. 458. See Reid v. McNaughton, 15 Barb. (N. Y.) 179 (1853); Carshore v. Huyck, 6 Barb. (N. Y.) 588 (1849); Bell v. Morrison, 26 U. S. (1 Pet.) 370 (1828); bk. 7 L. ed. 182; Ross v. Jones, 89 U. S. (22 Wall.) 593; bk. 22 L. ed. 730.

[2] See Wenman v. Mohawk Ins. Co., 13 Wend. (N. Y.) 267 (1835); s. c. 28 Am. Dec. 464; and Kincaid v. Archibald, 10 Hun (N. Y.) 9 (1877).

[3] New York Life Ins. & T. Co. v. Covert, 29 Barb. (N. Y.) 435 (1859); Jarvis v. Albro, 67 Me. 310 (1877).

[4] Pears v. Laing, L. R. 12 Eq. 51, 54 (1871); Roddam v. Morley, 1 DeG. & J. 1 (1857).

[5] Ward v. Carttar, L. R. 1 Eq. 29 (1865).

[6] Chinnery v. Evans, 11 H. L. Cas. 115 (1864).

more than twenty years, without calling upon the others for contribution, he can not, upon subsequently purchasing the mortgage, enforce it against such non-contributing parties or their grantees.[1]

§ 65. **Rights and liabilities of grantee of mortgagor.** —The grantees of a mortgagor have no greater rights and succeed to no better title than the mortgagor himself possessed at the time the conveyance was made; therefore, a purchaser with actual or constructive notice of the existence of a mortgage on the premises can avail himself of the defence of the bar of the statute of limitations, only when his grantor could have done so.[2] A purchaser of mortgaged premises, who assumes and agrees to pay the mortgage debt, recognizes it as a subsisting incumbrance, and his grantee will be bound by such admission[3] and will not be entitled to set up the statute of limitations after the lapse of twenty years, unless he has by act or word renounced the mortgage, and thereafter held adversely to the mortgagee. And the recital in a deed of an existing mortgage will constitute an acknowledgment which will remove the bar of the statute, and will have the same effect upon the purchaser and his grantees as a direct assumption of the mortgage debt.[4] Such purchaser will be bound by the acts and declarations of his vendor in reference to the mortgage while he retains the equity of redemption or any part of it.

Thus the purchasers of mortgaged premises are bound by an acknowledgment of the mortgage as a valid and subsisting incumbrance, made by their grantor within twenty years before the commencement of the suit to foreclose such mortgage, and can not for that reason rely upon the statute of limitations as a bar.[5] A purchaser with notice from a

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[1] Pike v. Goodnow, 94 Mass. (12 Allen) 472 (1866).

[2] Medley v. Elliott, 62 Ill. 532 (1872); Waterson v. Kirkwood, 17 Kan. 9 (1876).

[3] Harrington v. Slade, 22 Barb. (N. Y.) 161 (1856); Schmucker v. Sibert, 18 Kan. 104 (1877).

[4] Palmer v. Butler, 36 Iowa, 576 (1873).

[5] Heyer v. Pruyn, 7 Paige Ch. (N. Y.) 465 (1839); s. c. 34 Am. Dec. 355; Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 (1824); bk. 6 L. ed. 142.

mortgagor takes under the mortgage and subject to the rights and interests of the mortgagee; his rights and title are no better than those of his grantor, and the statute of limitations will not begin to run in his favor, until after some hostile act or declaration which makes his possession adverse to that of the mortgagee.[1]

While an acknowledgment of a mortgage by the mortgagor is binding upon his grantees, where made before the statute of limitations has run, yet an acknowledgment or a part payment made by the mortgagor, after the note and mortgage are once barred, will not revive them as against his grantees or any other person who has acquired an interest in the premises prior to such acknowledgment or part payment.[2] And it is the settled doctrine in some states that the mortgagor has no power, by express stipulation or otherwise, or by absenting himself from the state, to suspend the running of the statute of limitations, or in any manner to prolong the time for the payment of his mortgage against persons who have subsequently acquired an interest in the equity of redemption, either as purchasers or incumbrancers.[3]

§ 66. Possession by mortgagee — Presumption of foreclosure.—It is a well settled rule that the possession of mortgaged premises for twenty years by the mortgagee without any payment of principal or interest by the mortgagor, and without an accounting or an acknowledgment of a subsisting mortgage and without any dealing between the mortgagee and mortgagor in relation to the land, is presumptive evidence that the mortgage has been foreclosed,[4]

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[1] Thayer v. Cramer, 1 McC. (S. C.) Eq. 395 (1826); Mitchell v. Bogan, 11 Rich. (S. C.) 686, 706 (1857); Wright v. Eaves, 5 Rich. (S. C.) Eq. 81 (1852).

[2] Schmucker v. Sibert, 18 Kan 104 (1877).

[3] Wood v. Goodfellow, 43 Cal. 185 (1872); Sichel v. Carrillo, 42 Cal. 493 (1871); Barber v. Babel, 36 Cal. 1 (1868); Lent v. Shear, 26 Cal. 361 (1864). See also Clinton Co. v. Cox, 37 Iowa, 570 (1873); Schmucker v. Sibert, 18 Kan. 104 (1877); Waterson v. Kirkwood, 17 Kan. 9 (1876).

[4] Demarest v. Wynkoop, 3 Johns Ch. (N. Y.) 135 (1817); s. c. 8 Am. Dec. 467; Blethen v. Dwinal, 35 Me. 556 (1853); Dexter v. Arnold, 1 Sumn. C. C. 109 (1831); Ashton v. Milne, 6 Sim. 369 (1833); Cholmondeley v. Clinton, 2 Jac. & W. 1, 186 (1820).

and is a bar to an action for redemption unless the mortgagor can bring himself within the provisions of the statute of limitations.[1] The whole doctrine has been fully unfolded in a very elaborate opinion in a leading English case,[2] in the course of which the court remark: "The actual possession of the mortgagee, continued for twenty years without any payment of interest by the mortgagor, or anything done or said during that period to recognize the existence of the mortgage or to acknowledge it on the part of the mortgagee, would clearly operate as a bar to redemption by the mortgagor."

§ 67. **Decree for deficiency when debt barred.**— In an action to foreclose a mortgage a court of equity may render a decree *in personam* against the mortgagor for any part of the debt remaining unsatisfied on the sale, notwithstanding the fact that the remedy on the note has been barred by the statute of limitations.[3]

§ 68. **Right of mortgagee to retain possession after remedy barred.**—After forfeiture the mortgagee or his heirs, having obtained possession of the mortgaged premises, are entitled to retain such possession until the mortgage debt is satisfied.[4] The assignee of a mortgagee in possession

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[1] Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 136 (1817); s. c. 8 Am. Dec. 467. See Anonymous, 3 Atk. 313 (1746); Aggas v. Pickerell, 3 Atk. 225 (1745); Lytton v. Lytton, 4 Bro. Ch. 458 (1793); Reeks v. Postlethwaite, Coop. Eq. 161 (1815); Barron v. Martin, Coop. Eq. 189 (1815); Jenner v. Tracy, 3 P. Wms. 287 (1731), note; Belch v. Harvey, 3 P. Wms. 287 (1730); Bonney v. Ridgard, 17 Ves. 99 (1809); s. c. 4 Bro. Ch. 138; 1 Cox. Eq. 145 (1784); Hodle v. Healey, 1 Ves. & B. 536 (1813).

[2] Cholmondeley v. Clinton, 2 Jac. & W. 187 (1820).

[3] Birnie v. Main, 29 Ark. 591 (1874). See 1 Story Eq. Jur. § 64 k. citing Middletown Bank v. Russ, 3 Conn 135 (1819); s. c. 8 Am. Dec. 164; Jesus College v. Bloom, 3 Atk. 262 (1745); Pearce v. Creswick, 2 Hare, 293 (1843); 1 Foubl. Eq. 1, Ch. 1, § 3, note f.; Cooper Eq. Pl. Introd. p. xxxi.

[4] Chase v. Peck, 21 N. Y. 581 (1860); Siahler v. Singner, 44 Barb. (N. Y.) 606 (1865); Munroe v. Merchant, 26 Barb. (N. Y.) 383 (1858); Casey v. Buttolph, 12 Barb. (N. Y.) 637 (1851); Jackson v. Delancy, 13 Johns. (N. Y.) 537 (1816); s. c. 7 Am. Dec. 403; Moore v. Cable, 1 Johns. Ch. (N. Y.) 385 (1815); Watson v. Spence, 20 Wend. (N. Y.) 260 (1838); Phyfe v. Riley, 15 Wend. (N. Y.) 248 (1836); s. c. 30 Am. Dec. 55; VanDuyne v. Thayre, 14 Wend. (N. Y.) 234

will be protected by the mortgage to the same extent as the mortgagee, although no foreclosure may be shown ;[1] and this is true although the assignment was obtained on an usurious consideration.[2] The reason for this is because the mortgagee is still, independent of statute,[3] to be considered the absolute owner at law after default of payment.[4]

(1835) ; Bussey v. Page, 14 Me. 132 (1836); Pace v. Chadderdon, 4 Minn. 499 (1860) ; Pettengill v. Evans, 5 N. H. 54 (1829) ; Henry v. Confidence Gold & Silver Mining Co., 1 Nev. 619 (1865) ; Den v. Wright, 7 N. J. L. (2 Halst.) 175 (1824); s. c. 11 Am. Dec. 543 ; Harris v. Haynes, 34 Vt. 220 (1861) ; Hennesy v. Farrell, 20 Wis. 42 (1865).

[1] Jackson v. Bowen, 7 Cow. (N. Y.) 13 (1827) ; Jackson v. Minkler, 10 Johns. (N. Y.) 480 (1813). See also Madison Ave. Baptist Church v. Baptist Church in Oliver St., 73 N. Y. 82 (1878) ; Trimm v. Marsh, 54 N. Y. 599 (1874) ; s. c. 13 Am. Rep. 623 ; Winslow v. McCall, 32 Barb. (N. Y.) 241 (1860) ; Bolton v. Brewster, 32 Barb. (N. Y.) 389 (1860). See also Watson v. Spence, 20 Wend. (N. Y.) 261, 264 (1838); Jackson v. DeLancey, 11 Johns. (N. Y.) 365 (1814) ; s. c. 13 Johns. (N. Y.) 537 (1816) ; Randall v. Raab, 2 Abb. (N. Y.) Pr. 307, 314 (1855) ; Casey v. Buttolph, 12 Barb. (N. Y.) 637, 640 (1851).

[2] Jackson v. Bowen, 7 Cow. (N. Y.) 13 (1827).

[3] See 2 N. Y. Rev. Stat. (2d ed.) 236, § 57.

[4] Edwards v. Farmers' Fire Ins. Co., 21 Wend. (N. Y.) 467, 484 (1839). See also Jackson v. Pierce, 10 Johns. (N. Y.) 414 (1813) ; Smith v. Shuler, 12 Serg. & R. (Pa.) 240 (1824) ; Simpson's Lessee v. Ammons, 1 Binn. (Pa.) 175 (1806).

CHAPTER V.

PARTIES PLAINTIFF.

§ 69. Introductory.
70. Parties generally in equitable foreclosures.
71. Application of general rules by American courts.
72. Parties plaintiff generally.
73. Sole mortgagee, owning the mortgage, may foreclose.
74. Assignor of mortgage can not foreclose
75. Assignee, sole owner of mortgage, may foreclose.
76. Form of assignment to enable assignee to foreclose.
77. When assignor and assignee should or should not both be parties.
78. Joint mortgagees ; any one or more may foreclose.
79. Same rule—Joint mortgagees in representative capacity.
80. Partners ; any one or more may foreclose.
81. Joint mortgagees, one dying ; doctrine of survivorship.
82. When personal representatives of deceased joint mortgagee necessary parties.
83. Mortgagees, owners in severalty; any one or more may foreclose.
84. Owner of one of several notes secured by a mortgage may foreclose.
85. All owners of notes necessary parties—Payable in order of maturity.
86. Notes payable *pro rata* in New York and some other states.
87. Owner of mortgage, having pledged the same as collateral security, may foreclose.
88. Pledgee necessary party--Mortgage collaterally assigned.
§ 89. Assignee of mortgage as collateral security may foreclose.
90. Owner of an equitable interest of any kind in the mortgage may generally foreclose.
91. Special cases of equitable interest—Annuitants, legatees, executors.
92. Special cases of equitable assignment — Purchaser on defective foreclosure—Payment by mistake or fraud.
93. Equitable owner by subrogation may foreclose.
94. A surety for the mortgage debt may sometimes foreclose—First, having guaranteed debt.
95. Surety may foreclose--Second, grantee having assumed mortgage.
96. Surety may foreclose—Third, junior interest redeeming from senior interest.
97. Assignee of a mortgage without the bond can not foreclose.
98. Assignee of the note, bond or debt may foreclose, though the mortgage is not assigned.
99. Mortgagees owning contemporaneous mortgages, being equal liens, any one or more may foreclose.
100. Owner of two mortgages can not foreclose both at same time in separate actions.
101. Assignee in bankruptcy or by general assignment, or receiver of a corporation, may foreclose.
102. Assignee *pendente lite* may continue a foreclosure.
103. Owner of mortgage dying—Personal representatives may foreclose.

§ 104. Vendor under land contract dying—Personal representatives may foreclose.
105. Owner of mortgage dying—Heirs, devisees and legatees generally can not foreclose.
106. An executor or administrator to whom a mortgage is executed may foreclose.
107. The successor in office of an executor or administrator may foreclose.
108. Foreign executors and administrators—When they may foreclose.
§ 109. Methods of avoiding rule requiring domestic administrator for plaintiff.
110. Trustees may foreclose.
111. Beneficiaries—When not necessary parties.
112. Beneficiaries, *cestuis que trust*, may sometimes foreclose.
113 Mortgages to persons in official capacity; they or their successors may foreclose.
114. A married woman owning a mortgage may foreclose.

§ 69. **Introductory.**—In the conduct of an action in a court, or of a proceeding under a statute, it has always been of the first importance that the persons to be bound by the result should be brought within the jurisdiction of the authority pretended to be exercised. With some classes of actions the practitioner has no difficulty in determining who should be brought into court; but in the enforcement of the rights which attach to a mortgage and the debt it secures, difficult and complicated questions are often presented as to who should be brought within the cognizance of the court, that a complete remedy may be obtained by the prosecutor, and that the rights of no claimant of an interest in the subject matter or in the object of the proceeding, may be made to suffer an injury, or allowed to pass unprotected—and this is necessarily so from the peculiar character and history of mortgage securities, and from the large place that the law of mortgages fills in the general jurisprudence and practice of our states. Attention will be given in the following chapters on parties to a consideration of the questions, who may be and who should be brought into an action or a proceeding to enforce a mortgage, and what are the rights of parties with reference to such enforcement.

§ 70. **Parties generally in equitable foreclosures.**—There are two leading principles which control courts of equity the world over in determining the proper parties to a suit: first, that the rights of no man shall be decided in a court of justice unless he himself is present; second, that

the decree rendered shall provide for the rights of all persons whose interests are in any way connected with the subject-matter of the action. The combination of these two principles has given rise to the general rule that all persons having an interest in the object of the suit ought to be made parties. As expressed by an eminent English jurist, "all persons materially interested in the subject ought generally to be parties to the suit—plaintiffs or defendants —however numerous they may be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigation may be prevented."[1] It is only by the application of such broad principles that that complete justice which equity courts "delight to render,"[2] can be administered to the numerous persons who, in nearly every case, have some interest in the mortgage debt or in the mortgaged premises under foreclosure. In their practical application, however, these principles are subject to many limitations and modifications, due mainly to local interpretation and to statutory enactments.

§ 71. **Application of general rules by American courts.** —These general principles, established by such eminent English judges as Lords Talbot,[3] Redesdale,[4] Hardwicke,[5] Eldon,[6] Langsdale[7] and Sir William Grant,[8] have been adopted by all our equity courts, state and federal; and in many states the general principles of equity, respecting parties to suits, have been incorporated into their codes. In New York it is provided that "all persons having an interest in the subject of the action and in obtaining the judgment demanded, may be joined as plaintiffs."[9] "Any

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[1] Lord Redesdale in Red. Pl. 164.

[2] Knight v. K., 3 P. Wms. 333 (1734).

[3] Knight v. K., 3 P. Wms. 333 (1734).

[4] Red. Pl. 164.

[5] Poore v. Clarke, 2 Atk. 515 (1742).

[6] Cockburn v. Thompson, 16 Ves. Jr. 321 (1809).

[7] Richardson v. Hastings, 7 Beav. 323, 326 (1844).

[8] Palk v. Clinton, 12 Ves. Jr. 58 (1806).

[9] N. Y. Code Civ. Proc. § 446.

person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant, for a complete determination or settlement of a question involved therein."[1] But in the details of practice, various and often antagonistic rules have grown up in the different states respecting the proper and necessary parties to foreclosures, as will be seen from an examination of the cases cited under almost any of the following sections. It is only in rare or complicated cases, however, that the rules differ materially, especially where questions of trust, assignment, representation and personal liability are concerned; in simple cases the rules are substantially alike. When a mortgage and the parties to it remain the same at the time of foreclosure as at the time of delivery, it is a universal rule that the mortgagee and the mortgagor are the only parties to be brought before the court.

§ 72. **Parties plaintiff generally.**—Mortgages are now universally recognized as securities upon, and not titles in, real estate. The party holding the security has such an interest in the title, however, that so long as his debt exists the security binds the title to its ultimate payment. That the title may be cleared of this lien by the process of foreclosure, the equitable rule has been established that every party who has any interest in the mortgage debt must be brought before the court, that the rights and interests of all in the security may be adjudged in relation to the mortgaged premises.

All parties interested in the mortgage debt may come before the court together; and in some states it is provided by statute that "all persons having an interest in the subject of the action and in obtaining the judgment demanded may be joined as plaintiffs."[2] It is indispensable that the plaintiff have a real interest in the action; and the New York Code has provided that every action must be prosecuted in the name of the real party in interest, except that since the abolition of uses and trusts, a personal representative

[1] N. Y. Code Civ. Proc. § 447.

[2] N. Y. Code Civ. Proc. § 446.

and a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted.[1]

There are many cases in which more than one person has an interest in the mortgage, and in which all interested may join as plaintiffs. Some, however, may refuse to join as co-plaintiffs, and such parties may, as a general rule, be made defendants to the action. It is not material who begins the action, for it is sufficient in equity that all parties interested in the subject of the suit be before the court, in the form of plaintiffs or of defendants; but no person can be a plaintiff unless he has a real interest in the mortgage or in the debt thereby secured. It is generally true that any person who is so interested, even in a remote or conditional way, may, as plaintiff, commence an action to foreclose, making defendants all other parties interested in any way in the bond and mortgage, upon their refusal to join as co-plaintiffs.[2]

As no one but the mortgagee, or those claiming under him, can have any cause for commencing a foreclosure, he or his successor in interest generally becomes a party to the action by voluntarily instituting it as plaintiff. Bonds and mortgages have become such favorite securities and investments with capitalists and others, that the law determining the rights of parties holding them has grown into unusual importance in many states, so that complicated questions have arisen in the courts as to who can maintain an action for foreclosure. This chapter will be devoted to the consideration of parties plaintiff, or those who may commence the foreclosure of a mortgage.

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[1] N. Y. Code Civ. Proc. § 449.

[2] This general equitable rule has been embodied in the codes of some states. See the N. Y. Code Civ. Proc. § 448: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act. But if the consent of any one, who ought to be joined as a plaintiff, can not be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And where the question is one of a common or general interest of many persons; or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

§ 73. **Sole mortgagee, owning the mortgage, may foreclose.**—It is almost axiomatic that a sole mortgagee, who continues to own his mortgage, may be plaintiff in an action to foreclose the same. He is a party to the contract, and the only person who can be injured by a breach of it on the part of the mortgagor, or those who succeed to the mortgagor's interest; he is the only person who can be plaintiff, as no one else has any interest in the mortgage or in the indebtedness thereby secured.[1] The same rule is true in statutory foreclosures.[2]

The fact that a mortgagee has been appointed administrator of his mortgagor's estate will not prevent his foreclosing against the heirs of the mortgagor.[3] And where a decree of foreclosure has been vacated for irregularity, the mortgage is not cancelled, but will be restored, and the mortgagee may foreclose again. A surety may foreclose an indemnifying mortgage which he holds in his own name, without joining his principal in the action.[4] And a person holding a mortgage conditioned to pay an annuity in certain quantities of produce, may foreclose upon a breach of the condition, and have the premises sold for the amount of damages that he may be able to prove.[5]

§ 74. **Assignor of mortgage can not foreclose.**—If the mortgagee has assigned his bond and mortgage absolutely and unconditionally, he has, of course, no further interest in it, and can not, even nominally, be plaintiff in an action to foreclose.[6] A foreclosure by a mortgagee, who had parted with all his interest in the bond and mortgage, has been held

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[1] Haskell v. Bailey, 22 Conn. 573 (1853); Newall v. Wright, 3 Mass. 138 (1807); Wendell v. New Hampshire Bank, 9 N. H. 404, 417 (1838); Sutton v. Stone, 2 Atk. 101 (1740).

[2] Hubbell v. Sibley, 5 Lans. (N. Y.) 51 (1871).

[3] Hunsucker v. Smith, 49 Ind. 114 (1874).

[4] An acceptor of a bill can foreclose after payment, Planters' Bank v. Douglass, 2 Head (Tenn.) 699 (1859); so can a surety of a note after payment, Tilford v. James, 7 B. Mon. (Ky.) 337 (1847); McLean v. Ragsdale, 31 Miss. 701 (1856); also an indorser, Lewis v. Starke, 18 Miss. (10 Smed. & M.) 120 (1848).

[5] Peterson v. Oleson, 47 Wis. 122 (1879), citing similar cases. See Morrison v. Morrison, 4 Hun (N. Y.) 410 (1875).

[6] Barraque v. Manuel, 7 Ark. (2 Eng.) 516 (1847).

nugatory.[1] And in an action brought by a mortgagee "for the use of his assignee," the complaint was dismissed for the reasons that the assignee was not made a party and that the plaintiff did not have a real interest in the action;[2] but where an assignment was defective, the action was allowed to be maintained in the name of the mortgagee.[3] After an assignment, the mortgagee is neither a proper nor a necessary defendant to the action.[4]

§ 75. **Assignee, sole owner of mortgage, may foreclose.** —A person who acquires the absolute and unconditional ownership of a bond and mortgage by assignment from the mortgagee, or from a mesne assignee, may maintain an action for the foreclosure of the same;[5] he is, indeed, the only possible plaintiff, as he has "contracted to stand in the place of the original mortgagee and of all

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[1] Cushing v. Ayer, 25 Me. 383 (1845); Call v. Leisner, 23 Me. 25 (1843).

[2] Burton v. Baxter, 7 Blackf. (Ind.) 297 (1844). See Winkelman v. Kiser, 27 Ill. 21 (1861); Pryor v. Wood, 31 Pa. St. 142 (1858).

[3] Partridge v. Partridge, 38 Pa. St. 78 (1860), distinguishing Pryor v. Wood, 31 Pa. St. 142 (1858).

[4] Andrews v. Gillespie, 47 N. Y. 487 (1872); Whitney v. McKinney, 7 Johns. Ch. (N. Y.) 144 (1823). See *post* §§ 75, 178 and cases cited.

[5] Andrews v. Gillespie, 47 N. Y. 487 (1872); Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254 (1845); Franklyn v. Hayward, 61 How. (N. Y.) Pr. 43 (1881); Whitney v. McKinney, 7 Johns. Ch. (N. Y.) 144 (1823). See Meeker v. Claghorn, 44 N. Y. 349 (1871), and Allen v. Brown, 44 N. Y. 228 (1870), for a general discussion of the rights of an assignee of a chose in action to maintain a suit in his own name. Brown v. Snell, 6 Fla. 741 (1856); Strother v. Law, 54 Ill. 413 (1870); Crooker v. Jewell, 31 Me. 306 (1850), where the assignor was an administrator; Hills v. Eliot, 12 Mass. 26 (1815); Gould v. Newman, 6 Mass. 239 (1810); Fisher v. Meister, 24 Mich. 447 (1872); McGuffey v. Finley, 20 Ohio, 474 (1851), relying upon Miller v. Bear, 3 Paige Ch. (N. Y.) 466 (1832), and collating authorities. Kinna v. Smith, 3 N. J. Eq. (2 H. W. Gr.) 14 (1834), where the assignor was an executor; Dolman v. Cook, 14 N. J. Eq. (1 McCart.) 56 (1861); Horstman v. Gerker, 49 Pa. St. 282 (1865); Knox v. Galligan, 21 Wis. 470 (1867). In Douglass v. Durin, 51 Me. 121 (1863), the assignor was an heir, and as the assignment passed no title to the assignee, the foreclosure was void. In Casper v. Munger, 62 Ind. 481 (1878), the assignee of a mortgage, given to indemnify the mortgagee against certain contingencies, was allowed to foreclose on the accruing of the liability. Wood v. Williams, 4 Madd. 186 (1819); Fisher on Mortgages, § 355.

assignors." No other person can be interested in the mortgage debt. But if the pretended assignee has no title whatever to the mortgage, a foreclosure conducted by him, will be absolutely void and will pass no title to the purchaser.[1]

It has been held that if the husband of a married woman fails to unite with her in executing an assignment of her separate bond and mortgage, the assignee will not obtain a title upon which he can maintain a foreclosure.[2] And the assignment to a wife of a mortgage executed by her husband upon lands which he still owned at the time of the assignment has been held to extinguish the debt, so that no action would lie;[3] but in New York and most states such an assignment would not now impair the security. So where a husband became the assignee of a mortgage executed by himself and wife upon her separate real estate, he was allowed to foreclose it as a valid and subsisting lien.[4] The assignee of a land contract may also forclose by an equitable action;[5] so may the assignee of a "title bond," which is much in the nature of an ordinary land contract.[6] Mortgages containing a power of sale may be enforced by an assignee, the same as by the original mortgagee.[7]

§ 76. Form of Assignment to enable assignee to foreclose.—The form of the assignment should be in writing, but that is not indispensable. A parol assignment will give the assignee such an equitable interest in the mortgage that he can maintain a foreclosure in his own name;[8] and

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[1] Gale v. Battin, 12 Minn. 287 (1867); Bolles v. Carli, 12 Minn. 113 (1866).

[2] Stoops v. Blackford, 27 Pa. St. 213 (1856).

[3] Clark v. Wentworth, 6 Me. (6 Greenl.) 259 (1830).

[4] Faulks v. Dimock, 27 N. J. Eq. (12 C. E. Gr.) 65 (1876).

[5] Wright v. Troutman, 81 Ill. 374 (1876). See also Hutchinson v. Crane, 100 Ill. 269 (1881).

[6] Semour v. Freeman, Smith (Ind.) 25 (1848–49).

[7] Mason v. Ainsworth, 58 Ill. 163 (1871); Heath v. Hall, 60 Ill. 344 (1871); seemingly *contra*, Wilson v. Spring, 64 Ill. 14 (1872); Dempster v. West, 69 Ill. 613 (1873).

[8] Slaughter v. Foust, 4 Blackf. (Ind.) 379 (1837); Clearwater v. Rose, 1 Blackf. (Ind.) 137 (1821); Green v. Marble, 37 Iowa, 95 (1873); Pease v. Warren, 29 Mich. 9 (1874); Denton v. Cole, 30 N. J. Eq. (3 Stew.) 244 (1878); Andrews v. McDaniel, 68 N. C. 385 (1873).

mere delivery has been held sufficient.[1] But in such cases the assignor has been held a necessary party,[2] and it would certainly be unsafe to omit him. In Massachusetts and Maine a parol assignee can not foreclose in his own name.[3] A quit-claim deed from a mortgagee has been held to work an equitable assignment of the mortgage to a grantee,[4] and in Maine it seems to be a common form of assignment.

The assignee of one of several notes or bonds secured by a mortgage, may foreclose the mortgage in his own name,[5] for the reason that by the assignment of the note he acquires an equitable interest in the mortgage, and *pro tanto* becomes an assignee of the mortgage.[6] In some states the courts hold that the assignee of a note acquires only a *pro rata*[7] interest in the mortgage security, unless the contract of assignment otherwise provides.[8] But all courts are agreed that the assignee obtains such an interest in the mortgage that he can maintain a foreclosure and sale for the recovery of his part of the debt.

§ 77. When assignor and assignee should or should not both be parties.—It is not necessary for the assignee

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[1] Galway v. Fullerton, 17 N. J. Eq. (2 C. E. Gr.) 390 (1866). See *post* §§ 90, 93.

[2] Denby v. Mellgrew, 58 Ala. 147 (1877).

[3] Smith v. Kelly, 27 Me. 237 (1847); Prescott v. Ellingwood, 23 Me. 345 (1843); Adams v. Parker, 78 Mass. (12 Gray) 53 (1858).

[4] Johnson v. Leonards, 68 Me. 237 (1878); Dixfield v. Newton, 41 Me. 221 (1856); Dorkay v. Noble, 8 Me. (8 Greenl.) 278 (1832); Carll v. Butman, 7 Me. (7 Greenl.) 102 (1830); Bullard v. Hinckley, 5 Me. (5 Greenl.) 272 (1828); Stewart v. Thompson, 3 Vt. 255 (1831).

[5] Gower v. Howe, 20 Ind. 396 (1863); Hough v. Osborne, 7 Ind. 140 (1855); Stanley v. Beatty, 4 Ind. 134 (1853); Johnson v. Candage, 31 Me. 28 (1849); Swartz v. Leist, 13 Ohio St. 419 (1862). See *post* §§ 84, 85, 86, and notes.

[6] Grattan v. Wiggins, 23 Cal. 16 (1863); Andrews v. Fiske, 101 Mass. 422 (1869); Brown v. Delaney, 22 Minn. 349 (1876); Chappell v. Allen, 38 Mo. 213 (1866); Anderson v. Baumgartner, 27 Mo. 80 (1858); Page v. Pierce, 26 N. H. (6 Fost.) 317 (1853); Furbush v. Goodwin, 25 N. H. (5 Fost.) 425 (1852). See *post* §§ 84, 85, 86.

[7] Smith v. Day, 23 Vt. 662 (1850); Belding v. Manley, 21 Vt. 550 (1849); Keyes v. Wood, 21 Vt. 331 (1849); Wright v. Parker, 2 Aik. (Vt.) 212 (1827).

[8] Langdon v. Keith, 9 Vt. 299 (1837); Wright v. Parker, 2 Aik. (Vt.) 212 (1827). See *post* §§ 84, 85, 86.

to join his assignor with him as a co-plaintiff, as the assignor no longer has any interest in the bond and mortgage. This is also true where it is the assignor's intention simply to authorize the assignee to collect for his benefit the moneys secured by the mortgage.[1] Neither is it necessary to make the assignor, under either of such circumstances, a party defendant to the action;[2] but if an answer is pleaded, setting up a defence growing out of the bond and mortgage while in the hands of the assignor, the assignee, as plaintiff, may give notice of the action to his assignor, and offer to him the conduct of the defence; upon his giving such notice the assignor will be bound by the judgment in the action, whether he undertakes the defence or not.[3]

After an absolute assignment, the suit can not ordinarily be prosecuted by the assignee in the name of the mortgagee, for, as has been stated, it is a cardinal principal of foreclosures that they must be brought in the name of the real party in interest.[4] An allegation in the pleading that the suit is for the benefit of the assignee will not vary the rule;[5] and where an assignment authorized the assignee "to foreclose or release the mortgage at pleasure," the mortgagee was considered such a necessary party to a foreclosure that the title offered at the sale would be defective without him.[6]

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[1] Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254 (1845).

[2] Thayer v. Campbell, 9 Mo. 277 (1845). See *post* § 178.

[3] Andrews v. Gillespie, 47 N. Y. 487 (1872).

[4] Graham v. Newman, 21 Ala. 497 (1852); Irish v. Sharp, 89 Ill. 261 (1878); Winkelman v. Kiser, 27 Ill. 21 (1861); Pryor v. Wood, 31 Pa. St. 142 (1858). For cases holding that the suit may be maintained in the name of the mortgagee, see Holmes v. French, 70 Me. 341 (1879); Hurd v. Coleman, 42 Me. 182 (1856); also Gable v. Scarlett, 56 Md. 169 (1881), indicating that the rule is fixed by statute. In Calhoun v. Tullass, 35 Ga. 119 (1866), an assignee was allowed to foreclose in the name of the mortgagee, and against his will, on giving him an indemnifying undertaking against costs and damages. See *ante* §§ 73, 74, and notes

[5] Prior v. Wood, 31 Pa. St. 142 (1858), distinguished in Partridge v. Partridge, 38 Pa. St. 78 (1860), where the assignment was defective and the assignor foreclosed for the benefit of the assignee. See Clow v. Derby Coal Co., 98 Pa. St. 432 (1881') which seems contrary in practice to the other Pennsylvania cases cited. See *ante* §§ 73, 74.

[6] Wright v. Sperry, 21 Wis. 331 (1867).

Where foreclosure is conducted by the process of *scire facias*, it can not be in the name of the assignee, but must always be in the name of the original mortgagee.[1]

It may be remarked here that the assignee of a bond and mortgage takes it subject to the equities between the original parties, and to the equities which third persons could enforce against the assignor.[2] The assignee can generally acquire no better title than his assignor possessed;[3] but the rule is limited where the mortgage is given to secure a negotiable note.[4] For these reasons it is often prudent to make the assignor a party defendant.[5] The assignee also takes, and may enforce, all the collateral securities which his assignor holds.[6]

§ 78. **Joint mortagees; any one or more may foreclose.**—Where a bond and mortgage have been executed or assigned to two or more persons jointly, or are held by them in any way jointly, they may unite as co-plaintiffs in a

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[1] Bourland v. Kipp, 55 Ill. 376 (1870); Camp v. Small, 44 Ill. 37 (1867); Olds v. Cummings, 31 Ill. 188 (1863).

[2] Greene v. Warnick, 64 N. Y. 220 (1876), reversing 4 Hun (N. Y.) 703; Trustees of Union College v. Wheeler, 61 N. Y. 88, 99, 104 (1874), (opinion *per* Theodore W. Dwight, C., collating and reviewing the authorities at length); affirming 5 Lans. (N. Y.) 160; s. c. 59 Barb. (N. Y.) 585. Schafer v. Reilly, 50 N. Y. 61 (1872); Ingraham v. Disborough, 47 N. Y. 421 (1872). See Crane v. Turner, 67 N. Y. 437 (1876), and Davis v. Bechstein, 69 N. Y. 440, 442 (1877), *per* Church, Ch. J.

[3] Kamena v. Huelbig, 23 N. J. Eq. (8 C. E. Gr.) 78 (1872); Rose v. Kimball, 16 N. J. Eq. (1 C. E. Gr.) 185 (1863); Woodruff v. Depue, 14 N. J. Eq. (1 McCart.) 168 (1861). This proposition was questioned as to a *bona fide* purchaser for a valuable consideration by Comstock, J., in McLallen v. Jones, 20 N. Y. 162 (1859). See Bush v. Lathrop, 22 N. Y. 535, 537, 550 (1860), *per* Denio, J., who examined and repudiated the supposed distinction between "latent" equities, so called, and those existing between the original parties to the instrument; but this case was overruled in Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 49 (1873), opinion *per* Grover, J.; Allen, J., dissented. See also the later cases cited above. Lee v. Kirkpatrick, 14 N. J. Eq. (1 McCart.) 264 (1862). In Mott v. Clark, 9 Pa. St. 399 (1848), it was held that the assignee did not take subject to the latent equities of third persons. See Atwater v. Underhill, 22 N. J. Eq. (7 C. E. Gr.) 599 (1872.)

[4] Carpenter v. Longan, 83 U. S. (16 Wall.) 271 (1872); bk. 21 L. ed. 313.

[5] See *post* § 178 *et seq.*

[6] Philips v. Bank of Lewistown, 18 Pa. St. 394 (1852).

foreclosure; or any one or more of them may maintain the action without joining the others as co-plaintiffs.[1] A joint foreclosure has been allowed where the mortgage was joint in form, but given to secure different debts in severalty.[2] It is quite well settled that in such cases all the parties interested in the mortgage must be brought before the court as plaintiffs or defendants;[3] so, in an action to redeem, all the mortgagees are necessary parties.[4] Where a note and mortgage had been executed by thirteen persons to three of their number, the three were allowed to foreclose against the other ten. for ten-thirteenths of the debt.[5] But before any person who is jointly interested with others in a mortgage debt can be made a defendant, he must be requested to unite as a co-plaintiff.[6]

§ 79. **Same rule—Joint mortgagees in representative capacity.**—The same rules hold true when the joint mortgagees hold the mortgage in a representative or official capacity. A mortgagee, by his will, appointed his mortgagor and another person his executors; the second executor was entitled to foreclose against his co-executor, the mortgagor, making him a defendant individually and as executor, upon the principle that one co-executor may maintain an action in equity against another co-executor to compel the payment of a debt owing by him to the estate.[7] A mortgagee may also foreclose, though he has with others been made an assignee of the mortgagor for the benefit of creditors.[8]

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[1] Paton v. Murray, 6 Paige Ch. (N. Y.) 474 (1837); Sanford v. Bulkley, 30 Conn. 344 (1862); Baker v. Shephard, 30 Ga. 706 (1860); Hopkins v. Ward, 12 B. Mon. (Ky.) 185 (1851); Gleises v. Maignan, 3 La. 530 (1832); Brown v. Bates, 55 Me. 520 (1868).

[2] Shirkey v. Hanna, 3 Blackf. (Ind.) 403 (1834).

[3] Hopkins v. Ward, 12 B. Mon. (Ky.) 185 (1851); seemingly *contra*, Platt v. Squire, 53 Mass. (12 Metc.) 494, 501 (1847), holding that where one joint mortgagee begins a foreclosure, it is not necessary to bring the others into the action. See *ante* § 70.

[4] Woodward v. Wood, 19 Ala. 213 (1851).

[5] McDowell v. Jacobs, 10 Cal. 387 (1858).

[6] See *ante* § 72; N. Y. Code Civ. Proc. § 448.

[7] McGregor v. McGregor, 35 N. Y. 218 (1866); Lawrence v. Lawrence, 3 Barb. Ch. (N. Y.) 71 (1848).

[8] Paton v. Murray, 6 Paige Ch. (N. Y.) 474 (1837).

And the fact that a person owns an undivided part of certain premises, and at the same time holds a mortgage on another undivided part, will not prevent his foreclosing.[1]

§ 80. **Partners; any one or more may foreclose.**—Partners may unite in the foreclosure of a mortgage held by them as a part of their joint capital, or any one of them may bring the action as sole plaintiff. If any of the partners refuse to join as co-plaintiffs, the courts generally require them to be brought in as defendants; but it must appear in the pleadings, and be a fact, that the co-partners have refused to become co-plaintiffs, before they can be made defendants to the action.[2] Even where a mortgage was executed to one member of a co-partnership to secure a partnership debt, all the partners were deemed necessary parties to an action for foreclosure.[3] It would seem, however, that if a mortgage is held by one of the partners as a trustee for the partnership, he can foreclose without in any way bringing the other partners into the action.[4] In case of the death of a partner pending foreclosure, a bill of revivor against his personal representatives is unnecessary, the survivors taking the entire legal title to the bond and mortgage under the doctrine of survivorship in joint tenancy.[5]

§ 81. **Joint mortgagees, one dying; doctrine of survivorship.**—It seems quite well established that the doctrine of joint tenancy and survivorship, as applied to the tenure of lands, is also applicable to the joint ownership of choses in action, including mortgages. In People v. Keyser,[6] Selden, J., says: "There was never any doubt that the entire legal interest remained in the survivor. The only

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[1] Baker v. Shephard, 30 Ga. 706 (1860); Gleises v. Maignan, 3 La. 530 (1832).

[2] N. Y. Code Civ. Proc. § 448; Jewell v. West Orange, 36 N. J. Eq. (9 Stew.) 403 (1883).

[3] DeGreiff v. Wilson, 30 N. J. Eq. (3 Stew.) 435 (1879); Noyes v. Sawyer, 3 Vt. 160 (1831).

[4] Shelden v. Bennett, 44 Mich. 634 (1880).

[5] Roberts v. Stigleman, 78 Ill. 120 (1875). See *post* § 81.

[6] 28 N. Y. 226, 236 (1863), citing 1 Chitty on Pleading, 19, 20; 2 Fonbl. Eq. 103, and notes; Rolls v. Yate, Yelv. 177 (1611), note 1.

doubt was, whether the survivor did not take the whole interest, legal and equitable, according to the rule of survivorship applied to a joint tenancy in lands; but it was finally held, the case of Petty v. Styward,[1] being the leading case, that, although the entire legal interest vested in the survivor, he was to be regarded in equity as a trustee for the personal representatives of deceased parties for their equal shares." It is also well settled that upon the death of a partner, the surviving partners take the legal title to the property of the partnership for the purpose of settling its affairs.

The courts have accordingly deduced the rule that upon the death of one of a number of joint owners of a mortgage, the surviving owners can foreclose it without bringing the personal representatives or heirs of the deceased joint mortgagee into the action.[2] It has been explicitly held, that "a suit upon a mortgage to obtain a foreclosure, may be brought and maintained by the surviving mortgagee."[3] Where a mortgage had been executed to a husband and wife, she was allowed to foreclose upon his death, without bringing his personal representatives into the action.[4] There can be no harm, however, in making the personal representatives of a deceased joint mortgagee parties defendant to the action, for, if a contest as to the ownership of the mortgage should arise, they would then be concluded by the decree of foreclosure;[5] furthermore, they have

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[1] 1 Eq. Cas. Abr. 290.

[2] Erwin v. Ferguson, 5 Ala. 158 (1843); Milroy v. Stockwell, 1 Ind. 35 (1848); Lannay v. Wilson, 30 Md. 536 (1869); Blake v. Sanborn, 74 Mass. (8 Gray) 154 (1857); Martin v. McReynolds, 6 Mich. 70 (1858); McAllister v. Plant, 54 Miss. 106 (1876); Hansell v. Gregg, 7 Tex. 225 (1851). See *post* §§ 103, 105. *Contra*, Fisher on Mortgages, § 361; Vickers v. Cowell, 1 Beav 529 (1839); Mutual Life Ins. Co. v. Sturges, 32 N. J. Eq. (5 Stew.) 678, 683 (1880).

[3] Williams v. Hilton, 35 Me. 547 (1853). See also Kinsley v. Abbott, 19 Me. 430, 433, opinion *per* Shipley, J. In Penn v. Butler, 4 U. S. (4 Dall.) 354 (1801); bk. 1 L. ed. 864; the court say that the surviving obligee and mortgagee "was entitled to the possession of the joint securities, and that he might recover their amount."

[4] Lannay v. Wilson, 30 Md. 536 (1869); McMillan v. Mason, 5 Coldw. (Tenn.) 263 (1868).

[5] Freeman v. Scofield, 16 N. J. Eq. (1 C. E. Gr.) 28 (1863).

an equitable interest in the proceeds of the foreclosure, a portion of which must ultimately come into their hands for distribution.

§ 82. **When personal representatives of deceased joint mortgagee necessary parties.**—In New Jersey the personal representatives of a deceased joint mortgagee are considered indispensable parties to a foreclosure by the survivors;[1] they may be united as co-plaintiffs or made defendants.[2] And where a personal representative commences the action, the joint survivors are necessary parties. Thus, where a mortgage had been executed to a husband and wife, and after the husband's death foreclosure was brought by the assignee of his administrator, the widow was held erroneously omitted.[3] The rules of this section apply also to the joint assignees of a mortgage; and, indeed, to joint owners generally, whatever may have been the source of their title to the mortgage.[4]

§ 83. **Mortgagees, owners in severalty; any one or more may foreclose.**—Any one or more of a number of owners of a mortgage, each of whom holds a specific interest therein in severalty, may bring an action to foreclose the mortgage, making defendants such other owners as do not consent to become co-plaintiffs;[5] likewise all the owners may unite as co-plaintiffs.[6] Where a mortgage is owned in severalty, it is indispensable that all the interests be represented in an action to foreclose.[7] And even though debts in severalty be secured by a joint mortgage, any creditor may maintain a foreclosure, as in the case of a several

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[1] Mutual Life Ins. Co. v. Sturges, 32 N. J. Eq. (5 Stew.) 678, 683 (1880), explaining the reason for the rule, and following Freeman v. Schofield, 16 N. J. Eq. (1 C. E. Gr.) 28 (1863).

[2] Freeman v. Scofield, 16 N. J. Eq. (1 C. E. Gr.) 28 (1863).

[3] Savings Bank v. Freese, 26 N. J. Eq. (11 C. E. Gr.) 453 (1875).

[4] Martin v. McReynolds, 6 Mich. 70 (1858).

[5] Porter v. Clements, 3 Ark. 364, 380 (1839), where the question of parity of interest in the action is considered at length; Brown v. Bates, 55 Me. 520 (1868).

[6] Stevenson v. Mathers, 67 Ill. 123 (1873), where the action was to foreclose a land contract.

[7] Nashville & D. R. R. Co. v. Orr, 85 U. S. (18 Wall.) 471 (1873); bk. 21 L. ed. 810.

mortgage, but the other creditors are absolutely necessary parties as co-plaintiffs or defendants;[1] a joint bill for foreclosure is also allowable.[2] Upon the death of any of the owners in severalty, his personal representatives must be brought before the court.[3] The decree for foreclosure should be for the payment to the several owners of the sums respectively due to each.[4] Where mortgagees hold separate, but contemporaneous and equal mortgages, they may unite as co-plaintiffs, or any one may foreclose, making the others defendants, as though there was but one mortgage in which they held their interests in severalty.[5]

§ 84. Owner of one of several notes secured by a mortgage may foreclose.—In most of the Western and in some of the Eastern states, notes with interest coupons, instead of a bond, are given as the instrument of indebtedness. In order to facilitate their negotiability as investments, a number of notes are often given instead of one. In these states numerous decisions[6] have been rendered, fixing the legal status of such notes, and the remedies and procedure of owners for their collection. As the general result it may be stated that an action *at law* may be maintained by

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[1] See Tyler v. Yreka Water Co., 14 Cal. 212 (1859); Ætna Life Ins. Co. v. Finch, 84 Ind. 301 (1882); Moffitt v. Roche, 76 Ind. 75 (1881); Howe v. Dibble, 45 Ind. 120 (1873). See *ante* § 78.

[2] Shirkey v. Hanna, 3 Blackf. Ind. 403 (1834).

[3] Burnett v. Pratt, 39 Mass. (22 Pick.) 556 (1839); Vickers v. Cowell, 1 Beav. 529 (1839); Fisher, on Mortgages, §§ 349, 361.

[4] Higgs v. Hanson, 13 Nev. 356 (1878).

[5] Cochran v. Goodell, 131 Mass. 464 (1881). See *post* §§ 99, 184.

[6] Hartwell v. Blocker, 6 Ala. 581 (1844); Wilson v. Hayward, 2 Fla. 27 (1848); Myers v. Wright, 33 Ill. 284 (1864); Pogue v. Clark, 25 Ill. 351 (1861); Ross v. Utter, 15 Ill. 402 (1854); Goodall v. Mopley, 45 Ind. 355 (1873); Merritt v. Wells, 18 Ind. 171 (1862); Stanley v. Beatty, 4 Ind. 134 (1853); Barrett v. Blackmar, 47 Iowa, 569 (1877); Lyster v. Brewer, 13 Iowa, 461 (1862); Sangster v. Love, 11 Iowa, 580 (1861); Rankin v. Major, 9 Iowa, 297 (1859); Swenson v. Moline Plow Co., 14 Kan. 387 (1875); Jenkins v. Smith, 4 Met. (Ky.) 380 (1863); Bell v. Shrock, 2 B. Mon. (Ky.) 29 (1841); Jordon v. Cheney, 74 Me. 359 (1883); Moore v. Ware, 38 Me. 496 (1854); Johnson v. Candage, 31 Me. 28 (1849); Haynes v. Wellington, 25 Me. 458 (1845); Johnson v. Brown, 31 N. H. 405 (1855); Wiley v. Pinson, 23 Tex. 486 (1859); Pettibone v. Edwards, 15 Wis. 95 (1862).

the holder of any note as upon an ordinary promissory note. Or, the holder of any one of a number of the notes may proceed in the first instance by a suit in equity, as in an ordinary foreclosure; but he must bring all the other mortgagees and holders of notes secured by the mortgage into court, before a decree can be made.[1] It is peculiar that two holders of notes can not join as plaintiffs; each one holds an interest in the mortgage *pro tanto* for his own note. But where one person holds two or more notes, he may foreclose them in the same action;[2] in New Hampshire on the other hand, foreclosure by a writ of entry can not be maintained unless all the holders of notes unite as plaintiffs,[3] and then, it would seem, only after all the notes have become due.[4]

§ 85. **All owners of notes necessary parties—Payable in order of maturity.**—All holders of notes must be brought into the action,[5] so that the amounts and priorities of their several claims may be determined, for it is another peculiarity of these notes in some states, that they are entitled to payment in the order in which they fall due, and their respective priorities as liens on the mortgaged premises follow the same order. This rule obtains in Alabama,[6] Florida,[7] Illinois,[8] Indiana,[9] Iowa,[10] Kansas,[11] Missouri,[12]

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[1] King v. Merchants' Exchange Co., 5 N. Y. 547, 556 (1851); Pugh v. Holt, 27 Miss. 461 (1854); Archer v. Jones, 26 Miss. 583 (1853). See also the cases cited in the first note to the section.

[2] Myers v. Wright, 33 Ill. 284 (1864). See *ante* § 83.

[3] Noyes v. Barnet, 57 N. H. 605 (1876).

[4] Hunt v. Stiles, 10 N. H. 466 (1839).

[5] Myers v. Wright, 33 Ill. 284 (1864). See §§ 84 and 86, and cases cited. In Thayer v. Campbell, 9 Mo. 277 (1845), it was held that the holders of other notes were not necessary parties to the action, but that they might come in on their own motion. But see the later cases of Mitchell v. Ladew, 36 Mo. 526 (1865), approved and followed in Hurck v. Erskine, 45 Mo. 484 (1870); Thompson v. Field, 38 Mo. 320 (1866); Mason v. Barnard, 36 Mo. 384 (1865).

[6] Bank of Mobile v. Planters' and Merchants' Bank, 9 Ala. 645 (1846); McVay v. Bloodgood, 9 Port. (Ala.) 547 (1839), explained in Cullum v. Erwin, 4 Ala. 452 (1842).

[7] Cotton v. Blocker, 6 Fla. 1 (1855).

[8] Humphreys v. Morton, 100 Ill. 592 (1881); Koester v. Burke, 81 Ill. 436 (1876); Herrington v. McCollum, 73 Ill. 476 (1874); Flower v. Elwood,

New Hampshire,[1] Ohio,[2] Virginia, West Virginia and Wisconsin.[3] The principle upon which it proceeds is *potior in tempore, potior in jure*. Justice Walker in Preston v. Hodgen,[4] concisely stated the rule adopted in these states: "The assignment of each note operates as an assignment *pro tanto* of the mortgage, and by each assignment it, in effect, becomes so many separate mortgages to secure the several notes in the order of their maturity." But where all the notes mature at the same time, they are equal liens;[5] and if, by the terms of the notes and mortgage, default in the payment of the first note or of the interest, when due, renders all the notes due and payable, they become equal liens upon default, and are payable *pro rata* instead of *pro tanto* from the proceeds of a sale.[6]

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66 Ill. 438 (1872); Preston v. Hodgen, 50 Ill. 56 (1869); Funk v. McReynolds, 33 Ill. 481 (1864).

[9] Gerber v. Sharp, 72 Ind. 553 (1880); Doss v. Ditmars, 70 Ind. 451 (1880); Evansville People's Sav. Bank v. Finney, 63 Ind. 460 (1878); Sample v. Rowe, 24 Ind. 208 (1865); Murdock v. Ford, 17 Ind. 52 (1861); Hough v. Osborne, 7 Ind. 140 (1855), followed in Harris v. Harlan, 14 Ind. 439 (1860); Stanley v. Beatty, 4 Ind. 134 (1853); State Bank v. Tweedy, 8 Blackf. (Ind.) 447 (1847).

[10] Walker v. Schreiber, 47 Iowa, 529 (1877), and the cases cited in the preceeding section.

[11] Richardson v. McKim, 20 Kan. 346 (1878).

[12] Hurck v. Erskine, 45 Mo. 484 (1870); Thompson v. Field, 38 Mo. 320 (1866); Mitchell v. Ladew, 36 Mo. 526 (1865); Mason v. Barnard, 36 Mo. 384 (1865).

[1] Noyes v. Barnet, 57 N. H. 605 (1876); Johnson v. Brown, 31 N. H. 405 (1855); Hunt v. Stiles, 10 N. H. 466 (1839).

[2] Winters v. Bank, 33 Ohio St. 250 (1877); Bushfield v. Meyer, 10 Ohio St. 334 (1859); Bank of United States v. Covert, 13 Ohio, 240 (1844).

[3] Pierce v. Shaw, 51 Wis. 316 (1881); Marine Bank v. International Bank, 9 Wis. 57 (1859); Wood v. Trask, 7 Wis. 566 (1859).

[4] 50 Ill. 56, 59 (1869); Gerber v. Sharp, 72 Ind. 553 (1880), and cases cited; Murdock v. Ford, 17 Ind. 52 (1861). See also Smith v. Stevens, 49 Conn. 181 (1881). In Sargent v. Howe, 21 Ill. 148 (1859), A. executed three notes to B. and conveyed property in trust to C. to secure their payment; B. assigned two of the notes to D. It was held that the assignment carried the security with it as an incident to the debt, and that D., by an equity action, could compel the trustee to sell enough of the property to pay his notes. The assignment in such cases is *pro tanto*, not *pro rata*; the notes must be paid in the order in which they mature, as they have priority as liens in that order. See Vansant v. Allmon, 23 Ill. 30, 34 (1859).

[5] Humphreys v. Morton, 100 Ill. 592 (1881).

[6] Grattan v. Wiggins, 23 Cal. 16 (1863); Phelan v. Olney, 6 Cal. 478

§ 86. **Notes payable pro rata in New York and some other states.**—But in New York,[1] New Jersey,[2] Pennsylvania,[3] Minnesota,[4] Michigan,[5] Mississippi,[6] Kentucky,[7] and Vermont[8] the rule has been adopted that bonds and notes, maturing at different times and secured by a single mortgage, are equal and concurrent liens and entitled to the security *pro rata*. In a recent case in New York,[9] where mortgages were simultaneously executed and recorded, but matured at different times, Judge Finch, of the Court of Appeals, decided that the one falling due first had no priority of lien; and, after collating and reviewing the cases in the Western States, disapproved the proposition established in so many of them, that different obligations maturing at different times have priority of security according to the order of their maturity. Whichever rule is adopted, all

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(1856); Winters v. Bank, 33 Ohio St. 250 (1877); Bushfield v. Mayer, 10 Ohio St. 334 (1859), supported in point by Bank of United States v. Covert, 13 Ohio, 240 (1844); Pierce v. Shaw, 51 Wis. 316 (1881). *Contra*, holding that the notes must be paid in the order of their maturity, Hurck v. Erskine, 45 Mo. 484 (1870); Mason v. Barnard, 36 Mo. 384 (1865).

[1] Granger v. Crouch, 86 N. Y. 494, 499 (1881); Bridenbecker v. Lowell, 32 Barb. (N. Y.) 9 (1860).

[2] Collerd v. Huson, 34 N. J. Eq. (7 Stew.) 38 (1881). See the note to the case, giving a full collation of authorities.

[3] Perry's Appeal, 22 Pa. St. 43 (1853), where four bonds and mortgages, simultaneous in execution and record, but due in successive years, were held to be equal liens and to share *pro rata*; cases collated. The rule was also applied where all the bonds matured at the same time. Hodge's Appeal, 84 Pa. St. 359 (1877).

[4] Wilson v. Eigenbrodt, 30 Minn. 4 (1882). See the able and ingenious opinion of Mitchell, J., holding this to be the rule for Minnesota unless a contract to a different effect is expressed in the mortgage.

[5] Wilcox v. Allen, 36 Mich. 160 (1877); McCurdy v. Clark, 27 Mich. 445 (1873).

[6] Trustees Jefferson College v. Prentiss, 29 Miss. 46 (1855); Bank of England v. Tarleton, 23 Miss. 173 (1851); Henderson v. Herrod, 18 Miss. (10 Smed. & M.) 631 (1846); Dick v. Mawry, 17 Miss. (9 Smed. & M.) 448 (1848); Terry v. Woods, 14 Miss. (6 Smed. & M.) 139 (1846); Cage v. Iler, 13 Miss. (5 Smed. & M.) 410 (1845); Parker v. Mercer, 7 Miss. (6 How.) 320 (1842).

[7] Campbell v. Johnston, 4 Dana (Ky.) 182 (1836).

[8] Belding v. Manly, 21 Vt. 550 (1849); Keyes v. Wood, 21 Vt. 331 (1849); Wright v. Parker, 2 Aik. (Vt.) 212 (1827).

[9] Granger v. Crouch, 86 N. Y. 494, 499 (1881); in point and similar, Collerd v. Huson, 34 N. J. Eq. (7 Stew.) 38 (1881). See *post* § 99.

holders of notes and bonds are indispensable parties to a foreclosure of the mortgage, in order to produce a perfect title at the sale. It may be observed here that questions affecting the rights of holders of bonds given with railroad mortgages are not within the scope of this work, and the reader is referred to text-books treating specially of railway securities and kindred subjects.[1]

§ 87. **Owner of mortgage, having pledged the same as collateral security, may foreclose.**—Where the owner of a mortgage has pledged it as collateral security for a debt of less amount than the mortgage, he still has such an interest in it as entitles him to bring an action for the foreclosure of the mortgage. Vice-chancellor McCoun held, in Norton v. Warner,[2] that "the complainant had not divested himself of all interest in or control over the mortgage. The assignment is but a partial one, made to secure to the pledgee the payment of a loan, being less than the amount due on the mortgage. In equity, he is still the owner, subject only to the lien or pledge for the loan. The pledgee might have filed a bill of foreclosure against the original mortgagor and all parties in interest, and in that case the pledgee would have been deemed a trustee for the mortgagee, for the whole mortgage debt after satisfying his claim; and upon the pledgee's refusal to proceed—and which the bill alleges —I see no good reason why the complainant might not proceed, as he has done, to foreclose."

§ 88. **Pledgee necessary party—Mortgage collaterally assigned.**—But in such an action the pledgee is a necessary party,[3] and may be made a co-plaintiff,[4] or a defendant; neither the mortgagor, nor any person other than

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[1] Jones on Railway Securities.

[2] 3 Edw. Ch. (N. Y.) 106 (1837); Simson v. Satterlee, 64 N. Y. 657 (1876), affirming 6 Hun (N. Y.) 305. In point Sinking Fund Com'rs v. Northern Bank, 1 Metc. (Ky.) 174 (1858); McKinney v. Miller, 19 Mich. 142 (1869); George v. Woodward, 40 Vt. 672 (1868); Brunette v. Schettler, 21 Wis. 188 (1866). See *post* §§ 89, 181, 182.

[3] Plowman v. Riddle, 14 Ala. 169 (1848). See *post* §§ 181, 182.

[4] Hoyt v. Martense, 16 N. Y. 231 (1857).

the assignee himself, can object that he is made a defendant.[1] And if the assignee, or pledgee, refuses to become a co-plaintiff upon the request of the mortgagee, he can not himself object that he is made a defendant to the action;[2] it should be alleged in the complaint, however, that he has refused to join as a co-plaintiff. If an objection is made at all, it must be by demurrer or answer, or the alleged defect will be considered waived at the trial.[3] The rule of this section is in accordance with the general principle that all parties interested in the mortgage debt must be before the court, or the decree of foreclosure will not extinguish their interests. Equity courts are not particular as to how parties come before them, so long as all persons interested in the subject-matter of the action are brought within their jurisdiction, so that a complete determination can be made of the rights of all the parties interested. It is indispensable that the pledgee, and all others interested in the mortgage as a collateral security, be made parties to the action.[4] The decree should provide first for the payment to the pledgee of the amount due him, and then for the payment to the mortgagee of the balance.[5]

It is also proper for the mortgagee and the pledgee to join as co-plaintiffs in the action to foreclose, as they are together the owners of the entire bond and mortgage. Neither the mortgagor nor other parties to the action can object to such joinder of plaintiffs, as all parties interested in the mortgage debt are thereby brought before the court, so that its decree will become binding and conclusive upon them.[6]

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[1] Simson v. Satterlee, 64 N. Y. 657 (1876), affirming 6 Hun (N. Y.) 305 (1875).

[2] Norton v. Warner, 3 Edw. Ch. (N. Y.) 106 (1837); N. Y. Code Civ. Proc. § 448. See *ante* § 72.

[3] Carpenter v. O'Dougherty, 67 Barb. (N. Y.) 397 (1873); s. c. 2 T. & C. (N. Y.) 427; aff'd 58 N. Y. 681 (1874). See O'Dougherty v. Remington Paper Co., 81 N. Y. 496 (1880); Remington Paper Company v. O'Dougherty, 81 N. Y. 474 (1880).

[4] Kittle v. VanDyck, 1 Sandf. Ch. (N. Y.) 76 (1843); Woodruff v. Depue, 14 N. J. Eq. (1 McCart.) 168, 176 (1861); Miller v. Henderson, 10 N. J. Eq. (2 Stockt.) 320 (1855). See *post* §§ 181, 182.

[5] Overall v. Ellis, 32 Mo. 322 (1862); Brunette v. Schettler, 21 Wis. 188 (1866).

[6] Hoyt v. Martense, 16 N. Y. 231 (1857).

§ 89. Assignee of mortgage as collateral security may foreclose.—In the foregoing section it has been seen that though a mortgagee has pledged his mortgage as a collateral security, he may nevertheless maintain an action to foreclose it; also, that the mortgagee and the pledgee may unite as co-plaintiffs in foreclosing. It has now become well settled, as a further principle, that the pledgee, who holds the mortgage as a collateral security, may also maintain an action for its foreclosure.[1] The pledgee, however, can recover judgment only for the amount of his claim, the payment of which the decree should direct.[2] The amount secured and the

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[1] Bard v. Poole, 12 N. Y. 495, 507 (1855), *per* Denio J., stating the reasons for the rule; Bloomer v. Sturges, 58 N. Y. 168 (1874); Carpenter v. O'Dougherty, 67 Barb. (N. Y.) 397 (1873); s. c. 2 T. & C. (N. Y.) 427, affirmed in 58 N. Y. 681 (1874); Dalton v. Smith, 86 N. Y. 176 (1881); Bush v. Lathrop, 22 N. Y. 535 (1860); Whitney v. M'Kinney, 7 Johns. Ch. (N. Y.) 144 (1823); Lehman v. McQueen, 65 Ala. 570 (1880); Hunter v. Levan, 11 Cal. 11 (1858); Beers v. Hawley, 3 Conn. 110 (1819); Wilson v. Fatout, 42 Ind. 52 (1873); St. John v. Freeman, 1 Ind. 84 (1848). See Compton v. Jones, 65 Ind. 117 (1878), where the debt, for which the bond and mortgage had been assigned as collateral security, had been paid by the assignor, entitling him to a reassignment of the securities, and the assignee unsuccessfully attempted a foreclosure; Rice v. Dillingham, 73 Me. 59 (1881); Cutts v. York Manuf. Co., 14 Me. 326 (1837); s. c. 18 Me. 190 (1841), *per* Weston, Ch. J., where the assignor was made a defendant; Brown v. Tyler, 74 Mass. (8 Gray) 135 (1857); Graydon v. Church, 7 Mich. 36, 50, 68 (1859), *per* Christiancy, J., collating and reviewing the authorities, especially in New York; Selectmen of Natchez v. Minor, 17 Miss. (9 Smed. & M.) 544 (1848); Paige v. Chapman, 58 N. H. 333 (1878); Chew v. Brumagim, 21 N. J. Eq. (6 C. E. Gr.) 520, 529 (1870), *per* VanSyckel, J., a leading case, collating and reviewing the New York cases; reported below in 19 N. J. Eq. 130 (1868), and affirmed in Chew v. Brumagen, 80 U. S. (13 Wall.) 497 (1871); bk. 20 L. ed. 663, where the proposition of this section was considered at length; Wilson v. Giddings, 28 Ohio St. 554 (1876).

[2] Carpenter v. O'Dougherty, 67 Barb. (N. Y.) 397 (1873). See the preceding note. Salmon v. Allen, 11 Hun (N. Y.) 29 (1877), a complicated case; McCrum v. Corby, 11 Kan. 464 (1873). In Underhill v. Atwater, 22 N. J. Eq. (7 C. E. Gr.) 16 (1871), the assignee became the owner of the entire mortgage pending the foreclosure of his original claim, and a supplemental bill was held necessary to cover his new interest in the mortgage. See Ackerson v. Lodi Branch R. R., 28 N. J. Eq. (1 Stew.) 542 (1877); Van Deventer v. Stiger, 25 N. J. Eq. (10 C. E. Gr.) 224 (1874), holding that the decree must be for the amount of the

interests of all the parties in the mortgage, together with the fact that the assignment is only collateral or conditional, must be specifically stated in the complaint: and it is indispensable that the mortgagee, or owner of the equity of redemption in the mortgage, be made a party to the action in order that his interests also may be foreclosed.[1] It should also appear in the complaint that the mortgagee has refused to become a co-plaintiff with the pledgee; otherwise the complaint will be demurrable. It is believed that a person who holds an assignment of a mortgage to indemnify and protect him against liabilities or obligations of any kind may foreclose as soon as he is damnified.

§ 90. **Owner of an equitable interest of any kind in the mortgage may generally foreclose.**—According to Mr. Pomeroy, it is a general principle of practice in most of our states that every action must be prosecuted in the name of the real party in interest.[2] Following this universal and equitable principle, the courts have established a rule that whoever holds an equitable or real interest of any kind in a mortgage, may bring an action for its foreclosure;[3] indeed, the rule in such actions is as elastic and liberal as equity jurisprudence could possibly make it. It has become almost axiomatic that an equity court cares little who brings an action, so that he be a real party in interest, nor how it is brought, so long as it acquires complete jurisdiction of all the parties interested and of the entire subject-matter in issue, so that a complete adjudication can be made upon the whole case. It has been shown that the person who holds the largest interest in the mortgage should commence the action; and it is undoubtedly the best

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debt and interest only; Kamena v. Huelbig, 23 N. J. Eq. (8 C. E. Gr.) 78 (1872).

[1] See *post* §§ 181, 182 and cases cited; also *ante* § 87; Fisher on Mortgages, § 348, and the English cases cited.

[2] Pomeroy's Remedies, § 99. See *ante* § 72.

[3] Hill v. Meeker, 23 Conn. 594 (1855); Wooden v. Haviland, 18 Conn. 107 (1846). See Irish v. Sharp, 89 Ill. 261 (1878), holding that the action should be brought in the name of the equitable owner of the mortgage, and not in the name of the mortgagee for his use.

practice to have all parties interested in the mortgage united as plaintiffs, as opposed to all parties interested in the equity of redemption, who are best made defendants.[1] But where this is impossible, or parties refuse to join as co-plaintiffs, they can equally well be made defendants, and the decree of the court will be conclusive upon them. It often becomes necessary to make persons who are interested in the mortgage, defendants, as their interests may be antagonistic to the interests of others who also own a part of the mortgage. Furthermore, no one can be made a plaintiff against his will, and a person refusing to become a plaintiff can be brought into an action in no other way than as a defendant.[2]

§ 91. Special cases of equitable interest—Annuitants, legatees, executors.—The cases in which questions have arisen affecting equitable assignments and the conditional and contingent rights of parties in mortgages, are so varied in character that it is almost impossible to induce from them any general rules or principles applicable to the subject of this section. A legatee may foreclose a mortgage upon default where it is bequeathed,—the interest to him and the principal to another,—and the mortgage is to be kept on foot by the terms of the will as a living security for those purposes.[3] So a mortgagee may foreclose a mortgage conditioned for his support and maintenance during life.[4] In Lawrence v. Lawrence,[5] a mortgage had been given by a husband and wife who were executors to their co-executrix to secure the payment of moneys of the estate received by the husband as executor; the wife, after her husband's death, was not allowed to file a bill in her character as executrix against his personal representatives and heirs at law, to foreclose such mortgage, where it did not appear from the bill that she was entitled, in her sole and separate right as a legatee, to a portion of the fund secured by

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[1] See *ante* §§ 87, 89 and notes.

[2] N. Y. Code Civ. Proc. § 448. See Beebe v. Morris, 56 Ala. 525 (1876).

[3] Hancock v. Hancock, 22 N. Y. 568 (1860), *per* Comstock, Ch. J.

[4] Ferguson v. Ferguson, 2 N. Y. 360 (1849).

[5] 3 Barb. Ch. (N. Y.) 71, 75 (1848).

the mortgage. "If in such a case the wife had an interest in the fund, and the co-executrix to whom the mortgage was given, upon a proper application to her for that purpose, refuses to proceed to foreclose the mortgage, the widow of the mortgagee and the other legatees for whose benefit the mortgage was given, may file a bill showing their respective rights in the fund, and claiming to have the benefit of such mortgage and of a foreclosure thereof. But in that case the mortgagee and all the legatees who are interested in the fund, must be made parties to the suit; or the bill must be filed by some of the legatees in behalf of themselves and of all others having an interest in the fund."[1]

§ 92. **Special cases of equitable assignment—Purchaser on defective foreclosure—Payment by mistake or fraud.** —It may be stated generally that a purchaser at a foreclosure sale becomes an equitable assignee of the mortgage foreclosed, for the purpose of maintaining a second or strict foreclosure to extinguish the liens of junior incumbrancers who were not made parties to the original action, or of perfecting a foreclosure in any way defective;[2] he is entitled to an action *de novo* on the mortgage.[3] But a deed executed by both United States loan commissioners, in pursuance of a sale held by one only, has been held void and not operative as an equitable assignment of the mortgage to the purchaser, so as to give him any rights under it.[4] Where omitted

[1] The above quotation is abridged from the chancellor's opinion.

[2] Bolles v. Duff, 43 N. Y. 469 (1871); Robinson v. Ryan, 25 N. Y. 320 (1862); Franklyn v. Hayward, 61 How. (N. Y.) Pr. 43 (1881); Stewart v. Hutchinson, 29 How. (N. Y.) Pr. 181 (1864); Taylor v. Agricultural & M. Ass., 68 Ala. 229 (1880); Goodenow v. Ewer, 16 Cal. 461 (1860); Muir v. Berkshire, 52 Ind. 149 (1875); Shimer v. Hammond, 51 Iowa, 401 (1879); Shaw v. Heisey, 48 Iowa, 468 (1878); Johnson v. Robertson, 34 Md. 165 (1870); Wilcoxson v. Osburn, 77 Mo. 621 (1883); Jones v. Mack,. 53 Mo. 147 (1873); Bank of Wis. v. Abbott, 20 Wis. 570 (1866); Moore v. Cord, 14 Wis. 213 (1861); Stark v. Brown, 12 Wis. 572 (1860).

[3] Rogers v. Holyoke, 14 Minn. 220 (1869). In Robinson v. Ryan, 25 N. Y. 320 (1862), the purchaser at a statutory foreclosure sale, defective for want of service of a notice upon the mortgagor, was held to stand as an assignee of the mortgage, and was allowed in this action to foreclose.

[4] Olmsted v. Elder, 5 N. Y. 144 (1851).

parties or others bring an action to redeem from a foreclosure sale, the purchaser is likewise regarded as an equitable assignee of the mortgage,[1] and a necessary defendant.

A person who advances money for the payment of a mortgage, with the expectation of having another mortgage executed to himself as security, becomes an equitable assignee of the existing mortgage, and upon refusal of the mortgagor to execute a new mortgage, he may maintain an action for the foreclosure of the first one.[2] So also a person who loans money on a mortgage, to be used in part for the payment of a prior mortgage, is equitably subrogated as assignee of the mortgage so paid, and may foreclose it, in case the mortgage executed to him for the loan is declared usurious or void for other reasons.[3] A valid and subsisting obligation is not destroyed because included in a security, or made the subject of a contract, void for usury; although formally satisfied and discharged, it may be revived and enforced in case the new security or contract is invalidated. And where a mortgage, executed to a clerk in chancery, to secure a widow's dower, was subsequently discharged by the clerk without authority of the court, upon the execution to him of a second mortgage for a larger sum, the court decided that if the owners of the fund had not elected to foreclose the second mortgage they might have foreclosed the first one, on the ground that its discharge by the clerk, without authority, was null and void.[4]

§ 93. Equitable owner by subrogation may foreclose. —It often occurs that a purchaser of an equity of redemption in mortgaged premises, pays and procures an existing mortgage to be discharged, believing it to be the only incumbrance on the premises. Upon his discovery of liens

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[1] Bolles v. Duff, 43 N. Y. 469 (1871); McSorley v. Larissa, 100 Mass. 270 (1868); Childs v. Childs, 10 Ohio St. 339 (1859).

[2] Gilbert v. Gilbert, 39 Iowa, 657 (1874); Bank v. Campbell, 2 Rich. (S. C.) Eq. 179 (1846).

[3] Patterson v. Birdsall, 64 N. Y. 294, 298 (1876), affirming 6 Hun (N. Y.) 632 (1876). See Miller v. Winchell, 70 N. Y. 437 (1877).

[4] Farmers' Loan & Trust Co. v. Walworth, 1 N. Y. 433 (1848). See Homœopathic Mut. Life Ins. Co. v. Marshall, 32 N. J. Eq. (5 Stew.) 103 (1880).

subsequent to the mortgage discharged, the mortgage may be revived, and he will be held equitably subrogated to all the rights of the mortgagee.[1] A grantor who pays a mortgage which his grantee has assumed, is held subrogated to all the rights of the mortgagee, and in an action to foreclose, may recover a judgment for deficiency against the grantee; and it is questionable whether, where the security is being impaired, he has any remedy to protect himself, except to pay his bond and mortgage and become subrogated to the rights of the mortgagee.[2]

The form in which an assignee acquires his ownership or interest in the mortgage is quite immaterial; it may be by mere delivery or by parol, but to enable the assignee to maintain a forclosure there must be a distinct intention to give him an interest in the bond and mortgage. Where the intention is to have a written assignment, a mere manual delivery will not pass the title.[3]

§ 94. **A surety for the mortgage debt may sometimes foreclose—First, having guaranteed debt.**—If a person who stands in the relation of surety to a mortgage debt is compelled to pay it, he is entitled to be subrogated to the rights of the mortgagee, and may foreclose the mortgage in his own name, without a formal assignment either in writing or by parol.[4] There are three principal ways in which this relation and its attending rights may arise: First, where the surety has guaranteed the payment of the mortgage debt, in an assignment or a separate instrument, he may take up the bond and mortgage and enforce their

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[1] Ayers v. Adams, 82 Ind. 109 (1882); Lovejoy v. Vose, 73 Me. 46 (1881); Cobb v. Dyer, 69 Me. 494 (1879); Youngman v. Elmira & W. R. R., 65 Pa. St. 278 (1870).

[2] Marshall v. Davies, 78 N. Y. 414, 421 (1879), reversing 16 Hun (N. Y.) 606. See Calvo v. Davies, 73 N. Y. 211, 215 (1878). In point, Wadsworth v. Lyon, 93 N. Y. 201 (1883); Wood v. Smith, 51 Iowa, 156 (1879).

[3] So held by Folger, J., in Strause v. Josephthal, 77 N. Y. 622 (1879). See Green v. Marble, 37 Iowa, 95 (1873); Andrews v. McDaniel, 68 N. C. 385 (1873).

[4] Mims v. McDowell, 4 Ga. 182 (1848); Norton v. Soule, 2 Me. (2 Greenl.) 341 (1823); Saylors v. Saylors, 3 Heisk. (Tenn.) 525 (1871). See also the cases cited below, and *ante* §§ 89, 90 and notes.

payment in his own name;[1] and it has been held that not even an assignment is necessary.[2]

§ 95. **Surety may forclose—Second, grantee having assumed mortgage.**—Second, where a grantor is obligated to pay a mortgage debt and conveys the land to a grantee, who assumes the payment thereof, he is entitled, on paying the debt, voluntarily or otherwise, to be subrogated to the rights of the mortgagee, and to enforce the mortgage against the land as the primary fund for payment, and thereafter against all persons liable for a deficiency. The right to foreclose is perfect without an assignment of the bond and mortgage;[3] even in a case where the grantee had not assumed payment of the mortgage, the grantor, on paying the mortgage, was deemed equitably subrogated to the extent that he could maintain a foreclosure.[4] But an assignment can be compelled upon tender of the amount unpaid, and if the mortgagee refuses to assign, an action can be maintained against him for a formal assignment of the bond and mortgage. The theory upon which an assignment will be decreed has been stated as that of equitable subrogation.[5] Upon the rights of a surety in this connection, Judge Morse,[6] of the New York court of appeals, has said: "I understand the law to be as well settled, as the reason

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[1] Darst v. Bates, 95 Ill. 493 (1880); Gerber v. Sharp, 72 Ind. 553 (1880).

[2] Walker v. King, 44 Vt. 601 (1872).

[3] McLean v. Towle, 3 Sandf. Ch. (N. Y.) 117 (1845); Risk v. Hoffman, 69 Ind. 137 (1879); Hoffman v. Risk, 58 Ind. 113 (1877); Josselyn v. Edwards, 57 Ind. 212 (1877); Wood v. Smith, 51 Iowa, 156 (1879); Hoysradt v. Holland, 50 N. H. 433 (1870).

[4] Baker v. Terrell, 8 Minn. 195 (1863).

[5] Johnson v. Zink, 51 N. Y. 333 (1873), affirming 52 Barb. (N. Y.) 396 (1868); Matteson v. Thomas, 41 Ill. 110 (1866).

[6] Averill v. Taylor, 8 N. Y. 44, 51 (1853). See also Marshall v. Davies, 78 N. Y. 414, 421 (1879); s. c. 58 How. (N. Y.) Pr. 231; Marsh v. Pike, 10 Paige Ch. (N. Y.) 595 (1844), cited and reviewed in Calvo v. Davies, 73 N. Y. 211, 215 (1878); Cherry v. Monro, 2 Barb. Ch. (N. Y.) 618 (1848); Stebbins v. Hall, 29 Barb. (N. Y.) 525 (1859); Cornell v. Prescott, 2 Barb. (N. Y.) 16 (1847); Ferris v. Crawford, 2 Den. (N. Y.) 595 (1845); Tice v. Annin, 2 Johns. Ch. (N. Y.) 125 (1816); Halsey v. Reed, 9 Paige Ch. (N. Y.) 446 (1842); Cox v. Wheeler, 7 Paige Ch. (N. Y.) 248, 258 (1838); Brewer v. Staples, 3 Sandf. Ch. (N. Y.) 579 (1846).

and justice of the rule is clear, that any one who holds the actual relation of surety for the mortgage debt, charged upon land in which he has an interest, although his liability as such surety extends no farther than to lose his interest in the land, has a right to redeem, for the protection of such interest. And I suppose it to be equally well settled, that his right as surety in such a case, and upon his redeeming, is, to be subrogated to the rights and to occupy the position of the creditor from whom he redeems." And Chief Commissioner Lott, in a later case[1] in the same court, determined that the "relation of surety between the mortgagor and his grantee does not deprive the obligee of the right of enforcing the bond against the obligor. He is entitled to his debt, and has a right to avail himself of all his securities. Equity, however, requires that the obligor, on the payment of the debt out of his own funds, should be subrogated to the rights of the obligee, so that he can reimburse himself by a recourse to the mortgaged premises for that purpose. This can not prejudice the creditor, and it is clearly equitable as between the debtor and the owner of the land. He clearly has no right or color of right, justice or equity to claim that he, notwithstanding the conveyance of the property subject to the mortgage, and thus entitling him only to its value over and above it, should in fact enjoy and hold it discharged of the incumbrance, without any contribution toward its discharge and satisfaction, from the land. This equitable principle is fully recognized in most of the cases. Indeed, it is so consistent with right and justice as to require no authorities to sustain it." It is to be observed in all cases mentioned in this section, that the land is the primary fund for the payment of the mortgage debt.[2] The surety can not compel the mortgagee to file a bill to foreclose the mortgage and to exhaust his remedy against the principal debtor by a judgment for deficiency; but he may file a bill against the mortgagee[3] and the subsequent grantee, who has assumed the payment of the debt and thereby become

[1] Johnson v. Zink, 51 N. Y. 333, 336 (1873).

[2] Marsh v. Pike, 10 Paige Ch. (N. Y.) 595 (1844), affirming 1 Sandf. Ch. (N. Y.) 210 (1843).

[3] Morse v. Larkin, 46 Vt. 371 (1874).

the principal debtor, to have the debt paid to the mortgagee by such grantee, or from the proceeds of a sale of the mortgaged premises. "It is well settled that a surety, after the debt has become due, may come into court and compel the principal to pay the debt."[1]

§ 96. Surety may foreclose — Third, junior interest redeeming from senior interest.—Third, where a subsequent incumbrancer, though not holding the actual relation of surety for the mortgage debt, still has such an interest in the land that he may redeem from the mortgage debt by paying the same, and thereby become subrogated to the rights and the position of the mortgagee.[2] Cases under this head are numerous in those states where foreclosure may be made by entry and possession, and the mortgagor and those claiming under him are obliged to assert their rights by redemption, especially in Massachusetts, Maine and Vermont. One of two joint mortgagors, who has been obliged to pay the whole debt, has been held subrogated to the rights of the mortgagee as against the other mortgagor;[3] and if a purchaser of a divided or an undivided part of mortgaged premises pays the entire mortgage to protect his own interest, he will become the equitable assignee of a proportional part of the mortgage, and will be allowed to enforce it against the remaining part of the premises.[4] So a tenant for life, upon paying a prior existing mortgage, in

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[1] Marsh v. Pike, 1 Sandf. Ch. (N. Y.) 212 (1843), *per* Vice-chancellor Sandford, citing Warner v. Beardsley, 8 Wend. (N. Y.) 194 (1831): 1 Story's Eq. 327; 2 Story's Eq. 35, § 730; 144, § 849. See Cornell v. Prescott, 2 Barb. (N. Y.) 16 (1847); Norton v. Warner, 3 Edw. Ch. (N. Y.) 108 (1837), and note. Hayes v. Ward, 4 Johns. Ch. (N. Y.) 123, 132 (1819); McLean v. Lafayette Bank, 3 McL. C. C. 587 (1845).

[2] Ellsworth v. Lockwood, 42 N. Y. 89, 99 (1870), is the leading case; relied upon in Dings v. Parshall, 7 Hun (N. Y.) 522 (1876). See Averill v. Taylor, 8 N. Y. 44 (1853); Cornell v. Prescott, 2 Barb. (N. Y.) 20 (1847); Carpentier v. Brenham, 40 Cal. 221 (1870); Tyrrell v. Ward, 102 Ill. 29 (1882); Lowrey v. Byers, 80 Ind. 443 (1881); Benton v. Shreeve, 4 Ind. 66 (1853). For an exhaustive discussion of the doctrine of subrogation and substitution, as applied to parties to a mortgage, see Rardin v. Walpole, 38 Ind. 146 (1871), collating the authorities.

[3] Shinn v. Shinn, 91 Ill. 477 (1879); White v. Fisher, 62 Ill. 258 (1871)

[4] Champlin v. Williams, 9 Pa. St 341 (1848).

order to protect his own estate, is deemed an equitable assignee of the mortgage.[1] But a surety is never entitled to subrogation and foreclosure until he has paid the debt.[2] The propositions stated in this section are dependent upon the general principles of law which govern the relation of principal and surety, and more especially upon those principles which entitle a surety to be subrogated to the securities of a creditor upon the default of the principal debtor in making payment.[3]

§ 97. **Assignee of a mortgage without the bond can not foreclose.**—It is now a well established principle in the law of mortgages that the assignee of a mortgage without the bond, note or indebtedness which the mortgage was given to secure, acquires no title whatever to the mortgage debt, and can not maintain a foreclosure; the mortgage in his hands is a mere nullity. The assignment of the mortgage alone is scarcely presumptive evidence of an intention to assign the indebtedness which it was given to secure;[4] but an assignment of a bond and mortgage, and the moneys due and to grow due thereon, carries, by its terms, a note for which they are held as collateral security.[5] In Merritt v. Bartholick,[6] a leading case in New York, Judge Parker says: "As a mortgage is but an incident to the debt which it is intended to secure, the logical conclusion is, that a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it. The security can not be separated from

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[1] Hamilton v. Dobbs, 19 N. J. Eq. (4 C. E. Gr.) 227 (1868).

[2] Conwell v. McCowan, 53 Ill. 363 (1870).

[3] Brandt on Suretyship and Guaranty.

[4] Jackson v. Blodget, 5 Cow. (N. Y.) 206 (1825); Nagle v. Macy, 9 Cal. 426 (1858); Peters v. Jamestown Bridge Co., 5 Cal. 334 (1855); Hamilton v. Lubukee, 51 Ill. 415 (1869); Hubbard v. Harrison, 38 Ind. 323 (1871); Willis v. Vallette, 4 Met. (Ky.) 195 (1862); Lunt v. Lunt, 71 Me. 377 (1880); Webb v. Flanders, 32 Me. 175 (1850). See Bulkley v. Chapman, 9 Conn, 8 (1831), on the question of intent; Powell, 1115, 1116. See *post* § 98.

[5] Belden v. Meeker, 2 Lans. (N. Y.) 471 (1870); affirmed 47 N. Y. 307 (1872).

[6] 36 N. Y. 44, 45 (1867), affirming 47 Barb. (N. Y.) 253 (1866), and 34 How. (N. Y.) Pr. 129, and citing many cases; Cooper v. Newland, 17 Abb. (N. Y.) Pr. 342, 344 (1863); Langdon v. Buell, 9 Wend. (N. Y.) 80 (1832).

the debt and exist independently of it. This is the necessary legal conclusion, and is recognized as the rule by a long course of judicial decisions * * * for the legal maxim is, the incident shall pass by the grant of the principal, but not the principal by the grant of the incident." *Accessorium non ducit, sed sequitur principale.* In a later case,[1] a bond and mortgage had been given to secure the performance of a contract; after the contract had been rescinded, the assignee of the bond and mortgage brought an action for foreclosure, but it was dismissed on the ground that the rescission of the contract extinguished the indebtedness and the liability thereunder and destroyed the validity of the bond and mortgage.

Some courts have held that an assignment of the mortgage without the note or bond transfers a naked trust,[2] and that the assignee must hold the mortgage at the will and disposal of the creditor who owns the bond.[3] Where a mortgage is executed without a bond or other written evidence of the debt secured, and it contains no covenant for the payment of the debt, the assignee acquires a valid claim and lien upon the land, but nothing more.[4]

§ 98. Assignee of the note, bond or debt may foreclose, though the mortgage is not assigned.—As has been seen in the preceding section, the mortgage debt is the essential fact, while the mortgage is merely an incident. Consequently the assignee of the debt may foreclose, as he is the equitable assignee of the mortgage, though he holds neither a written nor a parol assignment of it.[5] He is the real party in interest

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[1] Wanzer v. Cary, 76 N. Y. 526 (1879). In point, Emory v. Keighan, 94 Ill. 543 (1880).

[2] Johnson v. Cornett, 29 Ind. 59 (1867); Johnson v. Walter, 60 Iowa, 315 (1882); Pope v. Jacobus, 10 Iowa, 262 (1859); Cleveland v. Cohrs, 10 Rich. (S. C.) 224 (1878).

[3] Dudley v. Cadwell, 19 Conn. 228 (1848); Huntington v. Smith, 4 Conn. 237 (1822); Medley v. Elliot, 62 Ill. 532 (1872); Webster v. Calden, 56 Me. 204 (1868); Bailey v. Gould, Walk. Ch. (Mich.) 478 (1844).

[4] Severence v. Griffith, 2 Lans. (N. Y.) 38 (1870).

[5] For the New York cases see the preceeding section. Center v. Planters' & Mechanics' Bank, 22 Ala. 743 (1853); Doe v. McLoskey, 1 Ala. 708 (1840); Willis v. Farley, 24 Cal. 490 (1864); Bennett v. Solomon, 6 Cal. 134 (1856); Ord v. McKee, 5 Cal. 515 (1855); Quinebaug Bank

and can give a full quittance of the debt, though he is not in a position to execute a legal discharge of the mortgage.[1] The rule of this section holds good even after the debt has been put into a judgment.[2]

While in a foreclosure it may not be indispensable to join the assignor as a party plaintiff or defendant, it would certainly be advisable to do so, in order to extinguish any possible interest which he might continue to have or claim. The assignor has sometimes been held a necessary party, on the ground that an assignment of the note alone carries only the equitable, and not the legal title to the security.[3]

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v. French, 17 Conn. 134 (1845); Huntington v. Smith, 4 Conn. 237 (1822); Austin v. Burbank, 2 Day (Conn.) 474 (1807); Hamilton v. Lubukee, 51 Ill. 415 (1869); Olds v. Cummings, 31 Ill. 188 (1863); Herring v. Woodhull, 29 Ill. 92 (1862); Ryan v. Dunlap, 17 Ill. 40 (1855); Holdrige v. Sweet, 23 Ind. 118 (1864); Gower v. Howe, 20 Ind. 396 (1863); Garrett v. Puckett, 15 Ind. 485 (1860); Walker v. Schreiber, 47 Iowa, 529 (1877); Preston v. Morris, 42 Iowa, 549 (1876); Bremer Co. Bank v. Eastman, 34 Iowa, 392, 394 (1872); Bank of Indiana v. Anderson, 14 Iowa, 544 (1863); Sangster v. Love, 11 Iowa, 580 (1861); Blair v. Marsh, 8 Iowa, 144 (1859); Crow v. Vance, 4 Clarke (Iowa), 434 (1857) and the cases cited at pages 440, 441; Kurtz v. Sponable, 6 Kan. 395 (1870); Burdette v. Clay, 8 B. Mon. (Ky.) 295 (1847); Vimont v. Stitt, 6 B. Mon. (Ky.) 478 (1846); Bank of United States v. Huth, 4 B. Mon. (Ky.) 450 (1844); Warren v. Homestead, 33 Me. 256 (1851); Byles v. Tome, 39 Md. 461 (1873); Ohio Life Ins. & Trust Co. v. Winn, 4 Md. Ch. Dec. 253 (1853); Briggs v. Hannowald, 35 Mich. 474 (1877); Martin v. McReynolds, 6 Mich. 70 (1858); Holmes v. McGinty, 44 Miss. 94 (1870); Laberge v. Chauvin, 2 Mo. 145 (1829); Richards v. Kountze, 4 Neb. 208 (1876); Kyger v. Ryley, 2 Neb. 20, 28 (1865); Wheeler v. Emerson, 45 N. H. 527 (1864); Whittemore v. Gibbs, 24 N. H. 484 (1852); Lane v. Sleeper, 18 N. H. 209 (1846); Rigney v. Lovejoy, 13 N. H. 253 (1842); Southerin v. Mendum, 5 N. H. 420, 432 (1831); Hyman v. Devereux, 63 N. C. 624 (1869); Perkins v. Sterne, 23 Tex. 561 (1859); Keyes v. Wood, 21 Vt. 331 (1849); Pratt v. Bank of Bennington, 10 Vt. 293 (1838); Body v. Jewsen, 33 Wis. 402 (1873); Martineau v. McCollum, 3 Pin. (Wis.) 455 (1852); Carpenter v. Longan, 83 U. S. (16 Wall.) 271 (1872); bk. 21 L. ed. 313.

[1] Wayman v. Cochrane, 35 Ill. 152 (1864).

[2] Wayman v. Cochrane, 35 Ill. 152 (1864); Swartz v. Leist, 13 Ohio St. 419 (1862); Moore v. Cornell, 68 Pa. St. 320 (1871).

[3] Bibb v. Hawley, 59 Ala. 403 (1877); Denby v. Mellgrew, 58 Ala. 147 (1877); Prout v. Hoge, 57 Ala. 28 (1876); Graham v. Newman, 21 Ala. 497 (1852); Burton v. Baxter, 7 Blackf. (Ind.) 297 (1844); Stone v. Locke, 46 Me. 445 (1859); Moore v. Ware, 38 Me. 496 (1854). See *ante* §97.

Vice versa, if the assignor should commence a foreclosure of his mortgage after having assigned the bond or debt, his assignee would certainly be a necessary party. According to the cases, however, the assignor could hardly maintain an action to foreclose. The assignee and the assignor may unite as co-plaintiffs;[1] and it has been held that the assignee can prosecute the action in the name of the assignor.[2]

§ 99. **Mortgagees owning contemporaneous mortgages, being equal liens, any one or more may foreclose.**— Where two or more bonds and mortgages have been simultaneously executed and recorded to secure independent debts, or parts of the same debt, and are equal liens upon the premises, the mortgagees may unite as co-plaintiffs to foreclose their mortgages, or any one or more may foreclose upon refusal of the others to unite as co-plaintiffs.[3] One of the mortgagees can not ignore the rights of the others, and foreclose without making them parties; if they are omitted, the decree and sale will be defective,[4] and they can redeem, or maintain a separate foreclosure.[5] The courts seem to regard such mortgages the same as though they constituted a single mortgage given to secure to the mortgagees in severalty the amounts of their respective claims.[6] In a New York case,[7] it appeared that a part of the purchase money for a farm was secured to a widow and several heirs by separate mortgages given to the widow and each of the heirs for their proportionate shares of

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[1] Holdridge v. Sweet, 23 Ind. 118 (1864).

[2] Calhoun v. Tullass, 35 Ga. 119 (1866); English v. Register, 7 Ga. 387 (1849).

[3] Potter v. Crandall, Clarke Ch. (N. Y.) 119, 123 (1839). See Greene v. Warnick, 64 N. Y. 220 (1876), reversing 4 Hun (N. Y.) 703, where the respective rights of simultaneous mortgagees came before the court in a contest for surplus moneys; Decker v. Boice, 83 N. Y. 215 (1880); Cochran v. Goodell, 131 Mass. 464 (1881). See also Perry's Appeal, 22 Pa. St. 43 (1853), collating and reviewing the Pennsylvania cases, *per* Woodward, J. See *post* § 184.

[4] But in Dungan v. American Life Ins. Co., 52 Pa. St. 253 (1866), one mortgagee foreclosed, ignoring the other, and the decree was held to divest both.

[5] Cain v. Hanna, 63 Ind. 408 (1878).

[6] See *ante* §§ 83, 84. See Granger v. Crouch, 86 N. Y. 494,499 (1881).

[7] Potter v. Crandall, Clarke Ch. (N. Y.) 119, 123 (1839), *per* Vice-Chancellor Whittlesey.

the purchase money: all the mortgages covered the same property, and were executed and recorded simultaneously. On default, one of the heirs filed a bill of foreclosure against the mortgagor, the widow and the other heirs. The court determined that a decree could not be granted, unless the widow and co-heirs had refused to unite with him as parties plaintiff, and unless all the rights of all the parties were set forth in the plaintiff's bill. Vice-Chancellor Whittlesey, writing the opinion, said: "The proper course for the complainant to pursue is to ask his mother and co-heirs to join with him in foreclosing all the mortgages in one bill; if any refuse, he can then make such as refuse, defendants. He should set forth in his bill all the circumstances of the simultaneous execution of the mortgages; and then the court can make a decree which will satisfactorily dispose of all the rights of all the parties, whether some of them are reluctant to proceed or not."

§ 100. **Owner of two mortgages can not foreclose both at same time in separate actions.**—A person who owns two or more mortgages upon the same premises, can not maintain separate actions at the same time for their foreclosure.[1] In a case[2] where this proposition was squarely before the court, Chancellor Walworth held that "the complainant not only unnecessarily, but contrary to the settled practice of the court, which is for the complainant to state all of his junior incumbrances upon the mortgaged premises in his bill to foreclose his prior mortgage, commenced two separate and distinct foreclosure suits upon these two mortgages, on one piece of land, given by the same mortgagors to the same mortgagee, and which mortgages, at the time of filing these bills, belonged to the same person." The best

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[1] Fitzhugh v. McPherson, 3 Gill (Md.) 408 (1845). In Demarest v. Berry, 16 N. J. Eq. (1 C. E. Gr.) 481 (1864), after an action had been commenced on a first mortgage, it was discovered that a second mortgage covered the same premises described in the first mortgage and other lands also, and an action was then commenced on the second mortgage; but the second foreclosure was allowed to continue only on the discontinuance of the first one. See *ante* § 99.

[2] Roosevelt v. Ellithorp, 10 Paige Ch. (N. Y.) 415, 419 (1843).

practice is to foreclose all the mortgages in one action,[1] or to foreclose the senior mortgage, setting forth in the complaint the claims upon the junior incumbrances. It matters not that the mortgages are of different dates, and given to different persons to secure different debts; it is essential only that they be owned by the same person at the time of foreclosure, and that they cover the same premises. If the junior mortgage covers other premises also, the fact should be set forth in the complaint. If the junior mortgage alone is foreclosed, the senior mortgage may remain as a valid and subsisting lien.[2]

§ 101. Assignee in bankruptcy or by general assignment, or receiver of a corporation, may foreclose.—An assignee in bankruptcy or by general assignment may foreclose a bond and mortgage which belonged to the estate of the assignor, as he succeeds to the entire legal title to the assets; he acquires no better title, however, than the assignor possessed.[3] Likewise, he may assign the mortgage, and the assignee can maintain a foreclosure.[4] The assignor is not a necessary party plaintiff or defendant; if deemed best, however, he may very properly be made a defendant, so as to extinguish any possible equities that he may claim. The assignee may decline to collect the mortgage or to prosecute a foreclosure if he believes that nothing can be realized. In such a case the bankrupt or assignor is at liberty to commence the suit in his own name, but the assignee should be brought into the action, or at least be notified of its pendency, and requested to prosecute it. The general rule is that, if an assignee abandons any property or choses in action belonging to the bankrupt's estate, or if he declines to appear as prosecutor when summoned in a suit pending in favor of the bankrupt, the right remains in or reverts to the bankrupt; he is still the legal and equitable owner of his estate as against every one but his assignee.[5]

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[1] McGowen v. Branch Bank at Mobile, 7 Ala. 823; Hawkins v. Hill, 15 Cal. 499 (1860); Phelps v. Ellsworth, 3 Day (Conn.) 397 (1809).

[2] Clements v. Griswold, 46 Hun (N. Y.) 377 (1877).

[3] Upton v. National Bank of Reading, 120 Mass. 153 (1876).

[4] Ward v. Price, 12 N. J. Eq. (1 Beas.) 543 (1859).

[5] Towle v. Rowe, 58 N. H. 394 (1878).

The receiver of an insolvent corporation may also foreclose a mortgage,[1] and his successor in office likewise succeeds to the same right.[2] "It is the settled doctrine that the receiver of an insolvent corporation represents not only the corporation, but also creditors and stockholders, and that, in his character as trustee for the latter, he may disaffirm and maintain an action as receiver * * * to recover its funds or securities invested or misapplied."[3]

§ 102. **Assignee pendente lite may continue a foreclosure.**—A person who purchases a bond and mortgage pending its foreclosure may be substituted as plaintiff and continue the action in his own name, or the action may be continued in the name of the assignor, if no one objects and the matter is not brought to the attention of the court. But objection can be made by answer if the assignment is executed before the answer is pleaded.[4] If the assignment is recorded, or the fact of the transfer is brought to the knowledge of the court, it would seem that the action can be continued only in the name of the true owner and real party in interest,[5] who should bring himself forward in the suit by petition or a supplemental bill.[6]

§ 103. **Owner of mortgage dying—Personal representatives may foreclose.**—The legal title to a bond and mortgage passes, upon the death of its owner, to his personal representatives, who are in equity trustees for the benefit of the decedent's heirs or legatees. When, at an earlier day, it was held that the mortgagee had a vested interest in the title to the lands under his mortgage, his heirs, instead of

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[1] Robinson v. Williams, 22 N. Y. 380 (1860), was an action by a receiver against a receiver; Iglehart v. Bierce, 36 Ill. 133 (1864).

[2] Iglehart v. Bierce, 36 Ill. 133 (1864).

[3] See Attorney-General v. Guardian Mutual Life Ins. Co., 77 N. Y. 272, 275 (1879), *per* Andrews, J.

[4] Mills v. Hoag, 7 Paige Ch. (N. Y.) 18 (1837); Field v. Maghee, 5 Paige Ch. (N. Y.) 539 (1836); Wallace v. Dunning, Walk. Ch. (Mich.) 416 (1844). See Smith v. Bartholomew, 42 Vt. 356 (1869).

[5] Bigelow v. Booth, 39 Mich. 622 (1878). See Ellis v. Sisson, 96 Ill. 105 (1880). See *post* §§ 130–133.

[6] Foster v. Deacon, 6 Madd. 59 (1821); Coles v. Forrest, 10 Beav. 552 (1847); Fisher on Mortgages, §§ 385–388.

his personal representatives, were held to succeed to that interest upon his death. But at present it is the uniform law of America that a bond and mortgage are only securities, and pass as personal property to the control and disposition of a decedent's personal representatives;[1] and the absence of a personal obligation by bond, note or covenant for the debt, does not affect the right of the personal representatives to the possession of the mortgage.

A personal representative upon coming into due possession and control of a bond and mortgage may maintain an action for its foreclosure; indeed, he is the only person who can foreclose the mortgage, as he holds the entire legal title to it.[2] The administrator of a mortgagee, to whom the mortgage was given to secure an annuity, may foreclose, if

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[1] Kinna v. Smith, 3 N. J. Eq. (2 H. W. Gr.) 14 (1834); Grace v. Hunt, 1 Cooke (Tenn.) 344 (1813); Thornborough v. Baker, 3 Swan. 628 (1675); Tabor v. Tabor, 3 Swan. 636 (1679). See the cases cited below.

[2] People v. Keyser, 28 N. Y. 226 (1863); Newton v. Stanley, 28 N. Y. 61 (1863); Peck v. Mallams, 10 N. Y. 509 (1853); Renaud v. Conselyea, 7 Abb. (N. Y.) Pr. 105 (1858), reversing 4 Abb. (N. Y.) Pr. 280 and 5 Abb. (N. Y.) Pr. 346; Routh v. Smith, 5 Conn. 135, 139 (1823); Buck v. Fischer, 2 Colo. 182 (1873); Dixon v. Cuyler, 27 Ga. 248 (1859). In Hunsucker v. Smith, 49 Ind. 114 (1874), an administrator held personally a mortgage on the lands of the decedent. Merrin v. Lewis, 90 Ill. 505 (1878); Nolte v. Libbert, 34 Ind. 163 (1870); Cryst v. Cryst, Smith (Ind.) 370 (1848); Talbot v. Dennis, Smith (Ind.) 357 (1849); White v. Rittemeyer, 30 Iowa, 272 citing many cases; Grimmel v. Warner, 21 Iowa, 13 (1866); Burton v. Hintrager, 18 Iowa, 348, 351 (1865). So by statute in Missouri, Riley's Adm'r v. McCord's Adm'r, 24 Mo. 265 (1857), (R. C. 1845, p. 749); also in Michigan, Albright v. Cobb, 30 Mich. 355 (1874). See Webster v. Calden, 56 Me. 204, 211 (1868); Fay v. Cheney, 31 Mass. 399 (1833); Dewey v. VanDeusen, 21 Mass. (4 Pick.) 19 (1826); Smith v. Dyer, 16 Mass. 18 (1819); Scott v. McFarland, 13 Mass. 309 (1816); Baldwin v. Allison, 4 Minn. 25 (1860); Griffin v. Lovell, 42 Miss. 402 (1869); Mutual Life Ins. Co. v. Sturges, 32 N. J. Eq. (5 Stew.) 678 (1880); s. c. 33 N. J. Eq. (6 Stew.) 328 (1880); Gibson v. Bailey, 9 N. H. 168 (1838); Trimmier v. Thomson, 10 Rich. (S. C.) 164 (1877); Collamer v. Langdon, 29 Vt. 32 (1856); Pierce v. Brown, 24 Vt. 165 (1852); Weir v. Mosher, 19 Wis. 311 (1865). For the English cases see Cave v. Cork, 2 Y. & C. C. C. 130 (1843); Wilton v. Jones, 2 Y. & C. C. C. 244 (1843); Hobart v. Abbott, 2 P. Wms. 643 (1731); Meeker v. Tanton, 2 Ch. Cas. 29 (1680); Gobe v. Carlisle, 2 Vern. 67 (1688), cited in Clerkson v. Bowyer, 2 Vern. 67 (1688). Fisher on Mortgages, §§ 359, 360.

the condition was broken during the decedent's life-time, and recover the unpaid annuity.[1] If two or more executors or administrators have qualified, all should unite as plaintiffs; but if any who have qualified refuse to join as co-plaintiffs, they may be made defendants to the action; they must be brought before the court in some capacity.[2] In most states it is not necessary to bring the heirs of the mortgagee into the action,[3] while in a few they are held indispensable parties.[4]

Where a testator dies pending his foreclosure, his executor after qualifying may properly revive the action; and he may do this, though his co-executor be the owner of the equity of redemption. In such a case it was held advisable in reviving the action to make the co-executor a defendant personally, as he was the owner of the equity of redemption, and a defendant also in his representative capacity; and the action was sustained upon the principle that one co-executor may maintain an action in equity against another co-executor to compel the payment of a debt owing by him to the estate.[5] The executor of a trustee has been allowed to foreclose a mortgage held in

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[1] Marsh v. Austin, 83 Mass. (1 Allen) 235 (1861); Pike v. Collins, 33 Me. 38 (1851).

[2] Rathbone v. Lyman, 8 R. I. 155 (1865); but see Alexander v. Rice, 52 Mich. 451 (1884).

[3] Dayton v. Dayton, 7 Ill. App. 136 (1879); Griffin v. Lovell, 42 Miss. 402 (1869). This is the rule in New York.

[4] Huggins v. Hall, 10 Ala. 283 (1846); McIver v. Cherry, 8 Humph. (Tenn.) 713 (1848); Atchison v. Surguine, 1 Yerg. (Tenn.) 400 (1830). They were necessary parties in Illinois until the statute of 1874, Ch. 95, § 9, dispensed with the old rule. Dayton v. Dayton, 7 Ill. App. 136 (1879). In Etheridge v. Vernoy, 71 N. C. 184 (1874), the heirs were held not necessary where the mortgagee had assigned the bond and mortgage absolutely and died insolvent without the state, but ordinarily the heirs of the mortgagee are held necessary parties. For the English cases see Fisher on Mortgages, § 359; Scott v. Nicoll, 3 Russ. 476 (1827); Ellis v. Guavas, 2 Ch. Cas. 50 (1680); Freak v. Hearsey, 1 Ch. Cas. 51 (1664).

[5] McGregor v. McGregor, 35 N. Y. 218, 222 (1866), Wright and Smith, JJ., writing the opinions, and relying largely upon Smith v. Lawrence, 11 Paige Ch. (N. Y.) 206 (1844). In Miller v. Donaldson, 17 Ohio, 264 (1848), an administrator *de bonis non* foreclosed a mortgage belonging to the estate of a testator whose executor was his mortgage debtor; the fact that he was made executor was held not to extinguish the debt.

trust by the decedent, where the trust was well defined and did not rest in the discretion of the trustee;[1] but the general rule is for the successor of the trustee to foreclose.[2]

§ 104. Vendor under land contract dying—Personal representatives may foreclose.—In the foreclosure of a land contract, the rule as stated above is somewhat limited. The personal representatives of a deceased vendor may foreclose a land contract, but they must either show that they have tendered, and are able and ready to give a deed with a good title, or else they must make the heirs or devisees of the deceased vendor, inheriting his legal title, parties to the action, so that they may be bound by the decree. Upon this subject Judge Earl has said that "by the contract of sale, the land conveyed became real estate in the purchasers, and would descend as such to their heirs or devisees. The vendor held the legal title as trustee for the purchasers. The purchase money due upon the contract was, as to him, personal estate, and upon his death passed to his personal representatives, as part of his personal estate; and the legal title to the real estate passed to his heirs or devisees in trust for the purchasers."[3]

§ 105. Owner of mortgage dying—Heirs, devisees and legatees generally can not forclose.—As has been shown in the preceding section, the heirs of a deceased mortgagee receive no title whatever to the bond and mortgage; consequently, having no interest in the security, they can not

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[1] Bunn v. Vaughan, 1 Abb. App. Dec. (N. Y.) 253 (1867).

[2] See *post* §§ 110–113.

[3] Thomson v. Smith, 63 N. Y. 301, 303 (1875), citing Dart on Purchasers and Vendors, 121; Moyer v. Hinman, 13 N. Y. 180 (1855); Lewis v. Smith, 9 N. Y. 502, 510 (1854); Moore v. Burrows, 34 Barb. (N. Y.) 173 (1861); Adams v. Green, 34 Barb. (N. Y.) 176 (1861); Champion v. Brown, 6 Johns. Ch. (N. Y.) 398 (1822). In Schroeppel v. Hopper, 40 Barb. (N. Y.) 425 (1863), the heirs at law of a decedent executed to his administrator a deed of their title to the premises to enable her to transfer it to the purchaser in fulfillment of a land contract, and the court held, in an action to foreclose the land contract, that the heirs were not necessary parties. In Leaper v. Lyon, 68 Mo. 216 (1878), on the other hand, the heirs were held necessary parties, even though a deed executed by them had been tendered to the vendee by the personal representatives. See Anshutz' App. 34 Pa. St. 375 (1859).

maintain an action for its foreclosure.[1] In a case where no personal representative had been appointed, an heir was allowed to foreclose on filing an indemnifying security to protect the mortgagor from being subsequently called upon for payment.[2] Neither can an heir make such an assignment of a mortgage as will entitle the assignee to maintain a foreclosure.[3] Where a mortgagee died pending a foreclosure, his heirs were allowed to revive the action;[4] and after administration had been closed upon the affairs of a decedent, his distributees were allowed to foreclose a mortgage belonging to his estate.[5] In an action to redeem from a mortgage, the heirs and personal representatives of the mortgagee have both been held necessary parties.[6]

Where, however, a mortgage is specifically bequeathed to a legatee, the entire title passes to him and he may foreclose the mortgage.[7] But even in such a case it has been held that the personal representatives should be made defendants.[8] Where the legacy is made a general bequest to be paid out of the mortgage, the action may properly be brought by the executor, making the legatee a defendant;[9] and an executor has been allowed to foreclose, even

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[1] Anthony v. Peay, 18 Ark. 24 (1856); Roath v. Smith, 5 Conn. 135, 139 (1823); Kinna v. Smith, 3 N. J. Eq. (2 H.W. Gr.) 14 (1834). *Contra*, English authorities: Gobe v. Carlisle, cited in 2 Vern. 67 (1688); Clerkson v. Bowyer, 2 Vern. 67 (1688); Fisher on Mortgages, § 364. See *ante* § 103, and the cases cited.

[2] Babbitt v. Bowen, 32 Vt. 437 (1859).

[3] Douglass v. Durin, 51 Me. 121 (1863).

[4] McIver v. Cherry, 8 Humph. (Tenn.) 713 (1848); Atchison v. Surguine, 1 Yerg. (Tenn.) 400 (1830).

[5] Hill v. Boyland, 40 Miss. 618 (1866).

[6] Hilton v. Lothrop, 46 Me. 297 (1858): Haskins v. Hawkes, 108 Mass. 379 (1871).

[7] White v. Secor, 58 Iowa, 533, 536 (1882); Grimmell v. Warner, 21 Iowa, 13 (1866); Trenton Banking Co. v. Woodruff, 2 N. J. Eq. (1 H.W. Gr.) 117 (1838). For the English authorities, see Fisher on Mortgages, § 355; Wood v. Williams, 4 Madd. 186 (1819); Wetherell v. Collins, 3 Madd. 255 (1818); Hichens v. Kelly, 2 Sm. & G. 264 (1854). The heir is not a necessary party; Fisher on Mortgages, § 359; How v. Vigures, 1 Rep. in Ch. 32 (1629); Skipp v. Wyatt, 1 Cox Ch. 353 (1787).

[8] Gibbes v. Holmes, 10 Rich. (S. C.) Eq. 484, 493 (1859).

[9] Newton v. Stanley, 28 N. Y. 61 (1863). See Buck v. Fischer, 2 Colo 182 (1873).

where the mortgage has been specifically bequeathed.[1] It is believed that such a foreclosure will always be allowed, if there should be a deficiency of assets to pay the decedent's debts.

§ 106. **An executor or administrator to whom a mortgage is executed may foreclose.**—Whenever a bond and mortgage are executed or assigned[2] to the personal representative of a decedent, to secure assets belonging to his estate, the personal representative may bring an action in his official capacity for foreclosure. The same principle is true where a personal representative holds funds in the capacity of a trustee; and the fact that the investment of trust funds in bonds and mortgages is so highly favored by courts, renders this principle very important in the administration of estates. The persons beneficially interested need not be brought into the action.[3] The character of the personal representative should clearly appear in the bond and mortgage, and must be specifically alleged in the pleadings to foreclose.[4]

In a leading New York case[5] the mortgagee was described as "T. B., executor of the estate of T. T., deceased;" *prima facie*, the mortgage was held to be the private property of T. B. After the death of T. B., an administrator of T. T., with the will annexed, filed a bill for the foreclosure of the mortgage. The court held that the personal representatives of T. B. were necessary parties, and that the plaintiff should

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[1] Cryst v. Cryst, Smith (Ind.) 370 (1848–49).

[2] Flagg v. Johnston, 39 Ga. 26 (1869).

[3] For the English cases, see Wood v. Harman, 5 Madd. 368 (1820); Locke v. Lomas, 5 DeG. & S. 326 (1852); s. c. 16 Jur. 814 (1852–53).

[4] Flagg v. Johnston, 39 Ga. 26 (1869).

[5] Peck v. Mallams, 10 N. Y. 509, 537, 546 (1853), opinions by Willard, Johnson and Mason, JJ. In People v. Keyser, 28 N. Y. 226 (1863), (reported below in 39 Barb. 587; 17 Abb. (N. Y.) Pr. 215), a mortgage was made to "M. & W., executors of E.;" after the death of M., the question arose as to whether W., the surviving executor, could execute a sufficient discharge of the mortgage, and whether the executors of M. ought not to unite with him in executing the discharge. It was held that the discharge by W. was sufficient. *Quære*, as to whether the surviving mortgagee could not have maintained an action for the foreclosure of the mortgage, if he had sufficient authority to execute a discharge of the debt. See *ante* § 81, on the doctrine of survivorship among joint mortgagees.

show by proper allegations that the mortgage was a part of the assets of the estate of T. T. In a similar case,[1] a mortgage was executed to "P., acting executor of the estate of D." Upon the death of P., it was held that the mortgage belonged *prima facie* to his estate, and could be foreclosed by his personal representatives, but later the court decided that evidence was admissible showing the real ownership of the mortgage; and it then appearing that it actually belonged to D., the personal representatives of P. were not allowed to maintain the action. And where an executor invests estate funds in his individual name and capacity, his personal representative alone, and not his successor, can foreclose the mortgage.[2]

§ 107. **The successor in office of an executor or administrator may foreclose.**—When a mortgage is made to A., *as* executor or administrator, his successor in office receives the legal title to the mortgage, and may foreclose it. The personal representatives of A. have nothing whatever to do with the bond and mortgage, which legally and equitably belong to the assets of the deceased person whom he represented.[3] Thus, a mortgage had been executed to an administrator to secure a widow's dower; upon his death his successor and not his personal representative was allowed to foreclose.[4]

§ 108. **Foreign executors and administrators—When they may foreclose.**—For more than a half century it has been well established as a principle of inter-state law, that an executor or administrator, appointed in a foreign political jurisdiction, can not maintain a suit in the courts of other states; and the word "foreign" is used in each state to designate all jurisdictions and laws without itself. While foreign laws are recognized in all courts under the principle

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[1] Renaud v. Conselyea, 4 Abb. (N. Y.) Pr. 280 (1856); s. c. 5 Abb. (N. Y.) Pr. 346 (1857). On re-argument, Strong, J., revised his opinion, writing the decision in 7 Abb. (N. Y.) Pr. 105 (1858).

[2] Caulkins v. Bolton, 98 N. Y. 511 (1885).

[3] Renaud v. Conselyea, 4 Abb. (N. Y.) Pr. 280 (1856). See *post* § 113.

[4] Brooks v. Smyser, 48 Pa. St. 86 (1864).

of *lex loci contractus*, the machinery used for the enforcement of such laws in their native jurisdictions is never recognized or allowed in any other jurisdiction. "The right which an individual may claim to personal property in one country, under title from a person domiciled in another, can only be asserted by the legal instrumentalities which the institutions of the country where the claim is made have provided. The foreign law furnishes the rule of decision as to the validity of the title to the thing claimed; but in respect to the legal assertion of that title it has no extra-territorial force. As a result of this doctrine it is now generally held everywhere, and it is well settled in this state, that an executor or administrator appointed in another state has not, as such, any authority beyond the sovereignty by virtue of whose laws he was appointed."[1] Accordingly a foreign executor or administrator can not foreclose a mortgage by an equitable action in New York.[2]

If a foreign personal representative desires to foreclose a mortgage in New York, or in any state outside of the political jurisdiction in which he was appointed, it is necessary for him to take out letters testamentary or of administration in some probate court within the state where the mortgaged premises are situated; otherwise he can not obtain such a standing in a court of equity as will enable him to maintain an action for foreclosure.[3] "It is not because the executor or administrator has no right to the assets of the deceased,

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[1] Parsons v. Lyman, 20 N. Y. 103 (1859), *per* Denio, J., citing Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153 (1814); Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45 (1823); Vroom v. VanHorne, 10 Paige Ch. (N. Y.) 549 (1844).

[2] Peterson v. Chemical Bank, 32 N. Y. 21, 40 (1865), affirming 29 How. (N. Y.) Pr. 240; Parsons v. Lyman, 20 N. Y. 112 (1859); Brown v. Brown, 1 Barb. Ch. (N. Y.) 189 (1845); Vermilya v. Beatty, 6 Barb. (N. Y.) 429 (1848); Lawrence v. Elmendorf, 5 Barb. (N. Y.) 73 (1848); Smith v. Webb, 1 Barb. (N. Y.) 232 (1847); Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353 (1822); Stone v. Scripture, 4 Lans. (N. Y.) 186 (1870). See the cases cited above.

[3] See the cases cited in the preceding notes to this section. Alexander v. Rice, 52 Mich. 451 (1884); Woodruff v. Mutchler, 34 N. J. Eq. (7 Stew.) 33 (1881), and note; Porter v. Trall, 30 N. J. Eq. (3 Stew.) 106 (1878); Trecothick v. Austin, 4 Mason C. C. 16 (1825). *Contra*, Heywood v. Hartshorn, 55 N. H. 476 (1875).

existing in another country, that he is refused a standing in the courts of such country, for his title to such assets, though conferred by the law of the domicile of the deceased, is recognized everywhere. Reasons of form, and a solicitude to protect the rights of creditors and others, resident in the jurisdiction in which the assets are found, have led to the disability of foreign executors and administrators, which disability, however inconsistent with principle, is very firmly established."[1]

§ 109. **Methods of avoiding rule requiring domestic administrator for plaintiff.**—The rule, requiring a foreign personal representative to take out letters testamentary or of administration, may, however, be avoided by his making an assignment of the bond and mortgage to some person residing in the state where the premises are situated; and the assignee may maintain an action for their foreclosure.

It seems that the disability of a foreign executor or administrator to sue in other states does not attach to the *subject-matter of the action*, but to the *person of the plaintiff*.[2] So a foreign specific legatee of a bond and mortgage may foreclose, on the ground that he is legally and equitably the absolute owner of them.[3] But such a foreclosure by a specific legatee or an assignee will not produce a perfect record title, inasmuch as no evidence of the authority of the personal representative to act in the place of the deceased mortgagee, and to execute a proper assignment of the mortgage, is to be found in the state.[4] Where a voluntary payment of

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[1] Peterson v. Chemical Bank, 32 N. Y. 43 (1865). Hiram Denio, Ch. J., has written the opinions in the leading cases of Parsons v. Lyman, 20 N. Y. 103 (1859), and Peterson v. Chemical Bank (*supra*), with so much learning and with such clearness, after an exhaustive review of all the cases which in any way affect the principles stated in this section, that they are worthy of the careful study of any one who has occasion to examine the law affecting the extra-territorial rights of foreign executors and administrators. Attention is also called to the elaborate briefs printed with the opinion in Peterson v. Chemical Bank.

[2] Peterson v. Chemical Bank, 32 N. Y. 43 (1865); Smith v. Webb, 1 Barb. (N. Y.) 232 (1847); Smith v. Tiffany, 16 Hun (N. Y.) 552 (1879), *per* Hardin, J., collating and reviewing the cases upon this point.

[3] Smith v. Webb, 1 Barb. (N. Y.) 232 (1847).

[4] Smith v. Tiffany, 16 Hun (N. Y.) 552 (1879).

the mortgage debt is made by the mortgagor to a foreign executor or administrator of the mortgagee, such payment will discharge the debt and cancel the lien. "The result of the cases seems to be that a foreign executor or administrator, appointed by the proper tribunal of the decedent's domicile, is authorized to take charge of the property here and to receive debts due to the decedent in this state, where there was no conflicting grant of letters here, and where it could be done without suit."[1] But in a recent case in New York, where an administrator had been appointed upon the estate of a deceased non-resident, and the mortgagor nevertheless paid his mortgage debt to a foreign administrator who was subsequently appointed at the intestate's place of residence, the domestic administrator in New York was allowed to foreclose the bond and mortgage, and the court determined that, under the circumstances, payment to the foreign administrator was no defense to the action.[2] In foreclosures, as in other actions, an objection that the plaintiff is a foreign executor or administrator, and therefore legally disqualified from suing, must be taken by demurrer or answer, or it will be considered waived.[3]

It is stated by Mr. Thomas,[4] that the foreclosure of a mortgage by advertisement under a power of sale, and pursuant to statute, is a matter of contract and not of jurisdiction,

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[1] Vroom v. VanHorne, 10 Paige Ch. (N. Y.) 549 (1844), *per* Chancellor Walworth, cited with approval and quoted by Denio, J., in Parsons v. Lyman, 20 N. Y. 115 (1859). The same principle is stated as good law by Judge Story, in Trecothick v. Austin, 4 Mason C. C. 33 (1825).

[2] Stone v. Scripture, 4 Lans. (N. Y.) 186 (1870).

[3] McBride v. Farmers' Bank of Salem, 26 N. Y. 457 (1863); Zabriskie v. Smith, 13 N. Y. 322, 326 (1855); Robbins v. Wells, 26 How. (N. Y.) Pr. 15 (1863).

[4] Thomas on Mortgages, p. 476, citing as authority, Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45 (1823); Averill v. Taylor, 5 How. (N. Y.) Pr. 476 (1850); but it is very doubtful whether this proposition would be approved at the present day. The former case was decided by Chancellor Kent in 1823, under a statute which made provision for the foreclosure of mortgages containing a power, and the mortgage in that case contained a special power which led the Chancellor to say that the foreclosure was a matter of private contract and not of court jurisdiction. He cited a colony statute as old as 1774. The court, in Averill v. Taylor, seemed to be in much doubt as

and that a foreign executor or administrator may therefore adopt that method of foreclosure without seeking the authority of our courts of probate.

§ 110. **Trustees may foreclose.**—It may be stated as a general rule that a person who is in any manner appointed the trustee of a person owning a mortgage or an interest therein, may maintain an action in his own name, as trustee, for its foreclosure.[1] So, also, a trustee, like a personal representative, to whom a mortgage is executed to secure funds of the trust estate, may foreclose in his own name as such trustee.[2] When the trust is merely nominal, it is usual for the trustee to join the *cestuis que trust* with him as co-plaintiffs; indeed, some courts have held that the beneficiaries are necessary parties plaintiff.[3] It is believed,

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to whether the proposition was good law, and with some hesitation relied upon Chancellor Kent's opinion. See Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129 (1817). The proposition, however, is supported by the late case of Hayes v. Frey, 54 Wis. 503, 518 (1882), which relies upon Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45 (1823).

[1] Fisher on Mortgages, §§ 355, 358, 365. For the English cases, see Osbourn v. Fallows, Russ. & M. 741 (1830); Adams v. Paynter, 1 Coll. 530 (1844); Smith v. Chichester, 2 Dru. & War. 404 (1839); Browne v. Lockhart, 10 Sim. 426 (1840); Wilton v. Jones, 2 Y. & C. C. C. 244 (1843); Allen v. Knight, 5 Hare, 280 (1846); Barkley v. Reay, 2 Hare, 306 (1843).

[2] Hays v. Dorsey, 5 Md. 99 (1853), act of 1833, chap. 181; Hackensack Water Co. v. DeKay, 36 N. J. Eq. (9 Stew.) 548 (1883). In Hays v. Galion G. L. & C. Co., 29 Ohio St. 330 (1876), the trustee owned in his own right no part of the mortgage debt, and the relation of trustee did not appear on the face of the notes or mortgage. Holmes v. Boyd, 90 Ind. 332 (1883), where a note and collateral mortgage were held in the name of a cashier for his bank. See *ante* § 106; N. Y. Code Civ. Proc. § 449.

[3] Hitchcock's Heirs v. United States Bank of Penn., 7 Ala. 386 (1845); Freeman v. Schofield, 16 N. J. Eq. (1 C. E. Gr.) 28 (1863); Large v. Van Doren, 14 N. J. Eq. (1 McCart.) 208 (1862); Woodruff v. Depue, 14 N. J. Eq. (1 McCart.) 168, 176 (1861); Stillwell v. McNeely, 2 N. J. Eq. (1 H. W. Gr.) 305 (1840); Davis v Hemingway, 29 Vt. 438 (1857); Fleming v. Holt, 12 W. Va. 143 (1877). In Cassidy v. Bigelow, 25 N. J. Eq. (10 C. E. Gr.) 112, (1874), the trustee and *cestui que trust* united as plaintiffs. In Wright v. Bundy, 11 Ind. 398 (1858), it was held that the beneficiaries were not necessary parties, but that they might properly be united as co-plaintiffs. This case was thoroughly argued twice by able counsel. For the English authorities, see Fisher on Mortgages, § 367; Goldsmid v. Stonehewer, 9 Hare Appx. 39; s. c. 17 Jur.

however, that if a beneficiary refuses to become a co-plaintiff, he can be made a defendant;[1] it is best, at least, when possible, to bring all parties interested in the trust within the jurisdiction of the court.

Where the number of beneficiaries is so large that great inconvenience and expense would be incurred by making them parties to the bill of foreclosure, the courts may, in their discretion, dispense with a strict adherence to the rule.[2] Thus, in one case a mortgage was executed to a person as "the agent and trustee of the several subscribers to the loan," which was of large amount; the mortgagee was allowed to file a bill for foreclosure in his own name, without bringing the beneficiaries into the action.[3] The complaint in such a case should state that the foreclosure is for the benefit of the bondholders, and that they are too numerous to be made parties.[4]

§ 111. **Beneficiaries—When not necessary parties.**—In the foreclosure of railroad mortgages this limitation has become so well established as to be a separate rule; the bondholders are never necessary nor proper parties plantiff or defendant, but there may be circumstances which would authorize the court to admit any of them as defendants on

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199 (1852), holding that the beneficiaries are unnecessary parties. See Wood v. Harman, 5 Madd. 368 (1820); Locke v. Lomas, 5 DeG. & S. 326 (1852); s. c. 16 Jur. 814 (1852). But where the trustee had died, it was deemed best to make the *cestuis que trust* parties, Stansfield v. Hobson, 16 Beav. 189 (1852).

[1] Large v. Van Doren, 14 N. J. Eq. (1 McCart.) 208 (1862); Davis v. Hemingway, 29 Vt. 438 (1857). See Fisher on Mortgages, § 373, for English cases; Minn v. Stant, 12 Beav. 190 (1849); s. c. 15 Beav. 49; Browne v. Lockhart, 10 Sim. 426 (1840).

[2] See *post*, §§ 112, 186, for English and other authorities; Fisher on Mortgages, § 374. In point, Swift v. Stebbins, 4 Stew. & P. (Ala.) 447 (1833). In Carpenter v. Canal) Co., 35 Ohio St. 307 (1880), the lienholders were so numerous that it was impracticable to bring them all before the court, and one, as trustee, prosecuted for all. See Bardstown & Louisville R. R. Co. v. Metcalfe, 4 Met. (Ky.) 199 (1862).

[3] Willink v. Morris Canal Banking Co., 4 N. J Eq. (3 H. W. Gr.) 377 (1843).

[4] Carpenter v. Blackhawk Gold Mining Co., 65 N. Y. 43 (1875); King v. The Merchants' Exchange Co., 5 N. Y. 547 (1851).

their own application.[1] Another limitation to the general rule is made in cases where a trustee is appointed to receive and administer a fund for the benefit of creditors; he may foreclose without bringing the creditors before the court.[2] In some cases the creditors are so numerous that it would be simply impossible to make all of them parties to the action; furthermore, creditors are often decribed as a class, and not by their individual names.

§ 112. **Beneficiaries, cestuis que trust, may sometimes foreclose.**—It is stated by Justice Story, on the authority of English cases, that a beneficiary, or *cestui que trust*, may maintain an action for the foreclosure of a mortgage belonging to his trust estate, or in which he has an interest.[3] So one or two beneficiaries may bring a foreclosure for themselves and other beneficiaries,[4] especially if the trustee is, for any reason, disqualified from acting.[5] But in such cases it also necessary to make the trustee a party plaintiff or defendant to the action, as the legal title to the mortgage,

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[1] See Jones on Railroad Securities, §§ 431, 437.

[2] Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254 (1845).

[3] Ala. Life Ins. & Trust Co. v. Pettway, 24 Ala. 544 (1854); Carradine v. O'Connor, 21 Ala. 573 (1852); Marriott v. Givens, 8 Ala. 694 (1846); McGowan v. Branch Bank Mobile, 7 Ala. 823 (1845); Somes v. Skinner, 16 Mass. 348 (1820); Martin v. McReynolds, 6 Mich. 70 (1858); Hackensack Water Co. v. DeKay, 36 N. J. Eq. (9 Stew.) 548 (1883); Mitchell v. McKinney, 6 Heisk. (Tenn.) 83 (1871); Wood v. Williams, 4 Madd. 186 (1819); Hichens v. Kelly, 2 Sm. & G. 264 (1854); Story Eq. Pl. §§ 201, 209. See N. Y. Code Civ. Proc. § 449.

[4] Berry v. Bacon, 28 Miss. 318 (1854).

[5] See Ashhurst v. Montour Iron Co., 35 Pa. St. 30 (1860), where the *cestuis que trust* were numerous bondholders, and the trustee was for some reason disqualified from acting; also Davis v. N. Y. Concert Co., 41 Hun (N. Y.) 492 (1886), where the trustee for numerous bondholders refused to foreclose at their request. Winton's Appeal, 87 Pa. St. 77 (1878). In Bank of Commerce v. Lanahan, 45 Md. 396 (1876), a deed, intended as a mortgage, was executed to one of a number of creditors to secure his own claim and the claims of others; it was held that the *cestuis que trust* could not maintain an action for foreclosure, although the grantee in the deed was a trustee, and the other creditors were beneficiaries. But in Dorsey v. Thompson, 37 Md. 25 (1872), the *cestuis que trust* foreclosed a mortgage, making the trustee a defendant.

if not the equitable title, is vested in him.[1] The best practice is for the trustee and the beneficiary to unite as co-plaintiffs.[2]

§ 113. Mortgages to persons in official capacity; they or their successors may foreclose.—A person to whom a bond and mortgage are executed in an official capacity may foreclose the same in his own name as such officer, as he holds the entire legal title; the real party, who equitably owns the fund, is not held a necessary party to the action. So also a successor in office may foreclose in his own name as such officer, as the courts hold him to be the equitable assignee of the security.[3] His predecessor, in whose name the mortgage was taken, need not be brought into the action, and upon his death his personal representatives are not necessary parties. The rule of this section is in harmony with the principles stated in §§ 107 and 110, as to executors, administrators and trustees. Thus the successor of a receiver of an insolvent corporation is allowed to sue in his own name as such receiver.[4] Illustrations may be taken from the reported cases, where mortgages have been given to guardians of infants[5] and lunatics,[6] to the comptroller of a

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[1] In Hays v. Lewis, 21 Wis. 663 (1867), the trustee was held an indispensable party, and it was questioned whether the *cestuis que trust* alone could maintain an action for foreclosure.

[2] See *ante* §§ 110, 111 and notes.

[3] Iglehart v. Bierce, 36 Ill. 133 (1864); Hiatt v. The State-Kitselman, 110 Ind. 472 (1886); Vanarsdall v. The State, 65 Ind. 176 (1879).

[4] Leavitt v. Pell, 27 Barb. (N. Y.) 322 (1858); affirmed 25 N. Y. 474 (1862); Iglehart v. Bierce, 36 Ill. 133 (1864).

[5] Lyon v. Lyon, 67 N. Y. 250 (1876); Cleveland v. Cohrs, 10 Rich. (S. C.) 224 (1878). In Walter v. Wala, 10 Neb. 123 (1880), a note and mortgage were turned over by an administrator to a guardian as a part of his ward's distributive share. In Commonwealth v. Watmough, 12 Pa. St. 316 (1849), a mortgage was executed to a guardian; the wards, on becoming of age, assigned their interests, and the assignee was held to have the full legal title and allowed to foreclose. See Caulkins v. Bolton, 98 N. Y. 511 (1885); Norton v. Ohrens, (Mich.) 12 West. Rep. 415 (1888); Miller v. Clark, 56 Mich. 337 (1885).

[6] See Peabody v. Peabody, 59 Ind. 556 (1877), for an action brought by a guardian or committee of a lunatic to foreclose a mortgage executed to the lunatic while sane.

state,[1] to the state superintendent of insurance,[2] to United States loan commissioners,[3] and to personal representatives[4] and trustees.[5] It is not necessary for a general guardian, to whom as such a mortgage has been assigned, to join his ward as a party in an action for foreclosure.[6]

§ 114. **A married woman owning a mortgage may foreclose.**—It is now a universal principle of law in England and in America that a married woman can own and control a separate estate in real and in personal property, and that she is entitled to all the rights and remedies pertaining to property which a *feme sole* possesses, and may enforce them as fully in the courts. She can own and foreclose a bond and mortgage in her own name, and it is not necessary for her to make her husband a party to the action, as he can have no interest in it.[7] Where a bond and mortgage were executed to a husband and wife, the wife was held entitled to foreclose in her own name on the death of the husband, upon the ground of survivorship in joint ownership;[8] and it appearing that the money was actually loaned by the wife, that fact was held as another circumstance which entitled her to foreclose in her own name. And so a discharge by a husband of a mortgage executed to him and his wife, but

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[1] Flagg v. Munger, 9 N. Y. 483 (1854), holding that the the comptroller of New York had power to foreclose a mortgage assigned to him by a bank to secure the redemption of its notes; so to the treasurer of the state of New Jersey, Townsend v. Smith, 12 N. J. Eq. (1 Beas.) 350 (1858); Supervisors of Iowa Co. v. Mineral Point R. R., 24 Wis. 93 (1869). See Delaplaine v. Lewis, Governor, etc., 19 Wis. 476 (1865).

[2] Smith v. Lombardo, 15 Hun (N. Y.) 415 (1878), where the action was in the name of the deputy.

[3] Thompson v. Comm'rs, 79 N. Y. 54 (1879); York v. Allen, 30 N. Y. 104 (1864); Pell v. Ulmar, 18 N. Y. 139 (1858); Olmstead v. Elder, 5 N. Y. 144 (1851); Powell v. Tuttle, 3 N. Y. 396 (1850); Wood v. Terry, 4 Lans. (N. Y.) 80 (1871). The foreclosure of United States loan mortgages is strictly statutory, and is governed by the laws of the United States; Laws of 1837, Ch. 150.

[4] See *ante* § 106.

[5] See *ante* § 110.

[6] Bayer v. Phillips, 17 Abb. (N. Y.) N. C. 425 (1886), with foot note. N. Y. Code Civ. Proc. § 1686.

[7] Bartlett v. Boyd, 34 Vt. 256 (1861). So she can assign her mortgage; Kamena v. Huelbig, 23 N. J. Eq. (8 C. E. Gr.) 78 (1872).

[8] Shockley v. Shockley, 20 Ind. 108 (1863).

really belonging to her, will not prevent her foreclosing.[1] The marriage of a mortgagee, a *feme sole*, to a mortgagor will not extinguish the mortgage; the mortgage remains unaffected and may be foreclosed.[2] A husband can execute a valid mortgage on his lands to his wife, who can foreclose against him.[3] She can also foreclose a mortgage assigned to her on her husband's lands. The assignment does not operate as a discharge of the mortgage.[4]

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[1] McKinney v. Hamilton, 51 Pa. St. 63 (1865).

[2] This has been the law in New York since the act of 1848. Power v. Lester, 17 How. (N. Y.) Pr. 413 (1858); aff'd 23 N. Y. 527 (1861), a leading case.

[3] Mix v. Andes Ins. Co., 9 Hun (N. Y.) 397 (1876); Wochoska v. Wochoska, 45 Wis. 423 (1878); Putnam v. Bicknell, 18 Wis. 333 (1864). Such a mortgage was held void in Terry v. Wilson, 63 Mo. 493 (1876).

[4] Bean v. Boothby, 57 Me. 295 (1869); Trenton Banking Co. v. Woodruff, 2 N. J. Eq. (1 H. W. Gr.) 117 (1838).

CHAPTER VI.

PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE.

OWNERS OF THE FEE TITLE.

§ 115. Introductory.
116. General principles.
117. Mortgagor, still owning the equity of redemption, necessary.
118. Mortgagor, no longer owning the equity of redemption, not necessary.
119. Mortgagor always a desirable defendant.
120. Mortgagor, still owning only a divided or undivided part of the premises, or being a tenant in common by descent or grant, a necessary party.
121. Mortgagor, being a tenant in common or by the entirety, a necessary defendant.
122. Joint mortgagors—Survivorship.
123. Mortgagor, still holding any kind of an equitable, contingent or latent interest, generally necessary—Sheriff's execution sale.
124. Vendor and vendee under land contract necessary.
125. Parties to deeds for security, in escrow or in fraud, necessary.
126. Purchaser and owner of the equity of redemption by grant or otherwise from the mortgagor necessary.
127. Owner of mortgaged premises omitted as defendant—Effect.
128. Remedies of omitted owner of mortgaged premises.
129. Mesne owners of the equity of redemption, no longer owners, generally not necessary.
§ 130. Purchaser *pendente lite* not necessary.
131. Common law doctrine of *lis pendens*.
132. New York statutory provisions for *lis pendens*; other states.
133. Effect on parties of omitted or defective *lis pendens*.
134. Mortgagor a married woman, having a separate estate, necessary.
135. Wife of mortgagor or owner of the equity of redemption necessary.
136. Wife not executing mortgage—Her remedies if omitted as defendant.
137. Wife of mortgagor; service of summons or process under early practice.
138. Wife of mortgagor; service of summons under present practice.
139. Wife of mortgagor or owner of equity of redemption, not necessary in those states where the common law doctrine of dower has been changed.
140. The husband of a mortgagor who is a married woman, having a separate estate, generally not necessary.
141. Heirs of mortgagor or owner of the equity of redemption necessary.
142. Heirs of mortgagor or owner—When not necessary.
143. Devisees of mortgaged premises necessary.
144. Legatees and annuitants necessary.
145. Executors and administrators generally not necessary.

§ 146. Trustees, holding an interest of whatever kind in mortgaged premises for beneficiaries, necessary.
147. *Cestuis que trust* and beneficiaries—When necessary.
148. *Cestuis que trust*—When not necessary.
149. Statutes making *Cestuis que trust* necessary.
150. Remaindermen and reversioners necessary.
151. A defendant *in esse* necessary.
152. Assignee in bankruptcy or by voluntary general assignment, and receiver, necessary.
§ 153. Assignee in bankruptcy *pendente lite* not necessary.
154. Infants, lunatics, idiots and habitual drunkards necessary parties.
155. Mortgage executed by administrator or executor to pay decedent's debts; heirs and devisees of the decedent necessary.
156. Corporations necessary parties by corporate name.
157. Tenants and occupants necessary.

§ 115. **Introductory.**—Most text-book writers have considered the subject of parties defendant to mortgage foreclosures under the sub-divisions of necessary parties and proper parties. Mr. Jones[1] has defined a necessary party as "one whose presence before the court is indispensable to the rendering of a judgment which shall have any effect on the property; without whom the court might properly refuse to proceed, because its decree would be practically nugatory." This definition, however, can not be considered logical, nor in accordance with the decisions of the courts; for at present no one can be said to be a necessary party in order to maintain the action, nor necessary in the sense that his omission would defeat the action or render the decree absolutely void.

The words "necessary" and "proper" are used with much looseness, inaccuracy and uncertainty of definition in the courts of our various states,—apparently in disregard of the fact that the words are relative in signification, and that they should be used as descriptive of parties, only with reference to the purposes for which the parties are made defendants to the foreclosure. Under the above definition neither an owner of a part or of the whole of an equity of redemption, nor a subsequent lienor, nor any other person interested in the subject-matter of the action, can be called a necessary party.

[1] Jones on Mortgages, § 1394.

To make a logical analysis of the subject of parties defendant to foreclosures, it will be necessary to divide the subject *according to the purposes* for which the parties are brought into the action. This chapter will be given to the consideration of parties who are necessary defendants for the purpose of extinguishing or of cutting off the entire equity of redemption, and the interests of all persons who claim under the owner of the equity by subsequent mortgages, judgments or otherwise,—that is, of parties who are necessary in order to exhaust every remedy against the land for the collection of the mortgage debt, and in order to produce a perfect title at the sale, or such a title as the courts will compel a bidder to accept. The word "necessary" will be used throughout the work in this sense alone; the word "proper" can not enter into the analysis, for it is too uncertain in meaning, and conveys the idea that there may be an option on the part of the plaintiff as to whether he will bring a party into the action or not.

For convenience of treatment and to make a logical division of this part of the work, parties defendant will be considered in this and the following chapter under the heads of *Owners of the Fee Title*, and *Subsequent Mortgagees and Lienors*. In this chapter exclusive attention will be given to parties who own the equity of redemption in the mortgaged premises, or who have any interest in the quality or the quantity of the title. In the following chapter, attention will be given to parties holding liens and incumbrances upon the mortgaged premises which accrued subsequent to the execution and delivery of the mortgage under foreclosure.

§ 116. **General principles.** — Many states have now codified the general equitable principle, that any person may be made a defendant to an action who has or claims to have an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.[1] Applying this principle to foreclosures, it may be said that any person who

[1] N. Y. Code Civ. Proc. § 447; Pomeroy's Remedies, § 271. See *ante* §§ 70, 71.

is interested in any way in the mortgaged premises, or who has an interest in the mortgage debt adverse to that of the plaintiff, may be made a defendant in the action. Thus the owner of any quantity or quality of estate in the premises, even in the remotest degree or of the most trifling value, becomes as necessary a party defendant to perfect the title as the sole owner of the entire equity of redemption. The holder of a lien by mortgage, judgment or any contingent equity, is also generally a necessary defendant.

The primary object of the suit is to divest the title, which existed in the mortgagor at the instant of the delivery of the mortgage, of every interest which he or those claiming under him can possibly have in it. If any such party is omitted, he stands, of course, unaffected by the action, and the decree produced will be defective. It matters not how valueless or remote any interest may be; it is of the utmost importance that it be brought within the jurisdiction of the court, so that it may be extinguished. The omitted party has, moreover, a right to redeem, and may thus put a purchaser of a defective title to endless trouble and expense in defending an estate which should have been perfected in the original action.

§ 117. Mortgagor, still owning the equity of redemption, necessary.—If the mortgagor continues to own the equity of redemption, he is for all purposes a necessary party to an action to foreclose a mortgage;[1] if he has not incumbered the property, he is the sole necessary defendant, and the simplest possible case of foreclosure exists. "There is no doubt that the owner of the equity of redemption is a

[1] Raynor v. Selmes, 52 N. Y. 579 (1873), reversing 7 Lans. (N. Y.) 440; Kay v. Whittaker, 44 N. Y. 565, 572 (1871); Griswold v. Fowler, 6 Abb. (N. Y.) Pr. 113 (1857); Reed v. Marble, 10 Paige Ch. (N. Y.) 409 (1843); Lane v. Erskine, 13 Ill. 501, 503 (1851), authorities collated by Treat, Ch. J.; followed in Harvey's Adm's v. Thornton, 14 Ill. 217 (1852); Hughes v. Patterson, 23 La. An. 679 (1871). For the English authorities, see Fisher on Mortgages, § 298; Fell v. Brown, 2 Bro. Ch. 276 (1787); Palk v. Clinton, 12 Ves. 48 (1806); Thomson and Baskerville Case, 3 Rep. in Ch. 215 (1688). For a mortgage of a life estate, see Hunter v. Macklew, 5 Hare, 238 (1846). See *post* §§ 126–128, and notes.

necessary party to a suit for the foreclosure of a mortgage. The mere statement of this proposition is sufficient to show its correctness, without the citation of any authorities in its support. The action is brought for the express purpose of foreclosing the equitable estate and right to redeem remaining against the mortgage, and of transferring to the purchaser at a sale by virtue of the decree, a complete legal title to the mortgaged premises. The very object of the proceeding would, therefore, be completely defeated if the owner of the equity of redemption were not a party. No title could be made that would not be defeasible by the person in whom this equity of redeeming the mortgage remained, not barred or destroyed."[1] If there are two or more mortgagors, all are necessary defendants; one can not represent the others.[2] If the title is held by a husband and wife as tenants by the entirety, both will be necessary defendants.[3] And if community lands, held by tenants in common, are mortgaged, all of the owners will be necessary defendants.[4] A person who has signed a note, for which another person executes a mortgage as collateral security, is not a necessary party to a foreclosure, as he has no interest in the land;[5] he can be made a defendant, however, if a judgment for deficiency is sought against him.

If the mortgagor has conveyed the premises by an instrument which remains unrecorded, he is still a necessary party, as the record continues to show the title in him;[6] it would

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[1] Hall v. Nelson, 23 Barb. (N. Y.) 90 (1856); s. c. 14 How. (N. Y.) Pr. 32, *per* Emott, J.; Watson v. Spence, 20 Wend. (N. Y.) 260 (1838), *per* Cowen, J.; Buckner v. Sessions, 27 Ark. 219 (1871); Cox v. Vickers, 35 Ind. 27 (1870); Lenox v. Reed, 12 Kan. 223, 228 (1873); Champlin v. Foster, 7 B. Mon. (Ky.) 105 (1846). In Louisiana a *curator* will be appointed by the court to represent the mortgagor, if he is a non-resident or hides himself; Lasere v. Rochereau, 21 La. An. 205 (1869).

[2] Stucker v. Stucker, 3 J. J. Marsh. (Ky.) 301 (1830), *per* Robertson, Ch. J. See *post* § 122, on joint mortgagors.

[3] Curtis v. Gooding, 99 Ind. 45 (1884).

[4] Johnson v. San Francisco Sav. Union, 63 Cal. 554 (1883).

[5] Deland v. Mershon, 7 Clarke (Iowa), 70 (1858).

[6] Hall v. Nelson, 23 Barb. (N. Y.) 88 (1856); Kipp v. Braudt, 49 How. (N. Y.) Pr. 358 (1875); Ostrom v. McCann, 21 How. (N. Y.) Pr. 431 (1860); Boice v. Mich. Mut. Life Ins. Co., (Mich.) 13 West. Rep. 377

be unsafe at least to omit such a mortgagor. It is believed that the safest and securest practice is, always to make the mortgagor a party, if he can be easily served with the summons.[1] If the mortgagor has contracted to sell and convey the premises, he remains a necessary party in order to cut off the entire equity of redemption, even though the contract be under seal and recorded.[2]

In strict foreclosures,[3] and also in foreclosures by advertisement under statute, the mortgagor, or those succeeding to his interests, are necessary parties defendant;[4] the statute must be strictly followed in the service of the required notice upon the necessary parties.[5]

§ 118. Mortgagor, no longer owning the equity of redemption, not necessary.—A mortgagor who has made an absolute conveyance of all his interest in mortgaged premises is not a necessary party to a foreclosure for the purposes of perfecting the title and of exhausting all remedies against the land for the collection of the debt;[6] neither are the

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(1888). See N. Y. Code Civ. Proc. §§ 1670, 1671, and *post* § 132.

[1] See *post* § 129, on intermediate purchasers.

[2] Crooke v. O'Higgins, 14 How. (N. Y.) Pr. 154 (1857). See *post* §§ 120, 121.

[3] Hornby v. Cramer, 12 How. (N. Y.) Pr. 490 (1855).

[4] Robinson v. Ryan, 25 N. Y. 320 (1862); Cole v. Moffitt, 20 Barb. (N. Y.) 18 (1854); Stanton v. Kline, 16 Barb. (N. Y.) 9 (1852); VanSlyke v. Shelden, 9 Barb. (N. Y.) 278 (1850).

[5] Mowry v. Sanborn, 65 N. Y. 581 (1875).

[6] Daly v. Burchell, 13 Abb. (N. Y.) Pr. N. S. 264, 268 (1872); Griswold v. Fowler, 6 Abb. (N. Y.) Pr. 113 (1857); VanNest v. Latson, 19 Barb. (N. Y.) 604, 608 (1855); Cherry v. Monro, 2 Barb. Ch. (N. Y.) 627 (1848); Rhodes v. Evans, Clarke Ch. (N. Y.) 168 (1840); Trustees v. Yates, 1 Hoff. Ch. (N. Y.) 142 (1839); Drury v. Clark, 16 How. (N. Y.) Pr. 428 (1857); Crooke v. O'Higgins, 14 How. (N. Y.) Pr. 154 (1857); Bram v. Bram, 34 Hun (N. Y.) 487, 491 (1885); Root v. Wright, 21 Hun (N. Y.) 344, 348 (1880), reversed in part, but not as to this point, in 84 N. Y. 72 (1881); Whitney v. McKinney, 7 Johns. Ch. (N. Y.) 144 (1823); Bigelow v. Bush, 6 Paige Ch. (N. Y.) 343 (1837); Horn v. Jones, 28 Cal. 194 (1865); Boggs v. Fowler, 16 Cal. 559 (1860); Swift v. Edson, 5 Conn. 534 (1825); Bennett v. Mattingly, 110 Ind. 197 (1886); Stevens v. Campbell, 21 Ind. 471 (1863); Burkham v. Beaver, 17 Ind. 367 (1861); Shaw v. Hoadley, 8 Blackf. (Ind.) 165 (1846); Johnson v. Monell, 13 Iowa, 300, 303 (1862); Jones v. Lapham, 15 Kan. 540 (1875); Bailey v. Myrick, 36 Me. 50 (1853); True v. Haley, 24 Me. 297 (1844); Osborne v. Crump, 57 Miss. 622 (1880);

assignees in bankruptcy, nor the heirs, nor the personal representatives[1] of such a mortgagor necessary parties.[2] But a mortgagor who has sold his equity of redemption by a warranty deed, may be made a party defendant on his own application; so also if he has any other interest in the foreclosure, but if he fails to show a real interest in the action when admitted, the court will subsequently dismiss him from it.[3]

The decisions are clear and uniform in sustaining these propositions, and it is only in exceptional cases and for special reasons that a court will require a mortgagor, who has parted with his entire interest in the property, to be brought in if the plaintiff has omitted him.[4] The mortgaged premises are always the primary fund for the payment of the debt, and a grantee has no right to object if the mortgagor is not made a party to the bill of foreclosure.[5] Neither will the objection of any other defendant be considered, unless he shows that his interests will be prejudiced by the omission of the mortgagor.[6] It is only when the party against whom the mortgagee asks a personal judgment for deficiency is a mere surety of the mortgagor, that he can insist that the latter be made a defendant and that the plaintiff's remedy against him for the deficiency in the property be exhausted

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Andrews v. Stelle, 22 N. J. Eq. (7 C. E. Gr.) 478 (1871). In Crenshaw v. Thackston, 14 S. C. 437 (1881), such a mortgagor was held a necessary party. Wright v. Eaves, 10 Rich. (S. C.) Eq. 582 (1858); Buchanan v. Monroe, 22 Tex. 537 (1858); Miner v. Smith, 53 Vt. 551 (1881); Delaplaine v. Lewis, 19 Wis. 476 (1865); Brown v. Stead, 5 Sim. 535 (1832). Fisher on Mortgages, § 305.

[1] Rickards v. Hutchinson, 18 Nev. 215 (1883).

[2] Bryce v. Bowers, 11 Rich. (S. C.) Eq. 41 (1859). For the English cases, see Rochfort v. Battersby, 14 Jur. 229 (1849); Lloyd v. Lander, 5 Madd. 282 (1821); Collins v. Shirley, 1 R. & M. 638 (1830); Kerrick v. Saffery, 7 Sim. 317 (1835); Fisher on Mortgages, § 306.

[3] Huston v. Stringham, 21 Iowa, 36 (1866); Gifford v. Workman, 15 Iowa, 34 (1863).

[4] Mims v. Mims, 35 Ala. 23 (1859); Swift v. Edson, 5 Conn. 534 (1825); Lane v. Erskine, 13 Ill. 501 (1851); Shaw v. Hoadley, 8 Blackf. (Ind.) 165 (1846); Murray v. Catlett, 4 G. Greene (Iowa), 108 (1853); Vreeland v. Loubat, 2 N. J. Eq. (1 H. W. Gr.) 104, 105 (1858); McGuffey v. Finley, 20 Ohio, 474 (1851); 1 Powell on Mortgages, 405, and note 2.

[5] Bigelow v. Bush, 6 Paige Ch. (N. Y.) 343, 346 (1837).

[6] Williams v. Meeker, 29 Iowa, 292, 294 (1870).

before resorting to the surety.[1] If there are equities or disputes between the grantee and the mortgagor, they must be settled in another suit.[2]

§ 119. **Mortgagor always a desirable defendant.**—It is nearly always desirable, however, to make the mortgagor a party defendant, even if he does not continue to hold the equity of redemption; it is against him especially that a judgment for deficiency is sought on his bond or note which the mortgage accompanies.[3] There may be, moreover, latent or secret interests to be cut off, which he continues to hold in the property; creditors may attack his conveyance as fraudulent; or his conveyance, absolute on its face, may be intended only as a collateral security.[4] Thus, in an action to foreclose a mortgage and to correct the description of the premises, both the mortgagor and his grantee have been deemed necessary defendants;[5] and the grantor of a trust deed has been held a necessary defendant for similar reasons.[6] When the plaintiff has no knowledge or suspicion of such equities, or fraudulent conveyance or collateral security deeds, he will generally be bound only by what appears on record.

§ 120. **Mortgagor, still owning only a divided or undivided part of the premises, or being a tenant in common by descent or grant, a necessary party.** — As long as a mortgagor continues to own any part of the title which he mortgages, he is just as necessary a party to a foreclosure as he would be if he continued to own the whole title.[7] A mortgagee's joining with his mortgagor in a deed

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[1] Drury v. Clark, 16 How. (N. Y.) Pr. 424, 431 (1857); Bigelow v. Bush, 6 Paige Ch. (N. Y.) 343 (1837).

[2] VanNest v. Latson, 19 Barb. (N. Y.) 604 (1855).

[3] Root v. Wright, 21 Hun (N. Y.) 344, 348; aff'd 84 N. Y. 72 (1881); Petry v. Ambrosher, 100 Ind. 511 (1884); Stevens v. Campbell, 21 Ind. 471 (1863); Miller v. Thompson, 34 Mich. 10 (1876). See *post* chap. x.

[4] Lloyd v. Lander, 5 Madd. 282 (1821); King v. Martin, 2 Ves. Jr. 641 (1795). This point is well illustrated by the litigation in Griswold v. Fowler, 6 Abb. (N. Y.) Pr. 113 (1857); Crooke v. O'Higgins, 14 How. (N. Y.) Pr. 154 (1857).

[5] Sickmon v. Wood, 69 Ill. 329 (1873).

[6] Marsh v. Green, 79 Ill. 385 (1875).

[7] See *ante* § 117; Taylor v. Porter, 7 Mass. 355 (1811); Spiller v. Spiller, 1 Hayw. (N. C.) L. 482 (1797).

of an undivided part of the mortgaged premises, for the purpose of releasing his mortgage debt on that part, has been held inoperative as a release. The mortgage still continued a lien on the entire premises.[1] A mortgage executed by a tenant in common upon his undivided interest in real property will not affect the rights of his co-tenants.[2] Such a mortgage can not be enforced against the mortgagor's divided part of the premises, until commissioners in partition have made an actual division of the lands, and a decree has been entered adjudging the mortgage a lien upon his part alone.[3] After a mortgage has been adjudged by a decree in partition to be a lien upon a divided instead of an undivided part of the premises, the mortgagee will be confined for his remedy exclusively to the share set off to his mortgagor.[4] Thus, in an action to foreclose a land contract or "title bond" of an undivided half of certain premises, the vendee of the remaining undivided half was allowed to file a cross bill for partition, and to have a decree entered that the divided half set apart to him be held free and clear of the lien of the title bond.[5]

It has been intimated in some cases[6] that a purchaser of an undivided interest in mortgaged premises would not be an absolutely necessary party; but it is nowhere questioned that a mortgagor still owning the remaining undivided interest is always a necessary defendant. The above intimation is not to be relied upon in New York or in those states where foreclosure is generally accomplished by an equitable action.

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[1] Torrey v. Cook, 116 Mass. 163 (1874), *per* Gray, Ch. J.

[2] Marks v. Sewall, 120 Mass. 174 (1876).

[3] Reid v. Gardner, 65 N. Y. 578 (1875); Hatch v. Kimball, 14 Me. 9 (1836); Rich v. Lord, 35 Mass. (18 Pick.) 322 (1836); Colton v. Smith, 28 Mass. (11 Pick.) 311 (1831); Stewart v. Allegheny National Bank, 101 Pa. St. 342 (1882).

[4] Kline v. McGuckin, 24 N. J. Eq. (9 C. E. Gr.) 411 (1874).

[5] Hammond v. Perry, 38 Iowa, 217 (1874); Cornell v. Prescott, 2 Barb. (N. Y.) 16 (1847). See also Loomis v. Riley, 24 Ill. 307 (1860); Williams v. Perry, 20 Ind. 437 (1863).

[6] Frost v. Frost, 3 Sandf. Ch. (N. Y.) 188 (1846); Mims v. Mims, 35 Ala. 23 (1859); Douglass v. Bishop, 27 Iowa, 214, 216 (1869); Hull v. Lyon, 27 Mo. 570 (1858); Crenshaw v. Thackston, 14 S. C. 437 (1881); Cholmondeley v. Clinton, 2 Jac. & W. 134 (1820); Palk v. Clinton, 12 Ves. 48, 59 (1806); Jones on Mortgages, § 1405.

§ 121. **Mortgagor, being a tenant in common or by the entirety, a necessary defendant.**—The owner of an undivided interest in lands, prior to the execution of a mortgage by his co-tenant, is not a necessary party to a foreclosure. If he is made a defendant, he can have the bill dismissed as to himself; even if the action proceeds to a decree and sale, the judgment will not be binding upon him.

One of four joint tenants executed a mortgage purporting to convey the whole estate; on foreclosure the remaining three were held not necessary parties; and even if they had been made parties, their rights would not have been concluded by the decree.[1] Where tenants in common jointly, or jointly and severally, mortgage property, a foreclosure can not be maintained against one of them separately to collect a moiety of the debt; the action must be against both and those claiming under them. Neither can either of them compel the mortgagee to receive half of the debt, and thereby relieve him, and to proceed against his co-tenant for the collection of the other half. The interests of tenants in common in such cases must always be sold together, no matter how numerous the owners may be.[2] If the mortgaged premises have been divided and conveyed in separate parcels, as frequently happens, all the owners of the several parcels must be made defendants to the foreclosure in order to produce a perfect title.[3]

§ 122. **Joint Mortgagors—Survivorship.**—It has been held that neither the heirs nor the personal representatives of a deceased joint mortgagor, or owner of the equity of redemption, are necessary parties to a foreclosure. This rule is undoubtedly based upon the common-law doctrine of survivorship in cases of joint tenancy. But as it is frequently an open question whether a title is held by persons as joint tenants or as tenants in common, it is the safest practice to make the heirs of the deceased owner parties to the

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[1] Stephen v. Beall, 89 U. S. (22 Wall.) 329 (1874): bk. 22 L. ed. 786.

[2] Frost v. Frost, 3 Sandf. Ch. (N. Y.) 188 (1846).

[3] Wiley v. Pinson, 23 Tex. 486 (1859); Peto v. Hammond, 29 Beav. 91 (1860); Ireson v. Denn, 2 Cox 425 (1796); Palk v. Clinton, 12 Ves. 48, 59 (1806).

foreclosure. In New York the law was settled in Bertles v. Nunan,[1] that under a conveyance to a husband and wife jointly, they take as tenants by the entirety, and upon the death of either, the survivor takes the whole estate; in such a case it would not be necessary to bring the heirs of the deceased joint owner into the action.

§ 123. **Mortgagor, still holding any kind of an equitable, contingent or latent interest, generally necessary —Sheriff's execution sale.**—It may be generally stated that, as long as the mortgagor continues to own or hold any interest of an equitable nature in the mortgaged premises, he is a necessary defendant to a foreclosure; for the entire equity of redemption can not be cut off or foreclosed as long as such interest is outstanding and unaffected by the action.[2] Such interests may be as various and different as the cases in which questions affecting them arise. It is only from an examination of numerous special cases that the proposition of this section is advanced as a general rule.

The sale of a mortgagor's interest under an execution may do away with the necessity of making the mortgagor a party to a foreclosure, after the delivery of the sheriff's deed and the expiration of the time limited for redemption, as such a sheriff's sale passes the entire equity of redemption remaining in the mortgagor to the purchaser as effectually as a deed would. But during the period of redemption the mortgagor is an indispensable party for the purposes stated in this chapter.[3] It has been said by Chancellor Kent[4] that "he has an existing right of which he could not be divested within the year by the sheriff's sale, and could only be in the foreclosure action by making him a party."

It seems that a purchaser at a sheriff's sale under an execution is also a necessary party from the time of his

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[1] 92 N. Y. 152 (1883), *per* Earl, J., reviewing Meeker v. Wright, 76 N. Y. 262 (1879), and in substance overruling it.

[2] Morgan v. Magoffin, 2 Bibb (Ky.) 395 (1811).

[3] N. Y. Code Civ. Proc. § 1440; Mims v. Mims, 35 Ala. 23 (1859). See *post* § 162.

[4] Hallock v. Smith, 4 Johns. Ch. (N. Y.) 649 (1820). The quotation is modified from the original to read with the text.

purchase.[1] But where the execution sale is held pending a foreclosure, the plaintiff is not bound to bring the purchaser into the action by a supplemental bill; the purchaser must intervene on his own application if he wishes to be heard.[2]

It has been held that "a sale by a sheriff gives the purchaser, under the certificate, an inchoate right to the land, if not an interest in the land itself; and it is such a right as will ripen into a title, unless the property be redeemed from him. In this case the sale and purchase were anterior to the filing of the bill of foreclosure, and though the purchaser did not obtain a deed from the sheriff until after the bill in this case and a notice of *lis pendens* were filed, yet he is considered something more than a purchaser *pendente lite*. He was a purchaser before, though his title did not become consummated until afterward; and by his purchase he acquired such a right and interest in the land as entitled him to be made a party to the foreclosure suit,—and not having been made a party, he is not foreclosed of his equity of redemption. The purchaser at the foreclosure sale does not get an absolute title, as against the purchaser at the execution sale."[3] At the time of this decision, too, there was no law requiring a sheriff's certificate to be recorded in the county clerk's office, and the plaintiff could have no notice of such certificate, as he now can, without examining the books in the sheriff's office.

From these two cases, which are unquestioned as good law, it appears that both the owner of the equity of redemption and the purchaser[4] at an execution sale are absolutely necessary parties during the period of redemption following

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[1] N. Y. Code Civ. Proc. §§ 1440, 1441, 1448; Smith v. Moore, 73 Ind. 388 (1881); Byington v. Walsh, 11 Iowa, 27 (1860). See *post* § 126.

[2] Bennett v. Calhoun Association, 9 Rich. (S. C.) Eq. 163 (1857). See *post* § 130, on purchasers *pendente lite*.

[3] Insurance Co. v. Bailey, 3 Edw. Ch. (N. Y.) 416 (1840); strongly in point to the contrary, Woods v. Love, 27 Mich. 308 (1873). See Smith v. Moore, 73 Ind. 388 (1881).

[4] Seemingly *contra*, Woods v. Love, 27 Mich. 308 (1873), holding that the purchaser at an execution sale is not a necessary defendant, even though he may have filed his sheriff's certificate in the register's office.

an execution sale, and one or the other of them will continue necessary, according as the property is redeemed or not.[1]

§ 124. **Vendor and vendee under land contract necessary.**—The mortgagor or owner of the equity of redemption also continues a necessary party, even though he may have entered into a land contract or an agreement in any form to convey the property. In such a case a mortgagor holds the equitable relation of mortgagee to the party agreeing to purchase, and can foreclose his land contract. He certainly has such an equitable interest in the property, that the title produced by foreclosure would not be perfect if he were omitted as a party defendant in the action.[2] It is believed that the person agreeing to purchase under a land contract is also a necessary defendant,[3] although Crooke v. O'Higgins[4] would seem to indicate that the omission to make him a party would not prevent the rendition of a valid judgment of foreclosure.

A curious case is reported in Weed v. Stevenson,[5] where it appeared that an absolute deed was executed to a grantee who executed a defeasance to a person other than the grantor, and both were recorded as a mortgage; in an action to foreclose, the grantor was omitted as a party. Objection was raised by demurrer that he was a necessary defendant. The court ruled that the grantor was a proper, though not a necessary, party; that he might safely have been omitted, but that if the plaintiff had any doubt about the validity of

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[1] For redeeming creditors, see N. Y. Code Civ. Proc. §§ 1447, 1449, 1451, 1452, 1453 *et seq.*

[2] Crooke v. O'Higgins, 14 How. (N. Y.) Pr. 154 (1857). In Roddy v. Elam, 12, 13 Rich. (S. C.) L. & Eq. 343 (1866), the plaintiff was allowed to amend his bill so as to bring in the original vendor.

[3] The Equitable Life Ass. Soc. v. Bostwick, 22 N. Y. Wk. Dig. 360 (1885); Martin v. Morris, 62 Wis. 418 (1885).

[4] 14 How. (N. Y.) Pr. 154 (1857); Greither v. Alexander, 15 Iowa, 470 (1863). In Blair v. Marsh, 8 Iowa, 144 (1859), the owner of a land contract, holding it as a "title bond," assigned it as a collateral security; on foreclosure, both the assignor and the assignee were made parties.

[5] Clarke Ch. (N. Y.) 166 (1840); Griswold v. Fowler, 6 Abb. (N. Y.) Pr. 113 (1857).

his conveyance, he had a perfect right to make the grantor a defendant to set such doubt at rest.

§ 125. **Parties to deeds for security, in escrow or in fraud, necessary.**—The mortgagor may also retain an equitable interest in the premises, and thereby remain a necessary party, where he has made a conveyance, absolute on its face, but intended only as a collateral security; or where he has delivered a deed in escrow; or where the deed has been executed, but remains unrecorded for secret purposes, and the plaintiff has no knowledge or suspicion of the same;[1] or where the mortgagor conveys his equity of redemption in fraud of creditors, and his conveyance is attacked or threatened. It is thus seen that the instances in which the mortgagor may still hold an equitable interest in the title, after he has apparently parted with his entire ownership, are innumerable and extremely various in character.

§ 126. **Purchaser and owner of the equity of redemption, by grant or otherwise from the mortgagor, necessary.**—An owner or holder of the equity of redemption by purchase from the mortgagor or a mesne purchaser, is as necessary a defendant to a foreclosure as a mortgagor still owning the mortgaged premises.[2] So, also, is a

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[1] Many of these difficulties may now be obviated by filing the statutory *lis pendens*. Kipp v. Brandt, 49 How. (N. Y.) Pr. 358 (1875); Ostrom v. McCann, 21 How. (N. Y.) Pr. 431 (1860); N. Y. Code Civ. Proc. §§ 1670, 1671. See *post* §§ 131, 132 on *lis pendens*. On fraudulent transfers, see Adams v. Bradley, 12 Mich. 346 (1864).

[2] Raynor v. Selmes, 52 N. Y. 579 (1873); Miner v. Beekman, 50 N. Y. 337, 344 (1872); Winslow v. Clark, 47 N. Y. 261 (1872); Robinson v. Ryan, 25 N. Y. 320 (1862); St. John v. Bumpstead, 17 Barb. (N. Y.) 100 (1852); VanSlyke v. Shelden, 9 Barb. (N. Y.) 278 (1850); Hall v. Nelson, 14 How. (N. Y.) Pr. 32 (1856); s. c. 23 Barb. (N. Y.) 88; Burnham v. DeBevorse, 8 How. (N. Y.) Pr. 159 (1853); Reed v. Marble, 10 Paige Ch. (N. Y.) 409 (1843); Williamson v. Field, 2 Sandf. Ch. (N. Y.) 533 (1845); Watson v. Spence, 20 Wend. (N. Y.) 260 (1838). In Mickles v. Dillaye, 15 Hun (N. Y.) 296 (1878), the foreclosure was by advertisement. Merritt v. Phenix, 48 Ala. 87 (1872); Hall v. Huggins, 19 Ala. 200 (1851); Porter v. Muller, 65 Cal. 512 (1884); Bludworth v. Lake, 33 Cal. 265 (1867); Skinner v. Buck, 29 Cal. 253 (1865); Horn v. Jones, 28 Cal. 194 (1865); Carpentier v. Williamson, 25 Cal. 154 (1864); Heyman v. Lowell, 23 Cal. 106 (1863); Boggs v. Fowler, 16 Cal.

purchaser of a divided[1] or of an undivided[2] part of the mortgaged premises a necessary defendant; and if not made a party, he will have the right to redeem his part by paying a proportional part of the mortgage debt.[3] The purchaser of an equity of redemption from an assignee in bankruptcy is a

559 (1860); Goodenow v. Ewer, 16 Cal. 461 (1860); DeLeon v. Higuera, 15 Cal. 483 (1860); Luning v. Brady, 10 Cal. 265 (1858); Coker v. Smith, 63 Ga. 517 (1881); Jeneson v. Jeneson, 66 Ill. 260 (1872); Ohling v. Luitjens, 32 Ill. 23 (1863); Daugherty v. Deardorf, 107 Ind. 527 (1886), citing many Indiana cases; Petry v. Ambrosher, 100 Ind. 510 (1884); Searle v. Whipperman, 79 Ind. 424 (1881); Mark v. Murphy, 76 Ind. 534 (1881); Lenox v. Reed, 12 Kan. 223, 228 (1873); Roney v. Bell, 9 Dana (Ky.) 4 (1839); Cooper v. Martin, 1 Dana (Ky.) 25 (1833); Bailey v. Myrick, 36 Me. 50 (1853); Learned v. Foster, 117 Mass. 365 (1875); Roche v. Farnsworth, 106 Mass. 509 (1871); Campbell v. Bemis, 81 Mass. (16 Gray) 485 (1860); Putnam v. Putnam, 21 Mass. (4 Pick.) 139 (1826); Thayer v. Smith, 17 Mass. 429 (1821); Nichols v. Randall, 5 Minn. 304, 308 (1861); Wolf v. Banning, 3 Minn. 202, 204 (1859); Brundred v. Walker, 12 N. J. Eq. (1 Beas.) 140 (1858); Durand v. Isaacks, 4 McC. (S. C.) L. 54 (1826); Rodgers v. Jones, 1 McC. (S. C.) Eq. 221 (1826); Meng v. Houser, 13 Rich. (S. C.) Eq. 210, 220 (1867); Manufacturing Co. v. Price, 4 S. C. 338, 345 (1873); Norton v. Lewis, 3 S. C. 25 (1871); Morrow v. Morgan, 48 Tex. 304 (1878); Buchanan v. Monroe, 22 Tex. 537 (1858); Cord v. Hirsch, 17 Wis. 403 (1863); Green v. Dixon, 9 Wis. 532 (1859); Hodgson v. Treat, 7 Wis. 263 (1858); Peto v. Hammond, 29 Beav. 91 (1860); Maule v. Beaufort, 1 Russ. 349 (1826); Brown v. Stead, 5 Sim. 535 (1832); Fisher on Mortgages, §§ 299, 305. Contrary to the above authorities, see Sumner v. Coleman, 20 Ind. 486 (1863); Cline v. Inlow, 14 Ind. 419 (1860); and Semple v. Lee, 13 Iowa, 304 (1862), holding that the owner of the equity is not a necessary, but only a proper, party; but these cases have been overruled by later decisions in the same courts. A fraudulent grantee was held a necessary party in Adams v. Bradley, 12 Mich. 346 (1864). The mere nominal holder of the title, who has no real interest therein, is a necessary defendant, McDonald v. McDonald, 45 Mich. 44 (1880); Merriman v. Hyde, 9 Neb. 113 (1879). Likewise the real owner of the property, though not holding the title, is a proper party and on his application to become a defendant, must be brought in by the plaintiff, Johnston v. Donvan, 106 N. Y. 269 (1887); s. c. 12 N. Y. Civ. Proc. Rep. 315.

[1] Spiller v. Spiller, 1 Hayw. (N. C.), L. 482 (1797).

[2] Jefferson v. Coleman, (Ind.) 9 West. Rep. 73 (1887). See Day v. Patterson, 18 Ind. 114 (1862), where there were a number of purchasers and all were held necessary parties. See also Sumner v. Coleman, 20 Ind. 486 (1863); Bates v. Ruddick, 2 Clarke (Iowa), 423 (1856).

[3] Bates v. Ruddick, 2 Clarke (Iowa), 423 (1856); Curtis v. Gooding, 99 Ind. 45 (1884); Logan v. Smith, 70 Ind. 598 (1880); Williams v. Beard, 1 S. C. L. 309 (1870).

necessary defendant, instead of the assignee or the bankrupt.[1] In the foreclosure of a mortgage containing a power of sale, the owner of the equity is entitled to due service of a notice, and a bare compliance with the terms of the power is not sufficient.[2] But where the foreclosure is conducted by *scire facias*, as it may be in Illinios and in some other states, the mortgagor or his personal representatives are the only necessary parties; the purchaser is not even a proper party.[3]

In some states the courts have held the owner of the equity a proper, but not a necessary, party; but these courts evidently mean that the owner is not a necessary defendant for the maintenance of the action, as they are agreed that his rights will remain unaffected unless he is brought into the action. Under the meaning given to the word in this chapter they are indispensable defendants, and the decisions of these courts in fact support the proposition of this section.[4]

§ 127. Owner of mortgaged premises omitted as defendant—Effect.—The cases are uniform in holding that a purchaser at a foreclosure sale acquires no title whatever to the mortgaged premises, unless the owner of the equity of redemption is made a party, although the mortgagor and subsequent incumbrancers may have been made defendants.

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[1] Felder v. Murphy, 2 Rich. (S. C.) Eq. 58 (1845).

[2] Drinan v. Nichols, 115 Mass. 353 (1874).

[3] Chickering v. Failes, 26 Ill. 507 (1861).

[4] See *ante* § 115; Sumner v. Coleman, 20 Ind. 486 (1863); Cline v. Inlow, 14 Ind. 419 (1860); Semple v. Lee, 13 Iowa, 304 (1862). In Rose v. Swann, 56 Ill. 37 (1870), the foreclosure of a land contract was sought; subsequent purchasers of the rights of the vendee were held *proper*, but not *necessary*, parties. In Williams v. Terrell, 54 Ga. 462 (1875), an owner was held necessary to the extent that he was unaffected by the decree if omitted, and might redeem; Georgia cases collated and reviewed. See Knowles v. Lawton, 18 Ga. 476 (1855), holding the purchaser unnecessary where the mortgagor was made a party; and May v. Rawson, 21 Ga. 461 (1857), holding that where the mortgagor has died, it is sufficient to make the purchaser a party. See Mevey's Appeal, 4 Pa. St. 80 (1846), holding a purchaser not indispensable under the acts of 1705 and 1822, but unaffected by the action if omitted, and citing the earlier Pennsylvania cases.

Such a purchaser remains a stranger to the title to the land, and the sale operates only as an equitable assignment of the mortgage to him.[1] It has sometimes been intimated that such a sale is void,[2] but the current of authorities agree that it is binding upon the parties who have been brought into the action. No suit can be instituted against the mortgagor for the payment of the mortgage debt without making the grantee of the equity of redemption a party defendant.[3]

The owner of the equity of redemption is not affected at all by a decree rendered in an action to which he is not made a party, as the court acquires no jurisdiction of him;[4] the decree is a nullity as to him, and he has a right to redeem, or to enforce such other remedies as the courts of the different states may allow.[5]

The principles stated in this and the preceding section are equally true, whether the owner acquires his title by grant, or through a sheriff's sale under an execution, receiving a

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[1] Miner v. Beekman, 50 N. Y. 337, 344 (1872); Winslow v. Clark, 47 N. Y. 261 (1872); Robinson v. Ryan, 25 N. Y. 320 (1862); Kelgour v. Wood, 64 Ill. 345 (1872); Cutter v. Jones, 52 Ill. 84 (1869); Barrett v. Blackmar, 47 Iowa, 565, 571 (1877), *per* Day, Ch. J.; Douglass v. Bishop, 27 Iowa, 214, 216 (1869). In point, Curtis v. Gooding, 99 Ind. 45 (1884); Moore v. Cord, 14 Wis. 213 (1861).

[2] In point, Skinner v. Buck, 29 Cal. 253 (1865). See Boggs v. Fowler, 16 Cal. 559 (1860), holding that such a sale is void, and that no title passes; Nat. Fire Ins. Co. v. McKay, 1 Sheld. (N. Y.) 138 (1867). See Reed v. Marble, 10 Paige Ch. (N. Y.) 409, 414 (1843); Watson v. Spence, 20 Wend. (N. Y.) 260 (1838). In Mickles v. Dillaye, 15 Hun (N. Y.) 296 (1878), it is queried whether a foreclosure by advertisment, in which no notice is served on the owner of the equity of redemption, is not a mere nullity as to *all* parties to the proceeding.

[3] Reed v. Marble, 10 Paige Ch. (N. Y.) 409, 414 (1843).

[4] Kelgour v. Wood, 64 Ill. 345 (1872); Cutter v. Jones, 52 Ill. 84 (1869); Dunlap v. Wilson, 32 Ill. 517 (1863); Hurd v. Case, 32 Ill. 45 (1863); Ohling v. Luitjens, 32 Ill. 23 (1863); Chickering v. Failes, 26 Ill. 517 (1861); Bradley v. Snyder, 14 Ill. 263 (1853); Porter v. Kilgore, 32 Iowa, 380 (1871); Street v. Beal, 16 Iowa, 68 (1864); Veach v. Schaup, 3 Clarke (Iowa), 194 (1856); Childs v. Childs, 10 Ohio St. 339 (1859). In point, Miner v. Beekman, 50 N. Y. 337 (1872). For other New York cases see the first note to § 126 *ante*.

[5] Barrett v. Blackmar, 47 Iowa, 565, 571 (1877), opinion *per* Day, Ch. J.; Douglass v. Bishop, 27 Iowa, 214, 216 (1869). See the cases in the preceding note.

deed in due time,[1] or from an assignee in bankruptcy,[2] or by descent or devise,[3] or otherwise,[4] or is a mere occupant under a land contract to purchase.[5]

The purchaser of an easement from a mortgagor is also a necessary defendant; and if he is omitted, he may continue to use and enjoy his easement without interruption, as the action does not extinguish or affect his rights.[6] The rule of this section remains the same, whether the foreclosure be conducted as an action or by advertisement; the notice required in foreclosures by advertisement must be served on the owner of the equity of redemption.[7] If the owner has not recorded his deed, and the mortgagee receives no notice of his ownership, the foreclosure may safely proceed without making the owner a party, providing a *lis pendens* is properly filed.[8] It will be readily seen that the principles of law

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[1] Coster v. Clark, 3 Edw. Ch. (N. Y.) 440 (1840); New York Life Ins. & Trust Co. v. Bailey, 3 Edw. Ch. (N. Y.) 416 (1840); Hallock v. Smith, 4 Johns. Ch. (N. Y.) 649 (1820); Kepley v. Jansen, 107 Ill. 79 (1883); Smith v. Moore. 73 Ind. 388 (1881); Brooks v. Keister, 45 Iowa, 303 (1876); Buck v. Sanders, 1 Dana (Ky.) 189 (1833); Bollinger v. Chateau, 20 Mo. 89 (1854); Hemphill v. Ross, 66 N. C. 477 (1872); Thorpe v. Ricks, 1 Dev. & B. (N. C.) Eq. 619 (1837); Davis v. Evans, 5 Ired. (N. C.) L. 525 (1845).

[2] Winslow v. Clark, 47 N. Y. 261 (1872); Burnham v. DeBevorse, 8 How. (N. Y.) Pr. 159 (1853).

[3] See *post* §§ 141–143, on heirs and devisees. The purchaser of a devisee is a necessary defendant. Ohling v. Luitjens, 32 Ill. 23 (1863).

[4] In Hall v. Huggins, 19 Ala. 200 (1851), the owner purchased the equity at a sale held pursuant to an order of the Orphans' Court. Where a mortgage is foreclosed pending proceedings to condemn lands for public uses, the parties prosecuting the proceeding should be made defendants; Colehour v. State Savings Institution, 90 Ill. 152 (1878).

[5] Martin v. Morris, 62 Wis. 418 (1885).

[6] In Packer v. Rochester & S. R. R. Co., 17 N. Y. 283, 297 (1858), the easement granted was to certain mill-owners to construct and maintain a race; the mortgagee foreclosing omitted them as defendants. Pratt, J., said: "The mortgage, therefore, stands unforeclosed as to the rights of the mill owners." See also the opinion *per* Denio, J., p. 287.

[7] Stanton v. Kline, 11 N. Y. 199 (1854), reversing 16 Barb. (N. Y.) 9; St. John v. Bumpstead, 17 Barb. (N. Y.) 100 (1852); VanSlyke v. Shelden, 9 Barb. (N. Y.) 278 (1850). See, especially, Mickles v. Dillaye, 15 Hun (N. Y.) 296 (1878); N. Y. Code Civ. Proc. § 2389.

[8] Kipp v. Brandt, 49 How. (N. Y.) Pr. 358 (1875); Ostrom v. McCann, 21 How. (N. Y.) Pr. 431 (1860). See *post* § 132; N. Y. Code Civ. Proc. § 1670; Aldrich v. Stephens, 49 Cal. 676 (1875); Daniels v. Henderson,

stated in this section are based upon the broader and more general principle already noticed,—that no person having an interest in the mortgaged premises will be affected by the decree of foreclosure, unless he is made a party to the action and is brought within the jurisdiction of the court.[1]

§ 128. **Remedies of omitted owner of mortgaged premises.**—If the owner of the equity of redemption is omitted as a defendant, the mortgagor or any other party interested in the action may object to it by demurrer, if the defect appears upon the face of the complaint, or by answer, if the defect does not so appear;[2] if objection is not taken, the defect will be deemed waived.[3] If the owner is omitted, it is not necessary for him to maintain an action to redeem in order to assert his rights, for he is already the owner of the title, never having been divested of it; and the purchaser at the sale, having acquired no title, is a stranger to the premises, and can be ejected or proceeded against for trespass.[4] The owner may, however, maintain an action to redeem if he desires; indeed, this is the usual practice, as it brings the question of title directly in issue.[5] If the

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49 Cal. 245 (1874). See also Tucker v. Leland, 75 N. Y. 186 (1878); Houghton v. Kneeland, 7 Wis. 244 (1858); *contra*, Hall v. Nelson, 14 How. (N. Y.) Pr. 32 (1856); s. c. 23 Barb. (N. Y.) 88. See Carpentier v. Williamson, 25 Cal. 154 (1864). In Webb v. Maxan, 11 Tex. 678, 684 (1854), the court held that, if the mortgagee foreclosing received no notice of the subsequent purchaser's deed, the decree would be conclusive against the purchaser; *aliter*, if he had notice.

[1] See *ante* §§ 115, 116.

[2] Bard v. Poole, 12 N. Y. 508 (1855); Hall v. Nelson, 23 Barb. (N. Y.) 88 (1856); Reed v. Marble, 10 Paige Ch. (N. Y.) 409 (1843); Kittle v. VanDyck, 1 Sandf. Ch. (N. Y.) 76 (1843); Erickson v. Rafferty, 79 Ill. 210 (1875); Dunlap v. Wilson, 32 Ill. 517 (1863); Taylor v. Collins, 51 Wis. 123 (1881); Baker v. Hawkins, 29 Wis. 576 (1872); Cord v. Hirsch, 17 Wis. 403 (1863). See Williams v. Mecker, 29 Iowa, 292 (1870).

[3] Davis v. Bechstein, 69 N. Y 440 (1877).

[4] VanSlyke v. Shelden, 9 Barb. (N. Y.) 278 (1850); Watson v. Spence, 20 Wend. (N. Y.) 260 (1838). In Kelgour v. Wood, 64 Ill. 345 (1872), it was held that ejectment could not be maintained. See Cutter v. Jones, 52 Ill. 84 (1869); also Fogal v. Pirro, 10 Bosw. (N. Y.) 100 (1862).

[5] See Miner v. Beekman, 50 N. Y. 337, 344 (1872), holding also that the action must be brought within ten years. Grandin v. Hernandez, 29 Hun (N. Y.) 399, 403 (1883); Carll v. Butman, 7 Me. (7 Greenl.) 102 (1830);

owner of the equity has assumed the payment of the mortgage, there is a double reason for making him a party, as he has thereby become the principal debtor, and the mortgagor only a surety; and if a judgment of deficiency is desired, it must be obtained first against such owner.[1]

§ 129. **Mesne owners of the equity of redemption, no longer owners, generally not necessary.**—For the reasons stated in a preceding section, parties who have once owned the equity of redemption in mortgaged premises, and again parted with the same by an absolute conveyance, are not necessary defendants to a foreclosure for the purpose of perfecting the title.[2] As they have no interest in the mortgaged property, they can have no interest in an action affecting it. It is only when latent equities, fraud or defects in the deeds may invalidate the mesne conveyances of intermediate purchasers, or when some of their deeds remain unrecorded, that they and their grantors become necessary parties. If they and all their grantors, subsequent to the delivery of the mortgage, have assumed the payment of the mortgage debt, they may properly be defendants if a personal judgment for deficiency is sought against them, or any of them.[3] The interesting question of personal liability for the payment of the mortgage debt when it has been assumed by a grantee in his deed of conveyance, will be fully considered in a subsequent chapter.[4]

§ 130. **Purchaser pendente lite not necessary.**—The general principle is now recognized by all the courts of this

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Green v. Dixon, 9 Wis. 532 (1859). A person who succeeds to the owner's interest may also redeem; Porter v. Kilgore, 32 Iowa, 380 (1871); Veach v. Schaup, 3 Clarke (Iowa), 194 (1856). See the cases cited in notes to § 127 *ante*.

[1] See *post* chap. xi.

[2] Lockwood v. Benedict, 3 Edw. Ch. (N. Y.) 472 (1841). In point, Merritt v. Phenix, 48 Ala. 87 (1872); Lewis v. Elrod, 38 Ala. 17 (1861); Haley v. Bennett, 5 Port. (Ala.) 452 (1837); Scarry v. Eldridge, 63 Ind. 44 (1878); Barton v. Kingsbury, 43 Vt. 640 (1871); Soule v. Albee, 31 Vt. 142 (1858). See Vrooman v. Turner, 69 N. Y. 280 (1877). See *ante* § 118.

[3] Vrooman v. Turner, 69 N. Y. 280 (1877); Scarry v. Eldridge, 63 Ind. 44 (1878). See Lockwood v. Benedict, 3 Edw. Ch. (N. Y.) 472 (1841).

[4] See *post* chap. xi.

country and of England, that a purchaser, assignee or attaching creditor of mortgaged premises, during the pendency of a suit to foreclose, is bound by the decree made against the party to the action from or through whom he derives title ;[1] it is not necessary to bring a party, so acquiring title, before the court. The reasons for this rule will be found in the two succeeding sections. Such a purchaser acquires, of course, only the rights of title or incumbrance which the person from whom he purchased held at the time of the transfer.

The early decisions upon the proposition of this section endeavored to make a clear distinction between voluntary transfers and those accomplished by operation of law.[2] It has been said by one of our ablest judges,[3] that there are English and American cases holding that when the interest of a party to the action is cast upon the transferee by operation of law, and not by the act of such party, the

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[1] Fuller v. Scribner, 76 N. Y. 190 (1879); Lamont v. Cheshire, 65 N. Y. 30 (1875); Lenihan v. Hamann, 55 N. Y. 652 (1873); Cleveland v. Boerum, 23 Barb. (N. Y.) 201 (1856); s. c. 3 Abb. (N. Y.) Pr. 294; and on appeal from the judgment at special term, 27 Barb (N. Y.) 252 (1858), aff'd 24 N. Y. 613 (1862); Zeiter v. Bowman, 6 Barb. (N. Y.) 133 (1849); Watt v. Watt, 2 Barb. Ch. (N. Y.) 371 (1847); Ostrom v. McCann, 21 How. (N. Y.) Pr. 431 (1860); Kindberg v. Freeman, 39 Hun (N. Y.) 466 (1886); Weeks v. Tomes, 16 Hun (N. Y.) 349 (1878); The People's Bank v. Hamilton Co., 10 Paige Ch. (N. Y.) 481, 490 (1843); Curtis v. Hitchcock, 10 Paige Ch. (N. Y.) 399 (1843); Jackson v. Losee, 4 Sandf. Ch. (N. Y.) 381 (1846); N. Y. Code Civ. Proc. § 1671; Horn v. Jones, 28 Cal. 194 (1865); Taylor v. Adam, 115 Ill. 570; s. c. 2 West. Rep. 827 (1886); Chickering v. Fullerton, 90 Ill. 520 (1878); Addison v. Crow, 5 Dana (Ky.) 279 (1837); Osborne v. Crump, 57 Miss. 622 (1880). See Loomis v. Riley, 24 Ill. 307 (1860), where a tenant in common of an undivided half of certain lands mortgaged his half during the pendency of a partition suit; Rogers v. Holyoke, 14 Minn. 220 (1869). In Chapman v. West, 17 N. Y. 125 (1858), the action was for the specific performance of a land contract. See Fisher on Mortgages, §§ 380 388, and the English cases cited.

[2] Cleveland v. Boerum, 23 Barb. (N. Y.) 205 (1856). See the same case affirmed on appeal in 24 N. Y. 613 (1862).

[3] Cleveland v. Boerum, 24 N. Y. 617 (1862), *per* Wright, J., a leading case; Lenihan v. Hamann, 55 N. Y. 652 (1873); Sedgwick v. Cleveland, 7 Paige Ch. (N. Y.) 290, 291 (1838). See Smith v. Sanger, 3 Barb. (N. Y.) 360 (1848); Anon v. Anon, 10 Paige Ch. (N. Y.) 20 (1842). The last two cases seem to be overruled by Cleveland v. Boerum, 24 N. Y. 613 (1862).

foreclosure will be defective, unless the transferee is brought before the court; but he intimates that these cases are not to be relied upon, though he refers to the case of Sedgwick v. Cleveland[1] as an illustration.

The statutes in most states now provide for filing a notice of pendency of action, settling this question in accordance with the general principle above stated; and it matters not whether the transferee acquires his title by the voluntary act of the transferrer, or by operation of law. Though the plaintiff is not bound to amend his complaint, so as to bring in a purchaser or an incumbrancer *pendente lite*, he may do so if he chooses; the purchaser can appear and defend in the name of the party from whom he acquired his interest,[2] or he can be made a party on his own application[3] by substitution, or subrogation.[4]

§ 131. Common-law doctrine of lis pendens.—The doctrine of *lis pendens* and the statutes enacted in the several states to regulate the same, are of the greatest importance to the plaintiff in determining who are necessary defendants to a foreclosure, and of equal importance to other parties having an interest in the equity of redemption. Lord Bacon has stated the common-law rule to be that "no decree bindeth any that cometh in *bona fide* by conveyance of the defendant before the bill exhibiteth, and is made no party, neither by bill or order; but when he comes in *pendente lite*, and while the suit is in full prosecution, and without any order of allowance or privity by the court, then regularly the decree bindeth."[5] The rule had its origin in the civil

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[1] 7 Paige Ch. (N. Y.) 291 (1838).

[2] Cleveland v. Boerum, 24 N. Y. 620, 621 (1862); The People's Bank v. Hamilton Co., 10 Paige Ch. (N. Y.) 484 (1843); Foster v. Deacon, 6 Madd. Ch. 59 (1821); Coles v. Forrest, 10 Beav. 552 (1847); Fisher on Mortgages, § 385.

[3] Cleveland v. Boerum, 24 N. Y. 613 (1862); The People's Bank v. Hamilton Co., 10 Paige Ch. (N. Y.) 484 (1843); Clow v. Derby Coal Co., 98 Pa. St. 432 (1881); Eyster v. Gaff, 91 U. S. (1 Otto), 521 (1875); bk. 23 L. ed. 403.

[4] Seward v. Huntington, 94 N. Y. 114 (1883).

[5] Bacon's Works, vol. 4, p. 515. In Bishop of Winchester v. Paine, 11 Ves. 194, 201 (1805), Sir William Grant said that "he who purchases during the pendency of the suit, is bound by the decree that may be made against the person

law, and was pungently stated in the legal maxim, *pendente lite, nihil innovetur*. It is well settled that a judgment in an action *in rem* binds not only the parties, but also all others claiming or deriving title under them by a transfer *pendente lite*.[1] Indeed, writers deduce from the cases the broad rule that decisions *in rem* are binding and conclusive, not only on the parties actually litigating the case and their privities, but also on all other persons, if the suit was commenced against the proper parties, and judgment was obtained *bona fide* and without fraud.[2]

§ 132. **New York statutory provisions for lis pendens; other states.**—Many of the states, in their codes or general statutes, have enacted the common-law rule into a statutory requirement and prescribed special rules of practice in connection with it. New York first did this in 1823,[3] by a special statute, which was re-enacted in the Revised Statutes,[4] and subsequently formed into § 132 of the old Code, and §§ 1670 and 1671 of the Code of Civil Procedure. Prior to 1851 the notice could be filed only at the time of commencing the action; now it can be filed with the complaint, and becomes operative at once before the summons is served on any of the defendants. Prior to 1858 a grantee, whose deed was not recorded, had to be discovered by the plaintiff and made

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from whom he derives the title; the litigating parties are exempted from the necessity of taking any notice of a title so acquired; as to them it is as if no such title existed, otherwise suits would be interminable, or, which would be the same in effect, it would be the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it."

[1] Rogers v. Holyoke, 14 Minn. 220 (1869); Hull v. Lyon, 27 Mo. 570 (1858); McPherson v. Housel, 13 N. J. Eq. (2 Beas.) 299 (1861); Youngman v. Elmira & W. R. R., 65 Pa. St. 278 (1870).

[2] See Cleveland v. Boerum, 24 N. Y. 617 (1862). The learned jurist, Theodore W. Dwight, as Commissioner of Appeals, in Lamont v. Cheshire, 65 N. Y. 30, 36 (1875), considered at length the history and the nature of a notice of pendency of action, and the office it was designed to fulfill. See Bellamy v. Sabine, 1 DeG. & J. 566 (1857), a leading English case; also Hunt v. Hunt, 34 Mass. (17 Pick.) 118 (1835).

[3] Laws of New York, 1823, chap. 182, § 11.

[4] Revised Statutes vol. 2, p. 174, § 43.

a party to the action,[1] but since, and at present, every person receiving or recording[2] his conveyance after the filing of such notice with the complaint, even though it be a few hours only,[3] is deemed a subsequent purchaser and incumbrancer; he stands in the same position as he would if he had actually purchased the land, or received his incumbrance, after the filing of such notice, and he is bound by such proceedings "to the same extent as if he was a party to the action,"[4]—that is, he is barred and foreclosed of all rights in the premises.

A purchaser or lienor may be brought into the action by a supplemental bill if desired.[5] Prior to 1862 the *lis pendens* was inoperative as to each defendant, until the summons had been served upon him,[6] but an amendment of that year (continued in the present Code of Civil Procedure) made the notice operative from the time of filing the complaint, and also fixed the limit of sixty days within which the summons must be served, or the notice would become void.[7] Prior incumbrancers and persons whose rights are superior to those of the plaintiff are not affected by the notice.[8] So, also, a person who claims title by virtue of a tax deed is not bound by the notice.[9]

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[1] Hall v. Nelson, 14 How. (N. Y.) Pr. 32 (1856); s. c. 23 Barb. (N. Y.) 88.

[2] Ostrom v. McCann, 21 How. (N. Y.) Pr. 431 (1860), citing § 132 of the old N. Y. Code; Earle v. Barnard, 22 How. (N. Y.) Pr. 437, 440 (1862); Kipp v. Brandt, 49 How. (N. Y.) Pr. 358 (1875), strongly in point. Supporting these cases, see Aldrich v. Stephens, 49 Cal. 676 (1875), and Daniels v. Henderson, 49 Cal. 245 (1874),

[3] Stern v. O'Connell, 35 N. Y. 104 (1866), Ostrom v. McCann, 21 How. (N. Y.) Pr. 431 (1860). See Weyh v. Boylan, 62 How. (N. Y.) Pr. 397 (1882) aff'd 63 How. (N. Y.) Pr. 72 (1882), where, after the commencement of the action and the filing of a *lis pendens*, the mortgagor conveyed his equity of redemption and died; the grantee was held an unnecessary party on reviving the action.

[4] N. Y. Code Civ. Proc. § 1671.

[5] Harrington v. Slade, 22 Barb. (N. Y.) 161 (1856). See *ante* § 130.

[6] Tate v. Jordan, 3 Abb. (N. Y.) Pr. 392 (1856); Butler v. Tomlinson, 38 Barb. (N. Y.) 641 (1862); s. c. 15 Abb. (N. Y.) Pr. 88 (1862); Muscott v. Woolworth, 14 How. (N. Y.) Pr. 477 (1857); Burroughs v. Reiger, 12 How. (N. Y.) Pr. 172 (1856); Fuller v. Scribner, 16 Hun (N. Y.) 130 (1878); aff'd 76 N. Y. 190 (1879).

[7] N. Y. Code Civ. Proc. § 1670. In point, Weeks v. Tomes, 16 Hun (N. Y.) 349 (1878); aff'd 76 N. Y. 601 (1879).

[8] Chapman v. West, Impl'd, 17 N. Y. 125 (1858); Bank v. Connelly, 8

§ 133. **Effect on parties of omitted or defective lis pendens.**—The notice of *lis pendens* is made by statute constructive notice to persons who are not parties to the action, but who acquire their rights from or under those who have been brought within the jurisdiction of the court. As their rights alone are affected, they alone can take advantage of the omission to file the notice, or of any defects in it.[1] Whenever there is a defect in filing the *lis pendens*, as the neglect to file the complaint with it, and any person obtains an interest in or a lien upon the equity of redemption from a party defendant during the pendency of the action and the continuance of the defect, he will not be bound by the decree and may redeem;[2] the purchaser at a sale under the decree of foreclosure will receive a defective title, although an order may have been made that the complaint be filed *nunc pro tunc*.

§ 134. **Mortgagor a married woman, having a separate estate, necessary.**—Where a married woman holds the fee title of property in her own name as a separate estate, and mortgages the same, or where she becomes the owner of the equity of redemption in property previously mortgaged, she is a necessary party to a foreclosure for the purposes stated in this chapter.[3] A married woman had no capacity at common-law to make contracts, and consequently no right to execute a mortgage on her separate estate. Statutes in

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Abb. (N. Y.) Pr. 128 (1858); Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847); Chapman v. Draper, 10 How. (N. Y.) Pr. 367 (1854); Stuyvesant v. Hone, 1 Sandf. Ch. (N. Y.) 419 (1844).

[2] Becker v. Howard, 4 Hun (N. Y.) 359 (1875); aff'd 66 N. Y. 5 (1876).

[1] White v. Coulter, 1 Hun (N. Y.) 357 (1874).

[2] Dakin v. Insurance Co., 77 N. Y. 601 (1879); Weeks v. Tomes, 16 Hun (N. Y.) 349 (1878). In point, Olson v. Paul, 56 Wis. 30 (1882).

[3] Conde v. Shepard, 4 How. (N. Y.) Pr. 75 (1849). For an exhaustive history and review of the cases affecting the right of a *feme covert* to mortgage her real estate, see the leading case of Albany Fire Ins. Co. v. Bay, 4 N. Y. 9, 38 (1850), affirming 4 Barb. (N. Y.) 407 (1848); opinions by Jewett, Taylor and Pratt, JJ.; Ellis v. Kenyon, 25 Ind. 134 (1865); Eaton v. Nason, 47 Me. 132 (1860); Galway v. Fullerton, 17 N. J. Eq. (2 C. E. Gr.) 389 (1866); Newhart v. Peters, 80 N. C. 166 (1879); McFerrin v. White, 6 Cold. (Tenn.) 499 (1869); Hill v. Edmonds, 5 DeG. & S. 603 (1852).

England and in America have greatly enlarged a married woman's rights in property, so that she can now make valid contracts affecting her real estate; but in Massachusetts, New Jersey and Pennsylvania it is necessary, even at the present day, for the husband to join with his wife in the execution of a mortgage upon her separate estate in order to make the mortgage valid.[1] It is in New York,[2] especially, that married women's rights have been enlarged, so that at present the law applicable to the subject-matter of this work, with reference to a male or a *feme sole*, is equally applicable with reference to a *feme covert*. The interesting question of a married woman's liability for a personal judgment of deficiency will be fully considered hereafter.[3]

§ 135. Wife of a mortgagor or owner of the equity of redemption necessary.—It has become a settled rule of law in all states where the common-law doctrine of dower remains unchanged, and in many states where statutes have prescribed a wife's rights in the real estate of her husband, that the inchoate right of dower of a wife in the lands of her husband is a real and existing interest, and as much entitled to protection as the vested rights of a widow; and that neither can be impaired by any judicial proceeding to which the wife or widow is not made a party. As such rights constitute an interest in real estate, it is plain that a wife or widow must be made a party to a foreclosure suit where she has signed the mortgage, released her rights otherwise, or acquired those rights subsequent to the execution of the mortgage. The right of a wife to be endowed of an equity of redemption has long been put at rest. She is an absolutely necessary party to an action in order to produce such a title as a purchaser at the sale will be compelled to accept.[4] But

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[1] Weed Sewing Mach. Co. v. Emerson, 115 Mass. 554 (1874); Merchant v. Thomson, 34 N. J. Eq. (7 Stew.) 73 (1881), and the cases cited; Armstrong v. Ross, 20 N. J. Eq. (5 C. E. Gr.) 109 (1869); Black v. Galway, 24 Pa. St. 18 (1854). Conflicting with this case, see Graham v. Long, 65 Pa. St. 383 (1870), and Glass v. Warnick, 40 Pa. St. 140 (1861).

[2] Laws of New York, 1848, chap. 200; 1849, chap. 375; 1860, chap. 90; 1862, chap. 172; 1884, chap. 381.

[3] See *post* chap. x.

[4] Merchant's Bank v. Thomson, 55 N. Y. 7 (1873); Mills v. Van Voorhies, 20 N. Y. 412 (1859);

if the wife has been omitted as a party defendant and dies during the pendency of the foreclosure, it will not be necessary to bring in her heirs and personal representatives in order to produce a perfect title, as they succeed to no interest.[1] If the mortgagor has two wives, both are necessary defendants.[2] Though a wife may have made a grant of her inchoate right of dower, she remains a necessary party; the grantee acquires no interest by the conveyance, as an inchoate right of dower is inalienable.[3] Wherever the right of dower has been abolished by statute, the wife is not a

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Denton v. Nanny, 8 Barb. (N. Y.) 618 (1850); Wheeler v. Morris, 2 Bosw. (N. Y.) 524, 529 (1858); Bell v. The Mayor, 10 Paige Ch. (N. Y.) 49, 67 (1843). See Kay v. Whittaker, 44 N. Y. 565, 572 (1871), holding that the wife is not an indispensable defendant to sustain the action, but that her rights will not be cut off by the decree, unless she is made a party; Denton v. Nanny, 8 Barb. (N. Y.) 618 (1850); Blydenburgh v. Northrop, 13 How. (N. Y.) Pr. 289 (1856); Hubbell v. Sibley, 5 Lans. (N. Y.) 56 (1871); Kittle v. Van Dyck, 1 Sandf. Ch. (N. Y.) 76, 79 (1843); Mabury v. Ruiz, 58 Cal. 11 (1881); Daniels v. Henderson, 5 Fla. 452 (1854); Kissel v. Eaton, 64 Ind. 248 (1878); Watt v. Alvord, 25 Ind. 533 (1865); Verry v. Robinson, 25 Ind. 14 (1865); Richardson v. Skolfield, 45 Me. 386 (1858); Gage v. Ward, 25 Me. 101 (1845); Campbell v. Knights, 24 Me. 332 (1844); Smith v. Eustis, 7 Me. (7 Greenl.) 41 (1830); Lund v. Woods, 52 Mass. (11 Metc.) 566 (1846); Swan v. Wiswall, 32 Mass. (15 Pick.) 126 (1833); Snyder v. Snyder, 6 Mich. 470 (1859); Atkinson v. Stewart, 46 Mo. 510 (1870). See Rands v. Kendall, 15 Ohio, 671, 675 (1846), where the law of dower in Ohio is explained, with citations from cases and statutes; Eldridge v. Eldridge, 14 N. J. Eq. (1 McCart.) 195 (1862); Chiswell v. Morris, 14 N. J. Eq. (1 McCart.) 101 (1861); Ketchum v. Shaw, 28 Ohio St. 503 (1876); State Bank of Ohio v. Hinton, 21 Ohio St. 509 (1871); McArthur v. Franklin, 15 Ohio St. 485 (1864); s. c. 16 Ohio St. 193 (1865); Conover v. Porter, 14 Ohio St. 450 (1863); Taylor v. Fowler, 18 Ohio, 567 (1849); Calmes v. McCrocker, 8 S. C. 87 (1876); James v. Fields, 5 Heisk. (Tenn.) 394 (1871); Gregg v. Jones, 5 Heisk. (Tenn.) 443 (1871). But see Verree v. Verree, 2 Brev. (S. C.) L. 211 (1807), holding that in 1807 a wife was not entitled to dower in an equity of redemption. In Newhall v. Lynn Bank, 101 Mass. 428 (1869), the wife of a husband who had made an assignment in bankruptcy was held a necessary party; but in Huston v. Neil, 41 Ind. 504 (1873), it was held that a wife had no interest in the partnership real estate of her husband, and accordingly was not a necessary party to the foreclosure of a mortgage on the same.

[1] Miller v. Miller, 48 Mich. 311 (1882).

[2] Wood v. Chew, 13 How. (N. Y.) Pr. 86 (1856).

[3] Earle v. Barnard, 22 How. (N. Y.) Pr. 437 (1862).

necessary defendant, as she has no interest in her husband's lands.[1]

If the wife has signed the mortgage, she is, of course, a necessary defendant.[2] "The only reason why the wife of a mortgagor, who joins in the execution of such an instrument, should be made a party, is to bar the equity of redemption in her right of dower, or to give her the opportunity, before it is foreclosed, to redeem and prevent its sale."[3] If the mortgage was executed by the husband before marriage, the wife is as necessary a defendant as though it had been executed by both after marriage and during coverture;[4] after the husband's death the widow remains a necessary party.[5]

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[1] See Ethridge v. Vernoy, 71 N. C. 184 (1874). See also Thornton v. Pigg, 24 Mo. 249 (1857), for the statute in Missouri, foreclosure being held a statutory action at law, and not an equitable action. See the preceding section for other cases. See Pitts v. Aldrich, 93 Mass. (11 Allen), 39 (1865).

[2] Hinchliffe v. Shea, 34 Hun (N. Y.) 365 (1884); Leonard v. Adm'r of Villars, 23 Ill. 377 (1860); Chambers v. Nicholson, 30 Ind. 349 (1868); Hinchman v. Stiles, 9 N. J. Eq. (1 Stockt.) 361 (1853); Hartshorne v. Hartshorne, 2 N. J. Eq. (1 H. W. Gr.) 349 (1840). Upon the general question of a wife's right of dower in mortgaged premises, see Campbell v. Campbell, 30 N. J. Eq. (3 Stew.) 415 (1879). See the cases cited in the first note to this section. Powell v. Ross, 4 Cal. 197 (1854); Cary v. Wheeler, 14 Wis. 281 (1861). See also Nimrock v. Scanlin, 87 N. C. 119 (1883). In Pitts v. Aldrich, 93 Mass. (11 Allen), 39 (1865), the wife was held not a necessary party where she had signed the mortgage. Colt, J., writing the opinion and collating the authorities, says that the law of Massachusetts on this point differs from that of all the other states. In Mims v. Mims, 1 Humph. (Tenn.) 425 (1839), a widow who had signed a mortgage was held not a necessary party. See McIver v. Cherry, 8 Humph. (Tenn.) 713 (1848).

[3] Wright v. Langley, 36 Ill. 381, 383 (1865).

[4] Smith v. Gardner, 42 Barb. (N. Y.) 356 (1864). See Northrup v. Wheeler, 43 How. (N. Y.) Pr. 122 (1872), where the foreclosure was by advertisement; Gilbert v. Maggord, 2 Ill. (1 Scam.) 471 (1838); Eaton v. Simonds, 31 Mass. (14 Pick.) 98 (1833); Hildreth v. Jones, 13 Mass. 525. See Bolton v. Ballard, 13 Mass. 227 (1816). Seemingly *contra*, Bird v. Gardner, 10 Mass. 364 (1813). In Wilson v. Scott, 29 Ohio St. 636 (1876), the wife of a mortgagor, who had executed the mortgage before marriage, was held not a necessary defendant. See the Indiana and Illinois cases cited on purchase money mortgages in the following notes.

[5] Burton v. Lies, 21 Cal. 87 (1862). See Bayly v. Muehe, 65 Cal. 345 (1884).

§ 136. Wife not executing mortgage—Her remedies if omitted as defendant.—Where the mortgage was given for purchase money, the wife's inchoate right of dower attaches to the equity of redemption, and she is just as necessary a defendant as she would have been had she signed the mortgage, and her rights will not be affected unless she is made a party to the action.[1] But in Illinois,[2] Indiana[3] and Michigan,[4] the contrary ruling prevails, that the wife is not a necessary defendant. If the wife does not sign[5] a mortgage executed by her husband during coverture, an action to foreclose it will not affect her rights, even if she is made a

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[1] Mills v. VanVoorhies, 20 N. Y. 412 (1859); s. c. 10 Abb. (N. Y.) Pr. 152 (1859), aff'g 23 Barb. (N. Y.) 125 (1856). Judge Selden, writing the opinion, cites Stow v. Tifft, 15 Johns. (N. Y.) 458 (1818), and gives a sketch of the history of the statute for purchase money mortgages. Wheeler v. Morris, 2 Bosw. (N. Y.) 524 (1858); Blydenburgh v. Northrop, 13 How. (N. Y.) Pr. 289 (1856); Brackett v. Baum, 50 N. Y. 8 (1872), *per* Rapallo, J., holds that the wife is not a necessary party in the foreclosure of a purchase money mortgage by advertisement. Young v. Tarbell, 37 Me. 509 (1854); Fox v. Pratt, 27 Ohio St. 512 (1875); Culver v. Harper, 27 Ohio St. 464 (1875); Welch v. Buckins, 9 Ohio St. 331 (1859); Carter v. Goodwin, 3 Ohio St. 75 (1853); Foster v. Hickox, 38 Wis. 408 (1875), authorities collated and the subject generally discussed, *per* Ryan, Ch. J.; Thompson v. Lyman, 28 Wis. 266 (1871); Cary v. Wheeler, 14 Wis. 281 (1861); Holdane v. Sweet, 55 Mich. 196 (1884).

[2] Short v. Raub, 81 Ill. 509 (1876), relying upon Stephens v. Bichnell, 27 Ill. 444 (1862).

[3] Fletcher v. Holmes, 32 Ind. 497, 506, 536 (1870); opinions *per* Elliott, J., and Gregory, Ch. J., collating and reviewing the cases; Frazer, J., wrote a dissenting opinion. See Walters v. Walters, 73 Ind. 425 (1881). But dower was abolished in Indiana by the Code of 1852, and the wife was made an heir. Hoskins v. Hutchings, 37 Ind. 324 (1871); May v. Fletcher, 40 Ind. 575 (1872), *per* Wooden, J., citing Fletcher v. Holmes, 32 Ind. 497, 506, 536 (1870), and collating the cases. See the Indiana acts of 1875 and 1879. See the early case of Nottingham v. Calvert, 1 Ind. 527 (1849), apparently supporting the New York rule.

[4] Amphlett v. Hibbard, 29 Mich. 298 (1874).

[5] Baker v. Scott, 62 Ill. 86 (1871); Leary v. Shaffer, 79 Ind. 567 (1881); Sutton v. Jervis, 31 Ind. 265 (1869); Mooney v. Maas, 22 Iowa, 380, 383 (1867); Amphlett v. Hibbard, 29 Mich. 298 (1874); Parmenter v. Binkley, 28 Ohio St. 32 (1875). A mortgage signed by a wife, but not acknowledged by her, is not so executed as to release her dower. Sheldon v. Patterson, 55 Ill. 507 (1870); Westfall v. Lee, 7 Clarke (Iowa), 12, 14 (1858). See Walsh v. Wilson, 130 Mass. 124 (1881).

party, without allegations in the complaint setting forth the facts, and even with such allegations, it is doubtful whether her rights will be affected in any way.[1] In an action brought by a widow for the recovery of her dower in lands which had been sold under the foreclosure of a mortgage which she had not executed with her husband, her dower was held paramount to the mortgage and not affected by the foreclosure, although she was made a defendant under the general allegation of having some interest in the premises.[2]

Where a widow's dower has been admeasured in premises mortgaged by her husband alone, the decree of foreclosure should be for the sale of the remaining two-thirds in the first place, and then for the sale of the admeasured third,—subject, however, to the dower.[3] If a wife or widow, having a right of dower, is not made a party, it is believed that the mortgagor or any other defendant may object to the omission by demurrer or answer.[4] The wife of a mortgagor is no more a necessary party than the mortgagor himself after she has joined in a deed with him, conveying their equity of redemption to a purchaser.[5]

The remedy of the wife or widow, whenever she is omitted as a party, is to redeem;[6] but this right to redeem

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[1] Merchants' Bank v. Thomson, 55 N. Y. 7 (1873); Lewis v. Smith, 9 N. Y. 502, 514, 519 (1854), affirming 11 Barb. (N. Y.) 152 (1851); Lainer v. Smith, 37 Hun (N. Y.) 529 (1885); Payn v. Grant, 23 Hun (N. Y.) 134 (1880); Foster v. Hickox, 38 Wis. 408 (1875).

[2] Lewis v. Smith, 9 N. Y. 502 (1854).

[3] Morton v. Noble, 22 Ind. 160 (1864).

[4] See *ante* § 128.

[5] The reasons stated in § 118 *ante*, apply to the wife or widow as well as to the mortgagor. Elmendorf v. Lockwood, 4 Lans. (N. Y.) 393 (1871). In Maloney v. Horan, 12 Abb. (N. Y.) Pr. N. S. 289 (1872), where a deed was set aside as fraudulent, the wife was held restored to her dower. See Popkin v. Bumstead, 8 Mass. 491 (1812).

[6] Mills v. VanVoorhies, 20 N. Y. 412 (1859); Denton v. Nanny, 8 Barb. (N. Y.) 618 (1850); Ross v. Boardman, 22 Hun (N. Y.) 527 (1880); Bell v. Mayor of New York, 10 Paige Ch. (N. Y.) 49 (1843); Carll v. Butman, 7 Me. (7 Greenl.) 102 (1830); VanVronker v. Eastman, 48 Mass. (7 Metc.) 157 (1843); Gibson v. Crehore, 23 Mass. (5 Pick.) 146 (1827). See Sheldon v. Patterson, 55 Ill. 507 (1870), where several mortgages, some of which the wife had not executed, were foreclosed in one action; Opdyke v. Bartles, 11 N. J. Eq. (3 Stockt.) 133 (1856).

does not accrue until the death of the husband, at which time the dower becomes fixed.[1] She can, however, assert her rights before the death of her husband, and have the value of her inchoate dower computed by the annuity tables and paid.[2] Ejectment can not be maintained by a wife or a widow.[3] If the widow accepts a devise or bequest, which is made to her in lieu of dower, it is believed that she will not be a necessary defendant.[4]

§ 137. **Wife of mortgagor; service of summons or process under early practice.**--At common law, and in the chancery practice of this state, the summons, or *subpœna*, was not required to be served upon the wife of the owner of the equity of redemption, where she was made a party to the foreclosure for the purpose of cutting off her inchoate right of dower; but the husband was bound, except where the estate was the separate property of the wife, to enter a joint appearance and to put in an answer for himself and wife.

This practice was based upon the common-law doctrine that a husband and wife are *one person*, and that the wife's inchoate right of dower was a kind of interest which resulted from the marital relation, and did not belong to her as a separate estate.[5] "The general rule is, that the service of a subpœna against husband and wife on the husband alone is a good service on both, and the reason is, that the husband and wife are one person in law, and the husband is bound to answer for both."[6] It must be kept in mind that such service upon the husband was good only when the wife's interest in the property was an inchoate right of dower; when her

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[1] White v. Coulter, 1 Hun (N. Y.) 357, 366 (1874); modified in 59 N. Y. 629 (1874); Morton v. Noble, 22 Ind. 160 (1864); followed in Grable v. McCulloch, 27 Ind. 472 (1867).

[2] Unger v. Leiter, 32 Ohio St. 210 (1877).

[3] Smith v. Gardner, 42 Barb. (N. Y.) 356 (1864).

[4] Zaegel v. Kuster, 51 Wis. 31 (1881). See Lewis v. Smith, 9 N. Y. 502 (1854).

[5] Foote v. Lathrop, 53 Barb. (N. Y.) 183 (1869), appeal dismissed in 41 N. Y. 358 (1869); Eckerson v. Vollmer, 11 How. (N. Y.) Pr. 42 (1855); Ferguson v. Smith, 2 Johns. Ch. (N. Y.) 139 (1816), Lathrop v. Heacock, 4 Lans. (N. Y.) 1 (1871); Leavitt v. Cruger, 1 Paige Ch. (N. Y.) 421 (1829).

[6] Ferguson v. Smith, 2 Johns. Ch. (N. Y.) 139 (1816), *per* Chancellor Kent.

separate property was concerned in the action, she had to be personally served.[1] It is to be further observed that the summons or process had to be directed to the wife; if her name was omitted, the court acquired no jurisdiction of her, and her inchoate right of dower would not be cut off or affected in any way by the action; her right to redeem it became perfect at the death of her husband.

§ 138. Wife of mortgagor; service of summons under present practice.—It is believed that this old practice has been changed in New York by the Code of Civil Procedure. There is some conflict of opinion in the reported cases as to the interpretation of § 450,[2] but the latest decisions indicate that the summons must be served upon the wife, and that service upon her husband alone is not sufficient.[3] In a case in Maryland, a summons was directed to the wife, but not served upon her; the court said that as she had a potential right of dower, and was not within its jurisdiction, she was not affected by the action;[4] and in another case, where a husband appeared and confessed a bill for the foreclosure of a mortgage executed by himself and wife, the wife was held not bound by the decree, as she did not appear in person and no summons was issued against her.[5]

Under the old practice, too, the wife could not appear separately and on her own account in an action to cut off her inchoate dower, without leave of the court; now, however, there is no question that the wife of the owner of the equity of redemption may appear and defend in her own name and by her own attorney, as though she were a *feme sole*.[6]

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[1] Mills v. VanVoorhies, 10 Abb. (N. Y.) Pr. 152 (1859); Watson v. Church, 3 Hun (N. Y.) 80 (1874); Lathrop v. Heacock, 4 Lans. (N. Y.) 1 (1871); Watson v. Church, 5 T. & C. (N. Y.) 243 (1875); White v. Coulter, 3 T. & C. (N. Y.) 608 (1874); McArthur v. Franklin, 15 Ohio St. 485 (1864).

[2] Old N. Y. Code, § 114.

[3] White v. Coulter, 59 N. Y. 629 (1874), modifying 1 Hun (N. Y.) 357 (1874). See Weil v. Martin, 24 Hun (N. Y.) 645 (1881); Hubbell v. Sibley, 5 Lans. (N. Y.) 51 (1871). In Northrup v. Wheeler, 43 How. (N. Y.) Pr. 122, 123 (1872), the foreclosure was by advertisement, and service upon the wife was held indispensable under the statute. See also the cases cited below.

[4] Hurtt v. Crane, 36 Md. 29 (1872).

[5] Pope v. North, 33 Ill. 440 (1864).

[6] Janinski v. Heidelberg, 21 Hun (N. Y.) 439 (1880); Muser v. Miller, 3 N. Y. Civ. Proc. Rep. 394 (1883),

After the death of the husband, service of the summons or notice upon the widow is indispensable.[1]

§ 139. **Wife of mortgagor or owner of equity of redemption, not necessary in those states where the common-law doctrine of dower has been changed.**—In those states where statutes have been enacted which completely sever the husband and wife, and make them independent of each other, as to their rights in real property, the wife is not a necessary party to an action to foreclose a mortgage upon her husband's property, even though she signed the mortgage.[2] The reason for this rule is, that, as she has no interest whatever in her husband's real estate, she can have no interest whatever in an action affecting it. In North Carolina the husband has absolute dominion over his land during his life, and can give a perfect conveyance of it without the consent of his wife; in that state, therefore, the wife is not a necessary party to the foreclosure of a mortgage against her husband's property.[3] But if the wife has signed the bond or instrument of indebtedness, charging herself with its payment, and a personal judgment for deficiency is sought against her, she is a necessary party for that purpose.[4]

§ 140. **The husband of a mortgagor who is a married woman, having a separate estate, generally not necessary.**—In most states where the common-law doctrine of curtesy remains unmodified by statute, a husband who joins with his wife in executing a mortgage on her separate real property is not a necessary defendant, if the sale in the action to foreclose takes place during the wife's life-time.[5]

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s. c. 65 How. (N. Y.) Pr. 286 (1883); FitzSimons v. Harrington, 1 N. Y. Civ. Proc. Rep. 360 (1881); Fitzgerald v. Quann, 1 N. Y. Civ. Proc. Rep. 278, 279 (1881); *contra*, Fitzgerald v. Quann, 1 N. Y. Civ. Proc. Rep. 273 (1881); N. Y. Code Civ. Proc. § 450; Throop's Code, p. 440.

[1] King v. Duntz, 11 Barb. (N. Y.) 191 (1851). See *ante* §§ 135, 136 and the cases cited.

[2] Powell v. Ross, 4 Cal. 197 (1854); Thornton v. Pigg, 24 Mo. 249 (1857); Miles v. Smith, 22 Mo. 502 (1856); Etheridge v. Vernoy, 71 N. C. 185 (1874). See Stevens v. Campbell, 21 Ind. 471 (1863).

[3] Etheridge v. Vernoy, 71 N. C. 185 (1874).

[4] See *post* chap. x.

[5] Trustees of Jones Fund v. Roth, 18 N. Y. Wk. Dig. 459 (1883), citing the statutes, and explaining the legal reasons for the rule.

Neither by common-law nor by the statute of any state does a husband have any interest in his wife's real property until her death. This is the general rule; but in some states the husband is deemed a necessary party, owing to statutory enactments and the special rules of their courts.[1] Four things are requisite to an estate by curtesy,[2] to wit: marriage, actual seisin of the wife, issue, and the death of the wife; and in New York the wife must die intestate. Upon the death of the wife intestate, after the accomplishment of these four requisites, the husband becomes a necessary defendant in order to cut off his curtesy and to perfect the title.[3]

In those states where statutes have made wholly separate and independent of each other the respective estates of a husband and a wife, the husband has no right to curtesy nor to any other interest in his wife's real property, and is consequently not a necessary party, so far as the title is concerned. If, however, he has obligated himself for the indebtedness by signing a note or bond, he is a necessary party if a personal judgment for deficiency is sought against him.[4]

§ 141. Heirs of mortgagor or owner of the equity of redemption necessary.—The heirs[5] of a mortgagor or person who dies seized of the equity of redemption in mortgaged

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[1] The husband has been held a necessary party in the following cases: Hilton v. Lothrop, 46 Me. 297 (1858); Yager v. Merkle, 26 Minn. 429 (1880); Wolf v. Banning, 3 Minn. 202 (1859). Landon v. Burke, 36 Wis. 378 (1874), cites a statute making the husband a necessary party; Mavrich v. Grier, 3 Nev. 52 (1867). In Andrews v. Swanton, 81 Ind. 474 (1882), the husband was held a proper, if not a necessary, party. In some states a mortgage executed by a married woman upon her separate real estate is void, unless her husband joins in its execution; in these states he is of course a necessary party to a foreclosure; Weed Sewing Mach. Co. v. Emerson, 115 Mass. 554 (1874). See the Mass. Laws of 1874, chap. 184; Camden v. Vail, 23 Cal. 633 (1863); Harrison v. Brown, 16 Cal. 287 (1860); Black v. Galway, 24 Pa. St. 18 (1854). See Laws of New York, 1848, chap. 200; also *ante* § 134, and the second note to the section.

[2] 4 Kent Com. 29.

[3] Fogal v. Pirro, 10 Bosw. (N. Y.) 100 (1862); Leggett v. McClelland, 39 Ohio St. 624 (1884).

[4] Thornton v. Pigg, 24 Mo. 249 (1857); Riddick v. Walsh, 15 Mo. 519, 538 (1852); Building, Loan & Savings Assoc. v. Camman, 11 N. J. Eq. (3 Stockt.) 382 (1857). See *post* chap. x.

[5] Wood v. Morehouse, 1 Lans. (N. Y.) 405 (1869); Leonard v. Morris,

premises are as necessary parties to a foreclosure as the deceased mortgagor or owner would have been, if the action had been brought in his life-time, as they succeed by operation of law under the statute of descent to the entire interest of the decedent in the property, the same as a purchaser would succeed to such interest by grant. It is not sufficient to make the personal representatives of the deceased owner alone defendants,[1] except in cases of foreclosure by

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9 Paige Ch. (N. Y.) 90 (1841); Bigelow v. Bush, 6 Paige Ch. (N. Y.) 345 (1837); Williamson v. Field, 2 Sandf. Ch. (N. Y.) 533 (1845); Bell v. Hall, 76 Ala. 546 (1884); Hunt v. Acre, 28 Ala. 580 (1856); Erwin v. Ferguson, 5 Ala. 158 (1843); Duval v. McCloskey, 1 Ala. 708 (1840); Pillow v. Sentelle, 39 Ark. 61 (1883); Kiernan v. Blackwell, 27 Ark. 235 (1871); Brown v. Orr, 29 Cal. 120 (1865); Burton v. Lies, 21 Cal. 87, 91 (1862); Pritchard v. Elton, 38 Conn. 434 (1871); Britton v. Hunt, 9 Kan. 228 (1872); Brenner v. Bigelow, 8 Kan. 496, 504 (1871); Lane v. Erskine, 13 Ill. 501 (1851), approved and followed in Harvey v. Thornton, 14 Ill. 317 (1852); McKay v. Wakefield, 63 Ind. 27 (1878); Daugherty v. Deardorf, 107 Ind. 527; s. c. 5 West Rep. 850 (1886); Newkirk v. Burson, 21 Ind. 129 (1863); Shaw v. Hoadley, 8 Blackf. (Ind.) 165 (1846); Slaughter v. Foust, 4 Blackf. (Ind.) 379 (1837); White v. Rittmeyer, 30 Iowa, 268, 272 (1870), citing many cases and authorities; Smith v. Manning, 9 Mass. 422 (1812); Abbott v. Godfroy's Heirs, 1 Mich. 178 (1849), *per* Miles, J., collating and reviewing the authorities; Averett v. Ward, 1 Busb. (N. C.) Eq. 192 (1853); Barrett v. Cochran, 8 S. C. 48 (1875); Williams v. Beard, 1 S. C. 309 (1869); Denison v. League, 16 Tex. 399, 409 (1856); George v. Cooper, 15 W. Va. 666 (1880); Zaegel v. Kuster, 51 Wis. 31 (1881), explaining the statute of 1860, chap. 363; Stark v. Brown, 12 Wis. 572 (1860); see the statute of 1842; Houghton v. Mariner, 7 Wis. 244 (1858). In Indiana the widow is made an heir by statute, and is a necessary party. See Fletcher v. Holmes, 32 Ind. 497, 510 (1870), and the cases cited. A sale has been held wholly void for the omission of the heirs; Shiveley's Adm's v. Jones, 6 B. Mon. (Ky.) 274 (1845); Renshaw v. Taylor, 7 Oreg. 315 (1879). In Massachusetts, where there is a tenant in possession on whom to serve the process, the heirs are not necessary parties; Shelton v. Atkins, 39 Mass. (22 Pick.) 71 (1839). The heirs of a sub-vendee are necessary defendants in the foreclosure of a land contract; Batre v. Auze's Heirs, 5 Ala. 173 (1843). In Bayly v. Muehe, 65 Cal. 345 (1884), the heirs were held not necessary parties where the personal representatives had been made defendants.

[1] Zaegel v. Kuster, 51 Wis. 31 (1881); Stark v. Brown, 12 Wis. 572 (1860); see the statute of 1842, referred to. In Missouri the heirs are by statute not necessary parties; Perkins v. Wood, 27 Mo. 547 (1858); Code of 1845. See Dixon's Adm'rs v. Cuyler's Adm'rs, 27 Ga. 248 (1859), holding the personal

advertisement.[1] The guardian of an infant heir is not a necessary party, but the infant must be made a defendant, and the process of the court must be personally served upon him.[2]

In reviving a foreclosure commenced against a deceased mortgagor in his life-time, his heirs are necessary parties in order to produce a perfect title. Thus, a grantor died during the pendency of an action in the nature of a foreclosure, for an accounting and sale of the premises, brought upon a deed given to secure an advance of money; and the suit having been revived against his administrator alone, a bidder at the sale was relieved of his bid on the ground that the title offered was defective, the heirs having been omitted as defendants.[3] The general principles of law that have been previously stated as rendering a mortgagor or an owner of the equity of redemption by purchase a necessary party, are equally applicable to the heirs at law of such a mortgagor or owner.[4]

§ 142. Heirs of mortgagor or owner — When not necessary.—If the mortgagor parted in his life-time with the equity of redemption, his heirs at law are not necessary parties;[5] but where the mortgagor at his decease still holds an equitable interest in the equity of redemption, his heirs, succeeding to his identical rights, will or will not be necessary parties according to the rules of law previously stated.[6]

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representatives instead of the heirs necessary parties. See *post* § 145.

[1] Mackenzie v. Alster, 64 How. (N. Y.) Pr. 388 (1882); Low v. Purdy, 2 Lans. (N. Y.) 424 (1869). See *post* § 145, and the cases cited in this section. In Illinois, in a foreclosure by *scire facias*, it has been held sufficient under the statute to make either the heirs or the executors or administrators parties; Rockwell v. Jones, 21 Ill. 279 (1859); John v. Hunt, 1 Blackf. (Ind.) 324 (1824).

[2] Alexander v. Frary, 9 Ind. 481 (1857); Moore v. Starks, 1 Ohio St. 369 (1853). See the N. Y. Code Civ. Proc. § 426.

[3] Dodd v. Neilson, 90 N. Y. 243 (1882). In Givens' Admr's v. Davenport, 8 Tex. 451 (1852), the heirs of a mortgagor who died pending the foreclosure were held not necessary parties in reviving it; *aliter* where the action was commenced against the personal representatives after the death of the mortgagor.

[4] See *ante* §§ 126, 127.

[5] Daly v. Burchall, 13 Abb. (N. Y.) Pr. N. S. 264, 268 (1872). In point, Wilkins v. Wilkins, 4 Port. (Ala.) 245 (1837); Hibernia Savings Society v. Herbert, 53 Cal. 375 (1879); Medley v. Elliott, 62 Ill. 532 (1872). See *ante* §§ 118, 119.

[6] See *ante* §§ 120–123.

If a judgment for deficiency is sought against the estate of a deceased mortgagor, or of a deceased purchaser, who has duly assumed the payment of the mortgage debt, the legal representatives of the decedent are necessary parties for that purpose;[1] but they are not necessary parties for the purpose of foreclosing the title.[2] The reason for this is, that in most states the executors and administrators, or legal representatives, of a deceased person receive no title or interest in the land.

In those states, however, where the real as well as the personal property passes into the hands of executors or administrators, they are necessary parties to a foreclosure in the place of the heirs, who are then not necessary parties;[3] and in statutory foreclosures by advertisement in New York the personal representatives are indispensable parties.[4] If the heirs, or any of them, are omitted as parties, any defendant interested in the action may object by demurrer, if the defect appears upon the face of the complaint, or by answer, and compel such omitted heir to be made a party.[5] And an omitted heir will always be permitted to appear and defend on application to the court.[6]

Where the decedent leaves a will, devising the equity of redemption in mortgaged premises, the devisees and beneficiaries become necessary parties instead of the heirs at law.[7] But if the will contains a power of sale directing distribution of the estate among certain heirs, the heirs will be necessary parties, as the fee is devised to them subject to the execution of the power of sale.[8] As the probate of a will of real estate may be impeached within a limited time,[9] it is proper, and may be necessary under certain circumstances, to make the heirs at law also parties. The plaintiff omits them at the risk of their subsequently redeeming.

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[1] See *post* chap. x.

[2] Leonard v. Morris, 9 Paige Ch. (N. Y.) 90 (1841).

[3] Harwood v. Marye, 8 Cal. 580 (1857).

[4] See *post* § 145, the last paragraph and the cases cited.

[5] See *ante* § 128.

[6] Zundel v. Tacke, 47 Hun (N. Y.) 239 (1888).

[7] See *post* § 143, on devisees; Hunt v. Acre, 28 Ala. 580 (1856).

[8] Noonan v. Brennemann, 54 N. Y. Super. Ct. (22 J. & S.) 337 (1887).

[9] N. Y. Code Civ. Proc. § 2627.

Where the title to mortgaged premises is conveyed to a man and his wife as tenants by the entirety,[1] or is held jointly by partners or others, the heirs of one of the deceased joint owners are not necessary parties to cut off the equity of redemption and to perfect the title by foreclosure; if, however, the deceased joint owner signed the bond or became in any way liable for the mortgage debt, his legal representatives are proper parties for the purpose of obtaining a judgment of deficiency against his estate. The reason for this rule is based on the common-law doctrine of survivorship, by which the entire title, upon the death of any of the joint owners, vests in the survivors.[2]

§ 143. Devisees of mortgaged premises necessary.—We have already seen that when the title to mortgaged premises devolves upon heirs at law under the statute of descent, they are necessary parties to a foreclosure. A testator is authorized by statute to make a will, superseding the statute of descent in the disposition of his property. Following the analogy of the rule which makes an heir a necessary party, the person or devisee to whom the testator passes the title of his mortgaged premises by will is also a necessary party to foreclose the equity of redemption, as he becomes the owner of the same.[3] A mortgage executed by a devisee upon lands received by will, is always subject to equities existing against the premises at the time of the testator's death.[4] If the entire title to the premises is devised, the heir, of course, is not a necessary party, as he has no interest in the property.[5] As a surrogate's decree, admitting a will of real estate to probate, is only presumptive

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[1] Bertles v. Nunan, 92 N. Y. 152 (1883). See *ante* § 122.

[2] 4 Kent Com. 360.

[3] Leggett v. Mut. Life Ins. Co., 64 Barb. (N. Y.) 36 (1872); Robinson v. Robinson, 1 Lans. (N. Y.) 117 (1869); Nodine v. Greenfield, 7 Paige Ch. (N. Y.) 547 (1839); Savings & Loan Society v. Gibb, 21 Cal. 595 (1863); Sanderson v. Edwards, 111 Mass. 335 (1873). It matters not whether the devise is absolute or in trust; Mayo v. Tomkies, 6 Munf. (Va.) 520 (1820): Graham's Exec'rs v. Carter, 2 Hen. & M. (Va.) 6 (1807); Coles v. Forrest, 10 Beav. 552 (1847).

[4] Simons v. Bryce, 10 S. C. L. 354 (1878).

[5] Macclesfield v. Fitton, 1 Vern. 168 (1683); Lewis v. Nangle, 2 Ves. Sr. 431 (1752); s. c. 1 Ambl. 150.

evidence of the matters adjudged in the decree, and as the probate of the will may be impeached within a limited time, the heirs at law may, during such time, become necessary defendants,[1] and they ought not to be omitted from the action, if any of them dispute the validity of the will. Until a decree is made, admitting a will to probate, the heirs are necessary parties; and it is believed that the devisees are also necessary. It is suggested that in such a case the rule of law may be applied which renders both the vendee and the vendor in a land contract of mortgaged premises necessary parties.[2]

§ 144. **Legatees and annuitants necessary.**—A legacy or an annuity charged by a will upon mortgaged premises is a lien thereupon, the same as though the decedent had mortgaged or otherwise incumbered the equity during his life-time; and the beneficiary of such a legacy or annuity is an indispensable party in an action to foreclose.[3] It seems, however, where a legacy is made generally from the estate, and not charged specifically upon the mortgaged premises, that the legatee is not a necessary party; but such a legatee may become an indispensable party if there is an insufficiency of personal property to pay the legacy,[4] and it becomes necessary to resort to the mortgaged premises to produce a fund to pay it.

§ 145. **Executors and administrators generally not necessary.**—In New York and in many other states the administrator of a person who dies seized of an equity of redemption, is not a necessary party defendant to a foreclosure,[5] except where the action is commenced during the

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[1] N. Y. Code Civ. Proc. § 2627. See the preceding section; exactly in point, Hunt v. Acre, 28 Ala. 580 (1856).

[2] See *ante* § 124.

[3] Hebron Society v. Schoen, 60 How. (N. Y.) Pr. 185 (1880); McGown v. Yerks, 6 Johns. Ch. (N. Y.) 450 (1822); Batchelor v. Middleton, 6 Hare, 75 (1847).

[4] Hebron Society v. Schoen, 60 How. (N. Y.) Pr. 185 (1880).

[5] For the New York cases see *ante* §§ 141, 142. Dodd v. Neilson, 90 N. Y. 243 (1882), held that it was not sufficient to make the personal representatives defendants; the heirs were also necessary. Erwin v. Ferguson, 5 Ala. 158 (1843); Inge v. Boardman, 2 Ala. 331 (1841); Wilkins v.

pendency of a proceeding in a probate court to sell the decedent's equity of redemption to pay his debts.[1] The reason for this rule is, that administrators have no interest in the real estate of a decedent.[2] Neither are executors necessary parties, unless their office is coupled with an interest in the property by trust, power of sale or otherwise. In a few states, personal representatives are held indispensable parties defendant,[3] while a majority of the decisions indicate that it

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Wilkins, 4 Port. (Ala.) 245 (1837); but held necessary in Dooley v. Villalonga, 61 Ala. 129 (1878); Bissell v. Marine Co. of Chicago, 55 Ill. 165 (1870); Rockwell v. Jones, 21 Ill. 279 (1859); Trapier v. Waldo, 16 S. C. 276 (1883); Stark v. Brown, 12 Wis. 572 (1860); Houghton v. Mariner, 7 Wis. 244 (1858). The personal representative of a deceased joint mortgagor should not be made a party, according to Wiley v. Pinson, 23 Tex. 486 (1859); Martin v. Harrison, 2 Tex. 456 (1847).

[1] N. Y. Code Civ. Proc. §§ 2749, 2797, 2798.

[2] Willard v. Nason, 5 Mass. 240 (1809). See *ante* §§ 141, 142.

[3] In Missouri a statute makes it sufficient to bring the personal representatives into the action; Perkins v. Woods, 27 Mo. 547 (1858); Cadwallader v. Cadwallader, 26 Mo. 76 (1857); Miles v. Smith, 22 Mo. 502 (1856); Riley's Adm'rs v. McCord's Adm'rs, 21 Mo. 285 (1855); s. c. 24 Mo. 265 (1857), holding the personal representatives indispensable; Randolph v. Widow, etc., of Chapman, 21 La. An. 486 (1869). See Dixon v. Cuyler, 27 Ga. 248 (1859), holding the heirs not necessary parties. Hall v. Musler, 1 Disney (Ohio), 36 (1855). In Biggerstaff v. Loveland, 8 Ohio, 44 (1837), it was held sufficient to make the personal representatives parties defendant on the ground that the statute reads, "heirs, executors or administrators." See also Heighway v. Pendleton, 15 Ohio, 735, 749, 758 (1846), where it was held that the statute of 1807 made the equity of redemption a "chattel descendible" to the personal representatives, and not to the heirs. Mebane v. Mebane, 80 N. C. 34, 38 (1879), distinguishing and ruling contrary to Averett v. Ward, 1 Busb. (N. C.) Eq. 192 (1853); Massie's Heirs v. Donaldson, 8 Ohio, 377 (1838); Hunsecker v. Thomas, 89 Pa. St. 154 (1879); Wallace v. Holmes, 40 Pa. St. 427 (1861), citing the statute; Bryce v. Bowers, 11 Rich. (S. C.) Eq. 41 (1859); Wright v. Eaves, 10 Rich. (S.C.) Eq. 582 (1858); Gibbes v. Holmes, 10 Rich. (S. C.) Eq. 484, 493 (1859). See Trapier v. Waldo, 16 S. C. 276 (1881), apparently overruling these cases. In Texas it has been held necessary under a statute to present the claim on the mortgage to the personal representatives before foreclosing; Graham v. Vining, 1 Tex. 639 (1847); the remedy against the mortgagor's estate must be pursued in the probate court. Limited in Cole v. Robertson, 6 Tex. 356 (1851), to the effect that a foreclosure *in rem*, but not an action *in personam*, can be maintained without a previous demand on the personal representatives.

is a proper and advisable practice always to bring before the court the legal representatives of a deceased owner of an equity of redemption.[1]

In the statutory foreclosure of mortgages by advertisement in New York, the rule is fixed and absolute that the notice must be served upon the "mortgagor, or, if he is dead, upon his *executor or administrator*;"[2] it is not required to be served upon the heirs or devisees. If no personal representatives have been appointed, foreclosure by advertisement can not be maintained.[3]

§ 146. **Trustees, holding an interest of whatever kind in mortgaged premises for beneficiaries, necessary.**— Whenever the title to, or an interest in, mortgaged premises is passed to a person in trust for specific purposes, for the benefit of other persons, the trustee is always a necessary party to a foreclosure in order to cut off the entire equity of redemption. The reported cases, almost without an exception, sustain this proposition, no matter what the character or purpose of the trust may be.[4] Though none of the cases

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[1] Personal representatives are held proper parties in Bayly v. Muche, 65 Cal. 345 (1884); Savings and Loan Society v. Gibb, 21 Cal. 595 (1863); Burton v. Lies, 21 Cal. 87 (1862); Fallon v. Butler, 21 Cal. 24 (1862); Darlington v. Effey, 13 Iowa, 177 (1862); Hodgdon v. Heidman, 66 Iowa, 645, (1885), holds personal representatives proper parties if a judgment for deficiency is desired; Brenner v. Bigelow, 8 Kan. 496, 504 (1871).

[2] Anderson v. Austin, 34 Barb. (N. Y.) 319 (1861); Cole v. Moffitt, 20 Barb. (N. Y.) 18 (1854); Hornby v. Cramer, 12 How. (N. Y.) Pr. 490 (1855); Low v. Purdy, 2 Lans. (N. Y.) 424 (1869); 2 N. Y. Rev. Stat. 545; Laws of 1844, chap. 346; N. Y. Code Civ. Proc. § 2388, subdiv. 4.

[3] Mackenzie v. Alster, 64 How. (N. Y.) Pr. 388 (1882); s. c. 12 Abb. (N. Y.) N. C. 110. Boardman, J., queries in VanSchaack, v. Sanders, 32 Hun (N. Y.) 515 (1884), s. c. 19 N. Y. Week. Dig. 170, whether service on a devisee is not sufficient where the executors have not qualified.

[4] Bard v. Poole, 12 N. Y. 495 (1855); Case v. Price, 9 Abb. (N. Y.) Pr. 111 (1859); Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254 (1845); Leggett v. Mutual Life Ins. Co., 64 Barb. (N. Y.) 38 (1872); Toole v. McKiernan, 48 N. Y. Super. Ct. (16 J. & S.) 163 (1882); Grant v. Duane, 9 Johns. (N. Y.) 591 (1812); Nodine v. Greenfield, 7 Paige Ch. (N. Y.) 547 (1839); Paton v. Murray, 6 Paige Ch. (N. Y.) 474 (1837); King v. McVicker, 3 Sandf. Ch. (N. Y.) 192 (1846); Williamson v. Field's Ex'rs, 2 Sandf. Ch. (N. Y.) 533, 563 (1845); Wilson v. Russ, 17 Fla. 691 (1880); C. & G. W. R.

state the reason for this principle, it is believed that it is based upon the fact that all trustees are held accountable by the courts for the performance of their trusts, and that without being made parties they would have no opportunity to be heard in an action affecting the subject of their trust.

Even if the trust were not coupled with an interest, there might be latent equities or hidden rights which would impair the title offered at a foreclosure sale, if the trustee were omitted as a party defendant. It is specially necessary, and, in fact, indispensable, to make a trustee of an express trust, or one who has an interest coupled with a trust, a party.[1] Trusts created by wills are so various in character and often approach so near a mere power, that each case must be judged by itself as it arises; and this is notably true, when it is remembered that the common-law theory of trusts and the statutory enactments of the various states respecting them are so complicated and intricate.[2] The trustee must be made a party in his reprensentative, and not in his individual, capacity.[3]

§ 147. **Cestuis que trust and beneficiaries—When necessary.**—The decisions of the courts and the statutes of this state have long established the *dictum*, that the *cestuis que trust* and beneficiaries of a trust are necessary defendants to a foreclosure, in order to cut off the entire equity of redemption.[4] Judge Story says: "It will not in general be

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Land Co. v. Peck, 112 Ill. 408, 435 (1885); Walsh v. Truesdale, 1 Ill. App. 126 (1877); Clark v. Reyburn, 75 U. S. (8 Wall.) 318 (1868); bk. 19 L. ed. 354; Fisher on Mortgages, §§ 365, 367; Wilton v. Jones, 2 Y. & C. C. C. 244 (1843). The heirs at law of a trustee are not necessary parties; N. & C. Bridge Co. v. Douglass, 12 Bush. (Ky.) 719 (1877). See Gardner v. Brown, 88 U. S. (21 Wall. 36 (1874); bk. 22 L. ed. 527, where a trustee had not filed a required bond.

[1] In Case v. Price, 17 How. (N. Y.) Pr. 348 (1859), it was held that when no estate, legal or equitable, vested in the trustee, he was not a necessary party; *aliter* when the trustee takes any interest in the property. See the cases cited *supra*.

[2] Nodine v. Greenfield, 7 Paige Ch. (N. Y.) 547 (1839).

[3] Rathbone v. Hooney, 58 N. Y. 463 (1874).

[4] Leggett v. Mutual L. I. Co., 64 Barb. (N. Y.) 23, 36 (1872); reversed in part in 53 N.Y. 400 (1873); Case v. Price, 17 How. (N.Y.) Pr. 348 (1859); Toole v. McKiernan, 48 N.Y. Super. Ct. (16 J. & S.) 163 (1882); Terrett v.

sufficient if the equity of redemption is conveyed or devised to a trustee in trust, to bring him before the court; but the *cestuis que trust* (the beneficiaries) should also be made parties."[1] "It is conceded to be the general rule, that if the equity of redemption is vested in a trustee in trust, the *cestuis que trust* must be made parties to the foreclosure."[2]

And even where the receipt of trustees was to be sufficient to discharge purchasers from all liability to the beneficiaries, the equity of redemption having been conveyed to trustees to sell and divide among certain specified persons, the *cestuis que trust* were held necessary parties to a bill brought to foreclose the mortgage.[3] The nature of the trust should appear on the face of the instrument creating it. Where the conveyance does not reveal the fact that it is a trust deed, together with the names of the beneficiaries, the foreclosure will produce a perfect title, and the rights of the

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Crombie, 6 Lans. (N. Y.) 82 (1872); modified in 55 N. Y. 683; Nodine v. Greenfield, 7 Paige Ch. (N. Y.) 544 (1839); King v. McVickar, 3 Sandf. Ch. (N. Y.) 192 (1846); Williamson v. Field, 2 Sandf. Ch. (N. Y.) 562 (1845). See Dodd v. Neilson, 90 N. Y. 243, 247 (1882). In Lockman v. Reilley, 10 Abb. (N. Y.) N. C. 351 (1881), certain beneficiaries were held unnecessary parties; but in that case the equity of redemption had been changed into personalty by the terms of a will. Woolner v. Wilson, 5 Ill. App. 439 (1880); Day v. Wetherby, 29 Wis. 363 (1872); Clark v. Reyburn, 75 U. S. (8 Wall.) 318 (1868); bk. 19 L. ed. 354. See Broward v. Hoeg, 15 Fla. 370 (1875), for a case where alleged beneficiaries were held not necessary parties. In Johnson v. Robertson, 31 Md. 476 (1869), the *cestui que trust*, being a non-resident, was held an unnecessary party; her interests were held bound by a decree taken *pro confesso* against her trustee. In Wood v. Nisbit, 20 Ga. 72 (1856), the premises were conveyed to a person as trustee, who executed a purchase money mortgage as trustee; the *cestui que trust* was held not a necessary party. *Contrary* to the text, see Fisher on Mortgages, § 367 *et seq.*, and the English cases, Hanman v. Riley, 9 Hare Append. 40 (1852); Goldsmid v. Stonehewer, 9 Hare Append. 39; s. c. 17 Jur. 199 (1852); Sale v. Kitson, 17 Jur. 171; s. c. 3 DeG., M. & G. 119 (1853); Tuder v. Morris, 1 Sm. & Gif 503 (1853); Cropper v. Mellersh, 1 Jur. N. S. 299 (1855). See Coles v. Forrest, 10 Beav. 557 (1847).

[1] Story's Eq. Pl. §§ 193, 197.

[2] Williamson v. Field, 2 Sandf. Ch. (N. Y.) 562 (1845), a leading case, *per* Vice-Chancellor Sandford All the books agree in sustaining this proposition. Gore v. Stacpoole, 1 Dow's P. C. 18, 31 (1813), *per* Lord Eldon; Story's Eq. Pl. §§ 193, 194, 207. Calvert on Parties, 181, 182.

[3] Calverley v. Phelp, 6 Madd. 229 (1822).

cestuis que trust will be cut off, though they are not made parties to the action.[1]

§ 148. Cestuis que trust—When not necessary.—As far as the reported cases show, there are only two exceptions to the general rule above stated. First, "in cases of remote limitation of the equity of redemption, in which, on account of the impossibilty of bringing in parties not *in esse*, or not ascertained, but who may ultimately become entitled, it is held sufficient to bring before the court the persons *in esse* who have the first estate of inheritance, together with the persons having all the precedent estates and prior interests."[2] But where a mortgagor conveyed his equity of redemption to trustees in settlement for his daughter on her marriage, out of which she was to receive an annuity, and the trustees were to raise out of the same a sum of money for the children of the marriage, the daughter and her children were deemed necessary parties to a suit for the foreclosure of the mortgage.[3]

Second, in cases where the beneficiaries are so numerous that it would be intolerably oppressive to compel the plaintiff to bring them all into the action, it is held sufficient to make the trustees defendants.[4] Thus, in a case where real estate had been purchased by a joint fund raised by subscriptions from above two hundred and fifty subscribers, and the property was conveyed to A., B. and C. as trustees, who executed a purchase money mortgage, Chancellor Kent

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[1] Johnston v. Donvan, 106 N. Y. 269 (1887); Brown v. Cherry, 38 How. (N. Y.) Pr. 352 (1870); s. c. 56 Barb. (N. Y.) 635; Young v. Whitney, 18 Fla. 54 (1881).

[2] Williamson v. Field, 2 Sandf. Ch. (N. Y.) 562 (1845). Special attention is called to this case for its learned and exhaustive discussion of the relation of trustees to their *cestuis que trust*, in cases of mortgage foreclosure.

[3] Anderson v. Stather, 16 L. J. (Eq.) N. S. 152 (1845), before Sir Knight Bruce, Vice-Chancellor.

[4] Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254 (1845); VanVechten v. Terry, 2 Johns. Ch. (N. Y.) 197 (1816); Paton v. Murray, 6 Paige Ch. (N. Y.) 474 (1837). See C. & G. W. R. Land Co. v. Peck, 112 Ill. 408, 435 (1885), citing VanVechten v. Terry, 2 Johns. Ch. (N. Y.) 197 (1816), and discussing this principle at length; Swift v. Stebbins, 4 Stew. & Port. (Ala.) 447 (1833); Willis v. Henderson, 5 Ill. (4 Scam.) 13 (1842); N. Y. Franklinite Co. v. Ames, 12 N. J. Eq. (1 Beas.) 507 (1859).

held on the foreclosure that "the trustees were selected in this case to hold and represent the property for the sake of convenience, and because the subscribers were too numerous to hold and manage the property as a co-partnership. The trustees are sufficient for the purpose of this bill, which is for a sale of the pledge; it would be intolerably oppressive and burdensome, to compel the plaintiff to bring in all of the *cestuis que trust*. The delay and the expense incident to such a proceeding would be a reflection on the justice of the court. This is one of those cases in which the general rule can not, and need not, be enforced; for the trustees sufficiently represent all the interests concerned; they were selected for that purpose, and we need not look beyond them."[1] Where a trust is created for the benefit of numerous creditors, the same explanation holds good, and the creditors are not necessary parties, but may be safely represented by the trustees;[2] but the beneficiaries may properly be made defendants, if the plaintiff desires to bring them into the action.[3]

§ 149. **Statutes making cestuis que trust necessary.** —The statutes of many states are clear in declaring that in cases of trusts made to one or more persons for the use of others, no estate or interest, legal or equitable, shall vest in the trustee; but that every beneficiary who by virtue of a trust is entitled to the actual possession of lands and the profits thereof, shall be deemed to have a legal estate therein, according to his beneficiary interest.[4] No court has ever

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[1] VanVechten v. Terry, 2 Johns. Ch. (N. Y.) 197 (1816).

[2] Grant v. Duane, 9 Johns. (N. Y.) 591 (1812). See the clear opinion of Caton, J., in Willis v. Henderson, 5 Ill. (4 Scam.) 13, 20 (1842); Fisher on Mortgages, § 374. For the English cases, see Thomas v. Dunning, 5 DeG. & S. 618 (1852); Newton v. Earl of Egmont, 4 Sim. 574 (1831); Troughton v. Binkes, 6 Ves. 573 (1801). A few creditors may represent the remainder; Holland v. Baker, 3 Hare, 68 (1842). See also Smart v. Bradstock, 7 Beav. 500 (1844); Powell v. Wright, 7 Beav. 444 (1844); Law v. Bagwell, 4 Dru. & War. 406; Doody v. Higgins, 9 Hare Append. 32 (1852); Gore v. Harris, 15 Jur. 761 (1850); Wallwyn v. Coutts, 3 Mer. 707 (1815); Garrard v. Lord Louderdale, 3 Sim. 1 (1839).

[3] Union Bank v. Bell, 14 Ohio St. 200 (1862).

[4] 1 N. Y. Rev. Stat. 728, §§ 47, 49. Rawson v. Lampman, 5 N. Y. 456 (1851).

held, so far as can be ascertained, that a *cestui que trust* may be omitted as a party to a foreclosure, except in the two cases already mentioned.[1] Even where a trustee executed the mortgage under authority of a court, it was held that the beneficiaries were necessary parties;[2] the same would hold true if the mortgage were executed by a trustee under authority contained in a will or other instrument.[3]

The general rule of law of this section is undoubtedly founded on the broad principle, that all persons having an interest in the equity of redemption should be made parties, and that none of them will be concluded as to their rights unless they are brought into the action so that the court acquires jurisdiction of them. Although the trustee has a *quasi* interest in the premises, the beneficiaries are, nevertheless, the actual parties in interest, owning as they do the equitable, if not the legal, title to the premises.

§ 150. Remaindermen and reversioners necessary.— All persons having a vested estate of inheritance in remainder or reversion in mortgaged premises, must be brought into court in an action to foreclose a mortgage; but where there are several future and contingent interests in the equity of redemption in mortgaged premises, it is not necessary generally to make every person having a future and contingent interest a party to a bill of foreclosure. It seems sufficient, if the person who has the first vested estate of inheritance, and the several intermediate remaindermen and persons having or claiming rights or interests in the premises prior to the vested estates, are brought before the court.[4]

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[1] See *ante* § 146, and the notes, for special instances.

[2] Williamson v. Field, 2 Sandf. Ch. (N. Y.) 533 (1845).

[3] Albany Fire Ins. Co. v. Bay, 4 N. Y. 9, 19 (1850).

[4] Brevoort v. Brevoort, 70 N. Y. 136 (1877); Rathbone v. Hooney, 58 N. Y. 463 (1874); Leggett v. Mutual Life Ins. Co., 64 Barb. (N. Y.) 23, 36 (1872); Eagle F. Ins. Co. v. Cammet, 2 Edw. Ch. (N. Y.) 127 (1833); Nodine v. Greenfield, 7 Paige Ch. (N. Y.) 544 (1839); Williamson v. Field, 2 Sandf. Ch. (N. Y.) 533, 563 (1845). See Lockman v. Reilley, 95 N. Y. 64 (1884); s. c. 10 Abb. (N. Y.) N. C. 351, where questions affecting the interpretation of a will were also involved. See Iowa Loan & Trust Co. v. King, 58 Iowa, 598 (1882). See Breit v. Yeaton, 101 Ill. 242 (1882), an action for partition. For the English authorities, see

It is clear equitable law that in order to make a foreclosure valid as against all claimants, he who has the first estate of inheritance must be brought before the court; and even then the intermediate remaindermen for life ought also to be brought before the court, to give them an opportunity to pay off the mortgage if they desire.[1] In a case where mortgaged premises were bequeathed by a mortgagor to his wife for life with remainder in fee to the children of his brother, who should be living at the time of her death, and to the issue of such of the children as should then have died leaving issue, with the power to his executors to sell his real estate and invest the proceeds for the benefit of the devisees, the court decided that the children of the brother, who were *in esse* at the death of the testator, took vested remainders in fee, subject to open and let in after-born children, and subject also to be divested by death during the continuance of the life estate of the widow, or to be defeated by the execution of the power of sale given to the executors by the will; and that accordingly the children of the brother who were *in esse* at the time of filing the bill, ought to have been made parties to the foreclosure, and that their equity of redemption was not barred by a decree in a suit in which the widow, the executors and the heirs at law alone were made parties.[2]

§ 151. **A defendant in esse necessary.**—All the courts are agreed in cases involving these questions, that there must be a defendant who is a person *in esse*,[3] and who holds a

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Fisher on Mortgages, § 309 *et seq.*; Lloyd v. Johnson, 9 Ves. 37 (1802); Gifford v. Hort, 1 Sch. & Lef 386, 408 (1804); Yates v. Hambly, 2 Atk. 237 (1741); Sutton v. Stone, 2 Atk. 101 (1740); Hopkins v. Hopkins, 1 Atk. 581, 590 (1738); Roscarrick v. Barton, 1 Ch. Cas. 218 (1671); Fishwick v. Lowe, 1 Cox Cas. in Eq. 411 (1787); Choppell v. Rees, 1 DeG., M. & G. 393 (1852); Gore v. Stacpoole, 1 Dow. 18, 31 (1813); Cholmondeley v. Clinton, 2 Jac. & W. 133 (1820).

[1] Gore v. Stacpoole, 1 Dow. 31 (1813); opinion rendered in the House of Lords, *per* Lord Chancellor Eldon.

[2] Nodine v. Greenfield, 7 Paige Ch. (N. Y.) 544 (1839), a leading case, *per* Chancellor Walworth, citing and quoting Lord Eldon, in Gore v. Stacpoole, 1 Dow. 31 (1813).

[3] See Clark v. Reyburn, 75 U. S. (8 Wall.) 318 (1868); bk. 19 L. ed. 354, where mortgaged premises had been conveyed in trust for the benefit of children born and to be born; all

vested estate of inheritance; and they are further agreed, that all persons having estates and interests prior or superior thereto, must be defendants.[1] As Vice-Chancellor McCoun says, "A decree against the party having the estate of inheritance will bind those in remainder or who in any way come afterwards; there must be a clear tenancy in tail to dispense with the necessity of a remainderman being a party to a bill of foreclosure. If there be an express estate for life, and it is doubtful whether the same person is also tenant in tail, the remainderman who has the first estate of inheritance ought to be a party."[2] Though the cases are uniform in using the term, "the first estate of inheritance," it would certainly be advisable to make even the remotest remainderman or reversioner, if he is *in esse*, also a party; it will avoid the raising of any question by him upon the determination or failure of the intermediate estate.

§ 152. Assignee in bankruptcy or by voluntary general assignment, and receiver, necessary. — An assignee in bankruptcy, under the former national bankrupt act, or by voluntary general assignment under the statutes of the several states, of the owner of the equity of redemption in mortgaged premises, is a necessary defendant[3] to a

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the children *in esse* at the time of filing the bill of foreclosure were held necessary parties. See the cases cited in the preceding section.

[1] English authorities: Fisher on Mortgages, §§ 311, 315. A tenant for life is necessary; Reynoldson v. Perkins, Ambl. 564 (1769). See Handcock v. Shaen, Coll. P. C. 122 (1701), holding that intermediate remaindermen are necessary. See Chappell v. Rees, 1 DeG., M. & G. 393 (1852); Gore v. Stacpoole, 1 Dow. 31 (1813).

[2] Eagle Fire Ins. Co. v. Cammet, 2 Edw. Ch. (N. Y.) 127 (1833). In this case M. C. mortgaged real estate and died after making his will, by which he gave all his real and personal estate to his widow until second marriage or death; then to his daughter Mary, as long as she should live; and if she should have no heirs at her death, then to the children of J. C. It was held that the daughter Mary had only a life estate, and that on a bill of foreclosure the children of J. C. ought to have been made parties. "The first tenant in tail," says Lord Camden, "is sufficient; he sustains the interests of everybody; thus any remaindermen are considered ciphers." Reynoldson v. Perkins, Ambl. 564 (1769).

[3] Lenihan v. Hamann, 55 N. Y. 652 (1873); Bard v. Poole, 12 N. Y. 507 (1855), a case of voluntary assignment; Cleveland v. Boerum, 23 Barb. (N. Y.) 205 (1856); aff'd 24

foreclosure, if the petition in bankruptcy or the voluntary assignment was made before the commencement of the action to foreclose; so also the receiver of an insolvent corporation is a necessary defendant.[1] If an action is brought by the Attorney-General in the name of the People for the dissolution of an insolvent corporation and the appointment of a receiver, the People and the receiver are not necessary, though proper, defendants to the foreclosure of a valid existing mortgage.[2]

This rule follows in analogy the broader principle of law which makes the owner of the equity of redemption always a necessary party to a foreclosure.[3] The assignee succeeds by the assignment to all the rights of the assignor, and becomes the owner of the equity. It must be carefully noticed, that to make the assignee a necessary party, the assignment must be made while the assignor owns the equity of redemption and before the commencement of the action to foreclose. The assignor is not a necessary party after the assignment;[4] he may, however, properly be made a defendant;[5] neither are his general creditors necessary or proper parties.[6]

N. Y. 613 (1862); Wagner v Hodge, 34 Hun (N. Y.) 524 (1885), a case of voluntary assignment, in which the defendant assignee was described merely in his individual capacity and not as assignee; it was held that he was properly and sufficiently made a defendant; followed in Landon v. Townshend, 44 Hun (N. Y.) 561 (1887); Spring v. Short, 90 N. Y. 538, 545 (1882); Winslow v. Clark, 47 N. Y. 261, 263 (1872); Burnham v. De Bevorse, 8 How. (N. Y.) Pr. 159 (1853); Harris v. Cornell, 80 Ill. 54 (1875); Stimpson v. Pease, 53 Iowa, 572 (1880); Eyster v. Gaff, 91 U. S. (1 Otto), 521 (1875); bk. 23 L. ed. 403; Gardner v. Brown, 88 U. S. (21 Wall.) 36 (1874); bk. 22 L. ed. 527. In Chickering v. Failes, 26 Ill. 507 (1861), the assignee was held a necessary party if the foreclosure was by an equitable action, but not if it were conducted by *scire facias*. King v. Bowman, 24 La. An. 506 (1872); Moors v. Albro, 129 Mass. 9 (1880); Freeland v. Freeland, 102 Mass. 475 (1869); Thorpe v. Ricks, 1 Dev. & B. (N. C.) Eq. 619, 620 (1837); Dwyer v. Garlough, 31 Ohio St. 158 (1877); Stafford v. Adair, 57 Vt. 63 (1885); Fisher on Mortgages, § 308.

[1] Raynor v. Selmes, 52 N. Y. 579 (1873), reversing 7 Lans. (N. Y.) 440. See Herring v. N. Y., L. E. & W. R. Co., 105 N. Y. 340, 371 (1887).

[2] Herring v. N. Y., L. E. & W. R. Co., 105 N. Y. 341, 371 (1887).

[3] See *ante* §§ 117, 126, 127.

[4] Rochfort v. Battersby, 14 Jur. 229 (1849); Lloyd v. Lander, 5 Madd. 282 (1821); Collins v. Shirley, 1 Russ & M. 638 (1830); Kerrick v. Saffery,

§ 153. Assignee in bankruptcy pendente lite not necessary.—Among the early decisions in New York,[1] it was held that if an assignment were made during the pendency of an action to foreclose, the decree of sale would be void as against the assignee, unless he were brought in as a party. The later decisions in all the courts of the country, however, are uniform in applying to assignees in bankruptcy the general rule previously stated, that purchasers *pendente lite* are not necessary parties.[2] Justice Miller held, in the Supreme Court of the United States,[3] that where an assignee in bankruptcy of a mortgagor is appointed during the pendency of a foreclosure of the mortgaged premises, he stands as any other purchaser would stand, on whom the title had fallen after the commencement of the suit. If there is any reason for interposing, the assignee should be substituted for the bankrupt or be made a defendant on petition.

Justice Allen, in deciding the same question in the New York Court of Appeals,[4] in 1873, held substantially the same ruling, and further that such a foreclosure might be restrained by injunction by a United States court in bankruptcy, but that, if allowed to proceed, the purchaser at the sale would acquire a good title as against the mortgagor or owner of the equity of redemption and against all parties claiming under them, including an assignee in bankruptcy. An exhaustive discussion of the question decided in these cases was given by Justice Strong in Cleveland v. Boerum.[5] Indeed, this was the earliest case to sustain the proposition of this section; it collates and reviews all the previous cases.

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7 Sim. 317 (1835); Fisher on Mortgages, § 306.

[5] Franklyn v. Fern, Barn. Ch. (folio) 30, 32 (1740); Singleton v. Cox, 4 Hare, 326 (1845); Rafferty v. King, 1 Keen 619 (1836); Collins v. Shirley, 1 Russ. & M. 638 (1830); cited in 9 Sim. 399; Eades v. Harris, 1 Y. & C. 234 (1842); Fisher on Mortgages, § 307.

[6] Spring v. Short, 90 N. Y. 538 (1882).

[1] Johnson v. Fitzhugh, 3 Barb. Ch. (N. Y.) 360 (1848); Burr v. Burr, 10 Paige Ch. (N. Y.) 20 (1842); Sedgwick v. Cleveland, 7 Paige Ch. (N. Y.) 290, 291 (1838).

[2] See *ante* § 130. See the cases cited in the preceding section.

[3] Eyster v. Gaff, 91 U. S. (1 Otto), 521 (1875); bk. 23 L. ed. 403.

[4] Lenihan v. Hamann, 55 N. Y. 652 (1873).

[5] 23 Barb. (N. Y.) 202; aff'd 24 N. Y. 613 (1862).

The error of the early decisions was due to the distinction made by the courts, between transfers made *pendente lite* by the voluntary act of the assignor and those accomplished by operation of law.

§ 154. **Infants, lunatics, idiots and habitual drunkards necessary parties.**—Provision has been made in the statutes of most of the states for a proceeding to dispose of the real property of infants, lunatics, idiots and habitual drunkards by sale, mortgage or lease. Prior to these statutes, there was a proceeding in the common-law practice to accomplish the same purpose. Where a mortgage has been executed by a guardian or a committee of an incompetent person, pursuant to an order of a court, the infant, lunatic, idiot or habitual drunkard, as the case may be, is a necessary defendant in an action to foreclose the mortgage.[1] Some of the states declare the effect of such conveyances. The New York Code of Civil Procedure declares that such a mortgage "has the same validity and effect as if it was executed by the person in whose behalf it was executed, and as if the infant was of full age, or the lunatic, idiot or habitual drunkard was of sound mind and competent to manage his own affairs."[2] A mortgage executed under such

[1] Prentiss v. Cornell, 31 Hun (N. Y.) 167 (1883). See Argricultural Ins. Co. v. Barnard, 96 N. Y. 525 (1884), holding also that a bond is not necessary with such a mortgage, but that it is discretionary with the court to require it. See Lyon v. Lyon, 67 N. Y. 250 (1876); McManis v. Rice, 48 Iowa, 361 (1878). In Eslava v. LePretre, 21 Ala. 504 (1852), the committee of a lunatic, who had been irregularly appointed, executed a mortgage jointly with her husband; on foreclosure the lunatic was held a necessary party, owing to the defect in the appointment. In Parker v. Lincoln, 12 Mass. 16 (1815), a mortgage was executed to an infant who had a guardian; the mortgagor, bringing an action to redeem, was obliged to make both the infant and his guardian parties to the action. In would seem that in Illinois an infant is not a necessary party in any legal proceedings where he has a guardian to represent his interests; Campbell v. Harmon, 43 Ill. 18 (1867); Merritt v. Simpson, 41 Ill. 391 (1866). In Boston Bank v. Chamberlain, 15 Mass. 220 (1818), an infant had executed a mortgage; after reaching his majority he conveyed the premises subject to the mortgage. In an action to foreclose, infancy at the time of executing the mortgage was pleaded in defense, but held no bar to its validity.

[2] N. Y. Code Civ. Proc. § 2358; Valentine v. Haff, 72 N. Y. 184

a proceeding does not bind a wife's inchoate right of dower, and she is not a necessary or proper party to a foreclosure of the mortgage unless she has voluntarily signed it.[1] If an infant or incompetent person whose real property has been mortgaged in such a proceeding should die before an action to foreclose was commenced, his heirs, devisees or legatees, as the case might be, would become necessary parties.[2]

It is to be observed that a proceeding to mortgage the property of an infant or incompetent person is statutory; and it is assumed here that the proceeding has been properly conducted, and the mortgage duly executed. The plaintiff in the foreclosure must allege in his complaint facts, showing the interest of the infant or incompetent person in the premises, if he is made a defendant.[3] Great care should be taken to secure legal service of the summons upon the infant or incompetent person; it is also essential that a guardian *ad litem* be appointed to represent the interests of the infant.[4] The guardian or committee who executes the mortgage pursuant to an order of the court is a very desirable, if not an indispensable, party to the action to foreclose, especially as he is interested in caring for any surplus that may arise, and in seeing that no deficiency is created.

§ 155. Mortgage executed by administrator or executor to pay decedent's debts; heirs and devisees of the decedent necessary.—Many of the states have made statutory provisions in their codes or otherwise, for disposing of a deceased person's real estate to pay his debts, which provisions are, in form and purpose, not unlike those made for disposing of the property of infants and incompetent persons. The practice under such provisions varies in different states. But

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(1878); Matter of Price, 67 N. Y. 231 (1876); Cole v. Gourlay, 9 Hun (N. Y.) 493 (1877).

[1] See *ante* § 135, 136.

[2] See *ante* §§ 141–144.

[3] Aldrich v. Lapham, 6 How. (N. Y.) Pr. 129 (1850).

[4] See Ingersoll v. Mangam, 84 N. Y. 622 (1881), stating what constitutes proper service on a non-resident infant under the age of fourteen years. Where there is a defect in the action which results in a failure to cut off the interest of the infant, he can maintain an action to set aside the foreclosure as to himself, on arriving at his majority; McMurray v. McMurray, 66 N. Y. 175 (1876).

it is a general principle of law, recognized by all courts, that administrators or executors, in mortgaging or selling a decedent's real estate, act simply in a capacity representative of the decedent, and are guided by orders of the probate court.

The title to the premises mortgaged in such a proceeding vests in the heirs or devisees immediately upon the death of the decedent, and is encumbered only pursuant to a statutory proceeding designed to marshal and pay his debts. In New York it is declared that a mortgage, executed pursuant to such a proceeding, has the same effect as if it had been made by the decedent immediately before his death.[1] The administrator or executor who signed the mortgage under the order of the probate court, is a very proper, if not an absolutely necessary, party to an action to foreclose, as he is in some measure interested in the action.[2]

§ 156. **Corporations necessary parties by corporate name.**—Corporations play such an important part in the commercial, industrial and social life of this age, that legislatures and courts have materially enlarged their rights and privileges so that more than ever they are a "single individual"[3] in the law. They are generally vested with all the rights and may assume all the obligations known to the law. With limited exceptions they may acquire real estate and convey the same by deed or mortgage.[4]

Whenever a corporation in its corporate name becomes the owner of the equity of redemption in mortgaged premises, or executes a mortgage upon its real estate, it is a necessary defendant to a foreclosure in its corporate name.[5] This rule is based upon the broad principle that corporations may sue and be sued in law by their corporate names.[6] A

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[1] N. Y. Code Civ. Proc. § 2760.

[2] See McMannis v. Rice, 48 Iowa, 361 (1878).

[3] 2 Kent, 267.

[4] See Aurora Agricultural & H. Society v. Paddock, 80 Ill. 263 (1873). As to what is necessary to authorize a manufacturing corporation to execute a mortgage in New York, see Rochester Savings Bank v. Averell, 96 N. Y. 467 (1884); Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328 (1877).

[5] Reed v. Bradley, 17 Ill. 321 (1856); Ottawa Northern Plank Road Co. v. Murray, 15 Ill. 336 (1854); Donnelly v. Rusch, 15 Iowa, 99 (1863).

[6] 2 Kent, 284, 293; People's Bank v. Hamilton Manufacturing Co., 10 Paige Ch. (N. Y.) 481 (1843).

stockholder is generally not a necessary defendant in the foreclosure of a mortgage on corporate property ;[1] but a stockholder in a defunct corporation has such an interest as entitles him to defend a foreclosure on the corporate real estate.[2]

§ 157. **Tenants and occupants necessary.** — Every tenant who takes a lease from the owner of the equity of redemption in mortgaged premises, subsequent to the execution and delivery of the mortgage, is a necessary defendant to a foreclosure.[3] The occupant or person in possession of the premises at the time of the commencement of the foreclosure is also indispensable, no matter how or under what circumstances he came into possession.[4] A tenant or occupant not made a party is not bound by the decree, and if omitted, he can not be ejected till the expiration of his tenancy.[5] His omission will, moreover, produce such a defect of title as to relieve a purchaser at the sale of his bid.[6]

A tenant is not affected by a foreclosure till the sale is consummated and the deed delivered.[7] And if he is omitted

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[1] Smith v. The Smith Moquette Loom Co., 20 N. Y. Wk. Dig. 342 (1884).

[2] Chouteau v. Allen, 70 Mo. 292 (1879).

[3] Globe Marble Mills Co. v. Quinn, 76 N. Y. 23 (1879); Clarkson v. Skidmore, 46 N. Y. 297 (1871), modifying 2 Lans. (N. Y.) 238; Whalen v. White, 25 N. Y. 462 (1862); Zeiter v. Bowman, 6 Barb. (N. Y.) 133 (1849); Simers v. Saltus, 3 Den. (N. Y.) 214 (1846); Fuller v. VanGeesen, 4 Hill (N. Y.) 171 (1843); Ostrom v. McCann, 21 How. (N. Y.) Pr. 431, 433 (1860); Peck v. Knickerbocker Ice Co., 18 Hun (N. Y.) 183 (1879); Hirsch v. Livingston, 3 Hun (N. Y.) 9 (1874); s. c. 48 How. (N. Y.) Pr. 243; Clason v. Corley, 5 Sandf. (N. Y.) 447 (1852); Campbell v. Savage, 33 Ark. 678 (1878); Gartside v. Outley, 58 Ill. 210, 215 (1871); Tuttle v. Lane, 17 Me. 437 (1840); Fletcher v. Cary 103 Mass. 475 (1870); Hemphill v Ross, 66 N. C. 477, 480 (1872); Coe v. Manseau, 62 Wis. 81 (1885).

[4] Ostrom v. McCann, 21 How. (N. Y.) Pr. 431, 433 (1860); Buckner v. Sessions, 27 Ark. 219 (1871); McLain v. Badgett, 4 Ark. 244 (1841); Cox v. Vickers, 35 Ind. 27 (1870).

[5] Sproule v. Samuel, 5 Ill. (4 Scam.) 135, 139 (1842); Downard v. Groff, 40 Iowa, 597, 598 (1875); Suiter v. Turner, 10 Iowa, 517, 527 (1860). In point, McDermott v. Burke, 16 Cal. 580 (1860); Richardson v. Hadsall, 106 Ill. 476, 479 (1883); Delespine v. Campbell, 45 Tex. 628 (1876). See the New York cases in the preceding notes.

[6] Hirsch v. Livingston, 3 Hun (N. Y.) 9 (1874); s. c. 48 How. (N. Y.) Pr. 243.

[7] Whalin v. White, 25 N. Y. 462 (1862).

as a party, he will be entitled to the emblements, and all crops that may be grown before the expiration of his term; a purchaser at the sale will receive his title subject to the rights of the tenant.[1] In a case where pending a foreclosure a tenant went into possession and raised and cut a crop of wheat before the action was concluded, he was allowed to carry it away.[2] If a tenant is made a party and his rights are cut off by the action, he will be entitled from the surplus money, if any, to the value of his unexpired term and damages for ejectment; if there is no surplus, he can maintain an action against the lessor for damages.[3] Foreclosure before the expiration of a tenant's term will not prejudice his right to remove fixtures.[4]

A tenant or other person, who holds possession after the execution and delivery of the deed by the referee to sell, may be ejected at once, if he was made a party to the action;[5] but in some states confirmation of the referee's report of sale is necessary before ejectment can be maintained.[6] If a lessee on being requested by the purchaser to attorn yield up the possession of the premises, it is equivalent to an actual eviction and will be a good defense to an action by the mortgagor for rent accruing subsequently.[7]

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[1] Cassilly v. Rhodes, 12 Ohio, 88 (1843), a leading case on the subject of tenants' rights.

[2] Johnson v. Camp, 51 Ill. 219 (1869).

[3] Clarkson v. Skidmore, 46 N. Y. 297 (1871), modifying 2 Lans. (N. Y.) 238 (1869).

[4] Globe Marble Mills Co. v. Quinn, 76 N. Y. 23 (1879).

[5] Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609 (1820); Hirsch v. Livingston, 3 Hun (N. Y.) 9, 10 (1874); N. Y. Code Civ. Proc. § 2232.

[6] Peck v. Knickerbocker Ice Co., 18 Hun (N. Y.) 183, 186 (1879); Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); Clason v. Corley, 5 Sandf. (N. Y.) 447 (1852).

[7] Simers v. Saltus, 3 Den. (N. Y.) 214 (1846); Jones v. Clark, 20 Johns. (N. Y.) 51 (1822); Magill v. Hinsdale, 6 Conn. 464, 469 (1827); s. c. 16 Am. Dec. 70; Wakeman v. Banks, 2 Conn. 445 (1818); Rockwell v. Bradley, 2 Conn. 1 (1816).

CHAPTER VII.

PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE.

SUBSEQUENT MORTGAGEES AND LIENORS.

§ 158. Introductory.
159. Subsequent mortgagees, still owning their mortgages, necessary defendants.
160. Subsequent mortgagees — Remedies if omitted as defendants.
161. Subsequent mortgagee owning prior mortgage—Practice on foreclosure.
162. Subsequent judgment creditors, still owning judgments, necessary.
163. Judgment creditors *pendente lite* and creditors at large not necessary.
164. Judgment creditors—Remedies if omitted as defendants.
165. Mechanic's lien, owner of, necessary.
166. Subsequent lienor, an assignor no longer holding the incumbrance, not necessary.
167. Subsequent lienors, holding any kind of an equitable or contingent interest in the lien, generally necessary.
168. Assignee of subsequent mortgage, judgment or other lien, necessary.
§ 169. Assignee of subsequent mortgage or lien *pendente lite* not necessary.
170. Incumbrancer *pendente lite* not necessary.
171. Subsequent mortgagee or lienor a married woman does not alter rule; necessary.
172. Heirs, devisees, legatees and annuitants of deceased subsequent lienor generally not necessary.
173. Executors and administrators of a deceased subsequent lienor necessary.
174. Assignee in bankruptcy and voluntary general assignee of subsequent lienor necessary.
175. General guardian of infant, and committee of lunatic, idiot or habitual drunkard, trustees and beneficiaries, holding subsequent mortgage or lien, necessary.
176. Purchasers at tax sales, boards of supervisors, state comptrollers and municipal corporations, defendants.

§ 158. **Introductory.**—In this chapter will be continued the consideration of parties who are necessary to a foreclosure, for the purpose of producing to the purchaser at the sale as perfect a title as the mortgagor could have granted at the time of the execution of the mortgage; that is, such a title as a court will compel a bidder at the sale to accept. As has been stated, this and the preceding chapter are devoted to those parties who are necessary and indispensable to the accomplishment of such a purpose.

In the preceding chapter attention has been given exclusively to those parties who are necessary to an action to foreclose and to cut off the fee title and the entire equity of redemption, as it existed in the mortgagor and the owners of the equity from him by grant, descent, devise or otherwise, even to the remotest degree in quantity of title or interest. In this chapter attention will be given only to those parties who acquired incumbrances and liens upon the equity of redemption, subsequent to the execution of the mortgage under foreclosure. It is to be kept clearly in mind that the word "necessary," as it will be used in this chapter, has its meaning limited and defined by the purpose of the plaintiff in the action, which is, as has been stated, to produce and offer at the foreclosure sale a perfect title. The word "necessary" has been used by courts and text-book writers with a great deal of inaccuracy and confusion, simply because applied with an absolute and invariable meaning, whereas it is a general and indefinite term and always relative in signification.

Keeping it in view, then, that it is the design of this chapter to consider those parties only who have acquired an interest in the equity of redemption by lien or incumbrance, subsequent to the execution of the mortgage under foreclosure, it may be said generally that all such parties are necessary to an action to foreclose, in order to extinguish their claims and the claims of all persons holding under them. It matters not whether the lien is created by the voluntary act of the owner of the equity, as in executing a mortgage, or by process and operation of law, as in docketing a judgment against him. The theory of the law is, that such an incumbrance is a pledge of the equity for the debt, and gives the lienor an equitable interest in the mortgaged premises.

As the owner of the equity may, by an absolute conveyance, transfer his entire interest, and thereby make his transferee a necessary party as we have seen, so he can on the same principle pledge, by a mortgage, judgment or otherwise, a part or the whole of his interest in the premises, and thereby render the incumbrancer a necessary party in

order to wipe out his interest. Though a lienor does not acquire the fee title to the equity, he acquires an interest in the premises which the statutes of the various states have long established, and which the courts have long recognized and sustained; and which parties dealing with the premises, can not ignore, except at their own peril. It is to be observed here that the interests in the mortgaged premises held by parties considered in this chapter are *personal property*, while the interests held by parties considered in the preceding chapter were *estates in real property*.

An action to foreclose will not be dismissed if subsequent incumbrancers are not made parties; it can be sustained without them, but their rights will not be concluded and their interests in the mortgaged premises extinguished, unless they are brought into the action.[1] It has been held that an incumbrancer may even be dismissed from the action on motion of the plaintiff, unless he objects;[2] and a subsequent incumbrancer may intervene and be made a defendant on his own application.[3]

§ 159. Subsequent mortgagees, still owning their mortgages, necessary defendants.—All authorities in all countries where mortgages are foreclosed by equitable actions, are agreed that subsequent and junior mortgagees are necessary parties to the foreclosure of a prior mortgage in order to extinguish and cut off their liens.[4] The action

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[1] Donnelly v. Rusch, 15 Iowa, 99 (1863); Heimstreet v. Winnie, 10 Iowa, 430 (1860); relied upon in Street v. Beal, 16 Iowa, 68, 70 (1864).

[2] Heimstreet v. Winnie, 10 Iowa, 430 (1860).

[3] Parott v. Hughes, 10 Iowa, 459 (1860).

[4] Gage v. Brewster, 31 N. Y. 218 (1865); Brainard v. Cooper, 10 N. Y. 356 (1852); Peabody v. Roberts, 47 Barb. (N. Y.) 91 (1866); Arnot v. Post, 6 Hill (N. Y.) 65 (1843); Franklyn v. Hayward, 61 How. (N. Y.) Pr. 43 (1881); Vanderkemp v. Shelton, 11 Paige Ch. (N. Y.) 28 (1844); Waller v. Harris, 7 Paige Ch. (N. Y.) 167 (1838); Vroom v. Ditmas, 4 Paige Ch. 526 (1834); Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833); Carpentier v. Brenham, 40 Cal. 221 (1870); Shores v. Scott River Co., 21 Cal. 135 (1862); Montgomery v. Tutt, 11 Cal. 307, 314 (1858); Whitney v. Higgins, 10 Cal. 547, 551 (1858); Goodman v. White, 26 Conn. 320 (1857); Broome v. Beers, 6 Conn. 207 (1826); Swift v. Edson, 5 Conn. 534 (1825); Smith v. Chapman, 4 Conn. 346 (1822); Hodgen v. Guttery, 58 Ill. 431 (1871); Strang v. Allen, 44 Ill. 428 (1867). See

can be sustained without them, but a defective title would be offered at the sale which no court would compel a bidder to accept.[1] The rule has long been settled that in a bill to foreclose a mortgage, the rights of incumbrancers not made parties to the suit, are not barred or affected by the decree.[2] If the foreclosure is conducted by advertisement the same rule prevails.[3] If the subsequent mortgagee is a trustee for

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Shinn v. Shinn, 91 Ill. 477 (1879), where the action was upon a deed of trust in the nature of a mortgage. In Kenyon v. Shreck, 52 Ill. 382 (1869), subsequent incumbrancers were held not necessary parties to a proceeding for foreclosure by *scire facias; aliter*, if the foreclosure is by an action in equity. Catterlin v. Armstrong, 79 Ind. 514 (1881); Hosford v. Johnson, 74 Ind. 479, 481 (1881); Hasselman v. McKernan, 50 Ind. 441 (1875); McKernan v. Neff, 43 Ind. 503 (1873); Holmes v. Bybee, 34 Ind. 262 (1870); Murdock v. Ford, 17 Ind. 52 (1861); Proctor v. Baker, 15 Ind. 178 (1860). See also, in point, Mack v. Graver, 12 Ind. 254 (1859); Pattison v. Shaw, 6 Ind. 377 (1855), holding junior incumbrancers proper, but not necessary, parties. Meredith v. Lackey, 14 Ind. 529 (1860); s. c. 16 Ind. 1 (1860); Walker v. Schreiber, 47 Iowa, 529 (1877); Newcomb v. Dewey, 27 Iowa, 381 (1869); Knowles v. Rablin, 20 Iowa, 103 (1865); Anson v. Anson, 20 Iowa, 58 (1865); Johnson v. Harmon, 19 Iowa, 56 (1865); Macey v. Fenwick, 4 B. Mon. (Ky.) 309 (1843); Rogers v. Holyoke, 14 Minn. 220 (1869); Brown v. Nevitt, 27 Miss. 801 (1854); White v. Bartlett, 14 Neb. 320 (1883); Hinson v. Adrian, 86 N. C. 61 (1882); Mills v. Traylor, 30 Tex. 7 (1867); Weed v. Beebe, 21 Vt. 495 (1849); Deuster v. McCamus, 14 Wis. 307 (1861); Moore v. Cord, 14 Wis. 213 (1861); Murphy v. Farwell, 9 Wis. 102 (1859); Farwell v. Murphy, 2 Wis. 533 (1853). For the English authorities, see Fisher on Mortgages, § 318; Burgess v. Sturges, 14 Beav. 440 (1851); Tylee v. Webb, 6 Beav 552 (1843); Adams v. Paynter, 1 Coll. Ch. 530 (1844); Johnson v. Holdsworth, 1 Sim. N. S. 106 (1850); Delabere v. Norwood, 3 Sw. 144 (1818); Payne v. Compton, 2 Y. & C. 457 (1837). See the following sections and notes; also the cases cited in the remaining notes to this section. In Rowan v. Mercer, 10 Humph. (Tenn.) 359 (1849), subsequent mortgagees were held proper, but not necessary, parties; the decree and sale were held conclusive without them.

[1] Cullum v. Batre, 2 Ala. 415 (1841), correcting Judson v. Emanuel, 1 Ala. 598 (1840); Hess v. Feldkamp, 2 Disney (Ohio), 332 (1858). See Hayward v. Stearns, 39 Cal. 58 (1870); Valentine v. Havener, 20 Mo. 133 (1854); Russell v. Mullanphy, 4 Mo. 319 (1836). See the cases *supra*.

[2] McCall v. Yard, 9 N. J. Eq. (1 Stockt.) 358 (1853); s. c. 11 N. J. Eq. (3 Stockt.) 58 (1855). See also Gould v. Wheeler, 28 N. J. Eq. (1 Stew.) 541 (1877); Willink v. Morris, Canal & Banking Co., 4 N. J. Eq. (3 H. W. Gr.) 377 (1843).

[3] Winslow v. McCall, 32 Barb. (N. Y.) 241 (1860).

numerous bondholders, it is sufficient to make him a defendant in his representative capacity, without bringing the bondholders into the action; a bondholder may interplead, however, *pro interesse suo*.[1] The successor of a trustee is also a necessary defendant if he has accepted the trust.[2]

§ 160. Subsequent mortgagees—Remedies if omitted as defendants.—If a junior mortgagee is omitted as a party, his remedy is to redeem from the sale under foreclosure;[3] and this right must be exercised in most states within ten years from the time when the mortgage debt becomes due.[4] In his redemption an accounting for rents and profits can be compelled,[5] and the junior mortgagee will be obliged to pay only the mortgage debt, principal and interest without the costs of the previous foreclosure.[6] Though the property may have been sold under foreclosure for less than the mortgage, the party redeeming will nevertheless be obliged to pay the amount due on the mortgage with interest;

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[1] McElrath v. Pittsburgh & S. R. Co., 68 Pa. St. 37 (1871); Supervisors of Iowa County v. Mineral Point R. R., 24 Wis. 93 (1869).

[2] Delaplaine v. Lewis, 19 Wis. 476 (1865).

[3] Wiley v. Ewing, 47 Ala. 418 (1872); Carpentier v. Brenhan, 40 Cal. 221 (1870); Hodgen v. Guttery, 58 Ill. 431 (1871); Gower v. Winchester, 33 Iowa, 303 (1871); Newcomb v. Dewey, 27 Iowa, 381 (1869); Roney v. Bell, 9 Dana (Ky.) 4 (1839); Cooper v. Martin, 1 Dana (Ky.) 25 (1833); Clary v. Marshall, 5 B. Mon. (Ky.) 274 (1845); Bank of U. S. v. Carroll, 4 B. Mon. (Ky.) 50 (1843); Avery v. Ryerson, 34 Mich. 362 (1876); Baker v. Pierson, 6 Mich. 522 (1859); Renard v. Brown, 7 Neb. 449 (1878); Holliger v. Bates, 43 Ohio St. 437 (1885); s. c. 1 West. Rep. 516. See the cases *supra*.

[4] Gage v. Brewster, 31 N. Y. 218 (1865); Peabody v. Roberts, 47 Barb. (N. Y.) 91 (1866); County of Floyd v. Cheney, 57 Iowa, 160, 163 (1881); Crawford v. Taylor, 42 Iowa, 260 (1875); Gower v. Winchester, 33 Iowa, 303 (1871). In Illinois the time is only seven years; Ewing v. Ainsworth, 53 Ill. 464 (1870).

[5] Gage v. Brewster, 31 N. Y. 218 (1865); Ten Eyck v. Casad, 15 Iowa, 524 (1864). See the next note.

[6] Gage v. Brewster, 31 N. Y. 218 (1865), opinions *per* Denio, Ch. J., Ingraham and Mullen, JJ. Mullen, J., in his opinion, makes a careful analysis and review of Chancellor Walworth's opinion in Vanderkamp v. Shelton, 11 Paige Ch. (N. Y.) 28 (1844), approving it in all respects. See Brainard v. Cooper, 10 N. Y. 356 (1852); Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 526 (1834); Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833), reviewed and commented on in the same opinion. See also Belden v. Slade, 26 Hun (N. Y.) 635 (1882).

if the property sold for more than the amount of the mortgage, its selling price becomes the amount to be paid to redeem.[1] After a mortgage has been paid, an action to redeem can not be maintained upon it.[2] It has been held in some cases that a junior mortgagee, who was omitted as a defendant in an action to foreclose a senior mortgage, may maintain a foreclosure of his own mortgage, instead of redeeming from the sale under the senior mortgage, and becoming thereby the equitable assignee of the senior mortgage.[3]

"There seems to be no impropriety whatever under the authorities in concluding that the plaintiff may maintain the present action as one for the foreclosure of his mortgage, notwithstanding the foreclosure and sale previously had under the senior mortgage. This conclusion is of very great practical importance in cases like the one now before the court, because it is, to say the least, exceedingly doubtful whether the action to redeem can be brought after the expiration of ten years from the time the mortgage debt became due, or the last payment was made upon it. * * * If an action to redeem in a case like the present one is the only action which the incumbrancer can maintain, and that must be commenced within ten years after the right has accrued, the legal anomaly, after that, will be presented of a party having a demand presumed by law to be unpaid, without any legal or equitable means of applying towards its

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[1] Johnson v. Harmon, 19 Iowa, 56 (1865); *per* Wright, Ch. J., writing an exhaustive opinion. American Buttonhole Co. v. Burlington M. L. Association, 61 Iowa, 464 (1883).

[2] McHenry v. Cooper, 27 Iowa, 137, 141 (1869).

[3] Peabody v. Roberts, 47 Barb. (N. Y.) 91 (1866). In Walsh v. Rutgers Fire Ins. Co., 13 Abb. (N. Y.) Pr. 33 (1861), such a foreclosure was held necessary. Coleman v. Witherspoon, 76 Ind. 285 (1881); McKernan v. Neff, 43 Ind. 503 (1873); Atwater v. West, 28 N. J. Eq. (1 Stew). 361 (1877), an important case; Chilver v. Weston, 27 N. J. Eq. (12 C. E. Gr.) 435 (1876); Stewart v. Johnson, 30 Ohio St. 24 (1876); Besser v. Hawthorn, 3 Oreg. 129 (1869); 3 Oreg. 512; Murphy v. Farwell, 9 Wis. 102 (1859). In Bache v. Purcell, 6 Hun (N. Y.) 518 (1876), a junior mortgagee was allowed to foreclose, even though he had been made a party defendant to a foreclosure by a senior mortgagee. But see Fliess v. Buckley, 90 N. Y. 286 (1882), holding that a junior mortgagee can not maintain a foreclosure to reach surplus moneys arising on the foreclosure of a senior mortgage.

payment the security created expressly for that purpose."[1] A junior mortgagee or incumbrancer, who is omitted in the foreclosure of a prior mortgage, may be cut off by a strict foreclosure,[2] conducted by the purchaser at the foreclosure sale, who by his purchase of the premises becomes the equitable assignee of the prior mortgage.[3]

§ 161. Subsequent mortgagee owning prior mortgage —Practice on foreclosure.—A junior mortgagee, who owns a prior mortgage, must set forth, in his complaint to foreclose the prior mortgage, his claim upon the junior mortgage, or it will be cut off by the action; he can not compel the premises to be sold subject to his junior mortgage. "The practice of the court requires that the complainant in his bill should set out all his claims upon the mortgaged property, and have the same in that suit duly litigated and disposed of by the decree, and that, if he omits to set out any incumbrance which he holds upon the premises junior to the mortgage described in the bill, such junior incumbrance will be cut off by a sale on a decree foreclosing the first mortgage, and making no allusion to any further lien."[4]

As a general rule a foreclosure bars the claims of all persons having liens subsequent to the mortgage foreclosed, who are parties to the suit. The plaintiff is a party, and if he fails to set up his claim on the junior mortgage, the neglect is his own, and can not be remedied by undertaking to impose a condition on the judgment of foreclosure and sale, for which the judgment itself gives no warrant. If the subsequent mortgagee has released the mortgaged premises from the lien of his mortgage, he is no longer a

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[1] Peabody v. Roberts, 47 Barb. (N. Y.) 91, 102 (1866), *per* Daniels, J., whose opinion seems to be at variance with Gage v. Brewster, 31 N. Y. 218 (1865).

[2] Brainard v. Cooper 10 N. Y. 359 (1852); Franklyn v. Hayward, 61 How. (N. Y.) Pr. 43 (1881).

[3] Gage v. Brewster, 31 N. Y. 218 (1865); Brainard v. Cooper, 10 N. Y. 356 (1852).

[4] Walsh v. Rutgers Fire Ins Co., 13 Abb. (N. Y.) Pr. 33 (1861); Wheeler v. VanKuren, 1 Barb. Ch. (N. Y.) 490 (1846); Homœopathic Medical Life Ins. Co. v. Sixbury, 17 Hun (N. Y.) 428 (1879), *per* Talcott, P. J.; Roosevelt v. Ellithrop, 10 Paige Ch. (N. Y.) 415 (1843); Tower v. White, 10 Paige Ch. (N. Y.) 395 (1843). See Clements v. Griswold, 46 Hun (N. Y.) 377 (1887).

necessary defendant. The owner of real property, parcel B, subject to a mortgage which also covers other property, parcel A, in which last named property he has no interest, is not a necessary party to an action to foreclose a prior mortgage on said parcel A; and though the said parcel A be sold under the decree for such sum as leaves nothing to be applied on the second mortgage, covering also plaintiff's premises, he can not, by virtue of his said ownership of parcel B, be allowed to come in and redeem.[1]

§ 162. Subsequent judgment creditors, still owning judgments, necessary.—A person who obtains and dockets a judgment against the owner of an equity of redemption in mortgaged premises, is a necessary defendant to a foreclosure of the mortgage commenced after the docketing of the judgment;[2] a judgment creditor can not be joined by the mortgagee as a co-plaintiff.[3] In some states judgment creditors are held only proper and not indispensable parties; but the courts which hold this are agreed that a judgment creditor's rights are not affected, unless he is brought into the action, and that his omission produces an imperfect title.[4] In Maryland it seems to be the rule to make prior as

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[1] Barnes v. Decker, 49 N. Y. Supr. Ct. (17 J. & S.) 221 (1883).

[2] Verdin v. Slocum, 71 N. Y. 345 (1877); Morris v. Wheeler, 45 N. Y. 708 (1871); Brainard v. Cooper, 10 N. Y. 356 (1852); Winebrener v. Johnson, 7 Abb. (N. Y.) Pr. N. S. 202 (1869); Shaw v. McNish, 1 Barb. Ch. (N. Y.) 326 (1846); Niagara Bank v. Roosevelt, 9 Cow. (N. Y.) 409 (1827); Arnot v. Post, 6 Hill (N. Y.) 65 (1843); Haines v. Beach, 3 Johns. Ch. (N. Y.) 466 (1818); Hubbell v. Sibley, 5 Lans. (N. Y.) 56 (1871); People's Bank v. Hamilton Manuf. Co., 10 Paige Ch. (N. Y.) 481 (1843); Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 531 (1834); Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833); Alexander v. Greenwood, 24 Cal. 505 (1864); Ritch v. Eichelberger, 13 Fla. 169 (1870); Kelgour v. Wood, 64 Ill. 345 (1872); Strang v. Allen, 44 Ill. 428 (1867); Ducker v. Belt, 3 Md. Ch. Dec. 13 (1851); Wylie v. McMakin, 2 Md. Ch. Dec. 413 (1851); Hinson v. Adrian, 86 N. C. 61 (1882). See the three preceding sections and notes.

[3] Felder v. Murphy, 2 Rich. (S. C.) Eq. 58 (1845).

[4] Person v. Merrick, 5 Wis. 231 (1856). In Leonard v. Groome, 47 Md. 499 (1877), the judgment creditor was held not indispensable, on the ground that he was presumed to know of the senior mortgage, and therefore to be able to protect his own interests. See Harris v. Hooper, 50 Md. 537 (1878). See also Gaines v. Walker, 16 Ind. 361 (1861), holding a judgment creditor only a

well as subsequent incumbrancers parties to a foreclosure.[1] The above general rule applies if the foreclosure is conducted by advertisement under the statute. All judgment creditors must be served with the notice,[2] and if a judgment is perfected against the owner of the equity at any time after the first publication of the notice and before the day of sale, the judgment creditor becomes a necessary party and must be served with the notice. This ruling is based on the language of the statute.[3]

In a recent foreclosure certain judgment creditors were not originally made parties; but after the entry of judgment they appeared by attorneys, on whose stipulation it was ordered that all papers and proceedings be amended *nunc pro tunc*, by inserting their names in the decree, and that they be bound in all respects by the action. The bidder at the sale refused to complete his purchase, on the ground that there was a defect of the parties in the omission of the judgment creditors; the court determined that it was incumbent upon the plaintiff to establish unequivocally the authority of the attorneys to enter into the stipulation, and that without such authority the judgment creditors were not bound, and the bidder could not be compelled to take the title.[4] The omission of a judgment creditor, who holds a judgment against the owner of a life estate in mortgaged premises, will produce such a defect of title as to release a bidder from his bid at the foreclosure sale.[5]

If a judgment is docketed against a person who subsequently purchases real estate and executes a purchase money mortgage thereon, the judgment becomes an incumbrance on the equity of redemption subsequent in its lien to the

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proper party. See § 159 and the note on the Indiana cases.

[1] Heuisler v. Nickum, 38 Md. 270 (1873); Tome v. Mer. Mec. B. & L. Co., 34 Md. 12 (1870); Md. Code, vol. 2, art. 4, §§ 782, 792.

[2] Root v. Wheeler, 12 Abb. (N. Y.) Pr. 294 (1861).

[3] Groff v. Morehouse, 51 N. Y. 503 (1873).

[4] Lyon v. Lyon, 67 N. Y. 250, 253 (1876), *per* Miller, J. See also Waldo v. Williams, 3 Ill. (2 Scam.) 470 (1840), where the omission was corrected by an *alias* writ.

[5] Verdin v. Slocum, 71 N. Y. 345 (1877), reversing 9 Hun (N. Y.) 150 (1876).

purchase money mortgage, and the judgment creditor is a necessary defendant to a foreclosure of the mortgage.[1] Likewise a judgment against a person who in any way becomes the owner of the equity of redemption in mortgaged premises becomes a lien upon the premises, and the judgment creditor is a necessary party in an action to foreclose the mortgage.

§ 163. **Judgment creditors pendente lite and creditors at large not necessary.**—A judgment is a lien from the time it is docketed,[2] but if the proceedings to recover the judgment have not been completed, the judgment is not a lien and the judgment creditor is not a necessary defendant. Thus a party who had recovered an award against a mortgagor, but had not yet reduced it to a judgment, has been held not a necessary party, for the reason that he had no lien on the land;[3] and where creditors had perfected their judgments against a mortgagor a few days after he had made a general assignment, they were held unnecessary parties, and though they were made parties to the action, they were not allowed to interpose a defense, as the assignee was the only necessary defendant.[4] A creditor at large has no status in court, and is not a necessary party; he will not even be allowed to intervene on his own application.[5]

What is said here refers to money judgments; but the same rules apply to equitable decrees and orders affecting mortgaged premises, which are entered in a "judgment book," and also to the persons benefited or bound by such decrees and orders.[6] A judgment creditor who has levied an execution remains a necessary party until the sheriff's certificate of sale is issued to the purchaser, and his judgment has been satisfied in full.[7] An attaching creditor is

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[1] Winebrener v. Johnson, 7 Abb. (N. Y.) Pr. N. S. 202 (1869); DeSaussure v. Bollmann, 7 S. C. 329, 339 (1875).

[2] N. Y. Code Civ. Proc. §§ 1250, 1251; Allen v. Case, 13 Wis. 621 (1861).

[3] Jones v. Winans, 20 N. J. Eq. (5 C. E. Gr.) 96 (1869).

[4] Spring v. Short, 90 N. Y. 538, 545 (1882).

[5] Herring v. N. Y., L. E. & W. R. R. Co. 105 N. Y. 340 (1887); People v. Erie Railway Co., 56 How. (N. Y.) Pr. 122 (1878); Gardner v. Lansing, 28 Hun (N. Y.) 413 (1882).

[6] N. Y. Code Civ. Proc. § 1236.

[7] See *ante* § 123; N. Y. Code Civ.

also a necessary party,[1] but a judgment creditor whose judgment is docketed pending the foreclosure, is not a necessary defendant; he may, however, intervene by petition, or redeem before the sale.[2] If a subsequent judgment creditor is omitted as a party defendant, any defendant who has a real interest in the premises may object by demurrer, if the defect appears on the face of the complaint, or by answer if it does not so appear, and compel the omitted party to be brought into court.[3] This rule is consistent with equity practice and principles, and is believed to have its foundation in the fact that if a judgment creditor were omitted, the title offered at the sale would be defective, and no bidder would offer as much as for a perfect title, thereby causing a loss to parties having an interest in or a lien upon the equity of redemption.

§ 164. Judgment creditors—Remedies if omitted as defendants.—Whenever a judgment creditor is omitted as a defendant and the mortgaged premises are sold under a decree of foreclosure, his only remedy is to redeem.[4]

Proc. § 1440. In point, Bullard v. Leach, 27 Vt. 491 (1854). In Woods v Love, 27 Mich. 308 (1873), the purchaser at an execution sale, to whom a sheriff's certificate had been issued and registered, was held an unnecessary party. Short v. Bacon, 99 N. Y. 275 (1885); Smith v. Moore, 73 Ind. 388 (1881).

[1] Bramhall v. Flood, 41 Conn. 68 (1874); Lyon v. Sandford, 5 Conn. 547 (1825); Campion v. Kille, 14 N. J. Eq. (1 McCart.) 229 (1862); s. c. 15 N. J. Eq. (2 McCart.) 476 (1863); Chandler v. Dyer, 37 Vt. 345 (1864), overruling Nichols v. Holgate, 2 Aik. (Vt.) 138 (1826), and the *dictum* in Downer v. Fox, 20 Vt. 388 (1848). See also the statute of 1864.

[2] People's Bank v. Hamilton Manuf. Co., 10 Paige Ch. (N. Y.) 481 (1843). See *post* § 170, on incumbrancers *pendente lite*.

[3] Leveridge v. Marsh, 30 N. J. Eq. (3 Stew.) 59 (1878); Ballard v. Anderson, 18 Tex. 377 (1857). See *ante* § 128.

[4] Gage v. Brewster, 31 N. Y. 218 (1863); Brainard v. Cooper, 10 N. Y. 356 (1852); Winebrener v. Johnson, 7 Abb. (N. Y.) Pr. N. S. 202 (1869); Belden v. Slade, 26 Hun (N. Y.) 635 (1882); American Buttonhole Co. v. Burlington M. L. Asso., 61 Iowa, 464 (1883), relying upon Anson v. Anson, 20 Iowa, 55 (1865); Jones v. Harstock, 42 Iowa, 147 (1875); Newcomb v. Dewey, 27 Iowa, 381 (1869). See also Rice v. Kelso, 57 Iowa, 115, 118 (1881); Wright v. Howell, 35 Iowa, 288, 292 (1872); Stuart v. Scott, 22 Kan. 585 (1879); Martin v. Fridley, 23 Minn. 13 (1876); Pratt v. Frear, 13 Wis. 462 (1861). As to what amount must be paid to redeem, see Iowa Co. v. Beeson, 55 Iowa,

Under the early New York decisions, a judgment creditor was required to issue a *fieri facias*, or execution, against the equity of redemption in order to obtain a sheriff's certificate of sale and deed, thereby making his judgment a specific, instead of a general, lien before he could redeem;[1] but it is now well settled that a judgment creditor, omitted as a party to the foreclosure, may redeem directly with his judgment as a general lien, instead of making it a specific lien by execution and a sheriff's sale.

Thus, judgment creditors who had been omitted from a foreclosure issued executions, and in time obtained a sheriff's deed; they then brought an action to redeem, and it was held that the judgment creditors, not having been made parties to the action by which the mortgage was foreclosed, were not bound by the decree, and that the foreclosure as to them was utterly void. The judgment creditors would, therefore, have a right to redeem the premises from the purchaser at the sale under the judgment of foreclosure, even though they had not made their liens specific by an execution and sale upon their judgments. And the foreclosure being, under the decisions of the Court of Appeals, utterly void as to said judgment creditors, it necessarily follows that they had a right to issue execution and to sell the premises under it, in the same manner as if the mortgage had not been foreclosed; and it further follows that the purchaser at said sale, upon receiving his deed from the sheriff, acquired a good

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262 (1880). See also the preceding sections. In New York and most other states the redemption must be within ten years. See the cases cited in the first note to § 162 *ante*. But in Illinois the redemption must be within seven years; Ewing v. Ainsworth, 53 Ill. 464 (1870). See Miller v. Finn, 1 Neb. 254 (1870), holding that redemption will not be allowed, if the purchaser under the foreclosure offers to pay the claim of the omitted incumbrancer.

[1] Brainard v. Cooper, 10 N. Y. 362 (1852); Winebrener v. Johnson, 7 Abb. (N. Y.) Pr. N. S. 202 (1869); Niagara Bank v. Roosevelt, 9 Cow. (N.Y.) 413 (1827); Arnot v. Post, 6 Hill (N. Y.) 66 (1843). Thus, in Arnot v. Post, 6 Hill (N. Y.) 66 (1843), Bronson, J., held that an omitted judgment creditor's right to sell after the foreclosure is just as perfect as it is before, and a sale is the only mode in which he can assign his legal rights. Without a sale he has nothing but a lien, but by a sale the purchaser acquires a real interest in the land.

title to the extent of the right, title and interest of the judgment debtor in said premises at the time of the docketing of the judgments against him, or which he at any time thereafter acquired in the premises.[1]

At present a judgment creditor has the alternative practice of redeeming directly under his general lien, or of issuing an execution and redeeming under the specific lien of a sheriff's deed. A purchaser at a foreclosure sale, in his relation to a judgment creditor, is deemed merely an equitable assignee of the mortgage.[2] A redeeming creditor is now obliged to pay only the mortgage debt, principal and interest, without the costs of the foreclosure; but the purchaser at the foreclosure sale and his grantees will be entitled to an accounting of rents, taxes and disbursements for improvements.[3]

§ 165. Mechanic's lien, owner of, necessary. — All persons holding mechanics' liens, which, as incumbrances upon the mortgaged premises, are subsequent to the mortgage, are necessary parties to an action to foreclose.[4] It may not always be easy to determine whether a mechanic's lien, as a lien upon the premises, is subsequent to the mortgage, but questions affecting that subject can not be discussed here; for the purposes of this work it is assumed that the mechanic's lien is subsequent. A mechanics' lien is a special statutory charge upon real estate, peculiar to American law;

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[1] Winebrener v. Johnson, 7 Abb. (N. Y.) Pr. N. S. 208 (1869), *per* Freedman, J., citing and relying upon Brainard v. Cooper, 10 N. Y. 356 (1852); Haines v. Beach, 3 Johns. Ch. (N. Y.) 460 (1818). Brainard v. Cooper was before the New York Court of Appeals three times for argument, and now stands as the leading case upon the rights of judgment creditors who are omitted as parties to a foreclosure. The question as to whether a naked or a general judgment lien is a sufficient title to maintain an action for redemption, is considered at length, and after an exhaustive review of the English and American cases, Gardner, J., writing the opinion, concludes that such a general judgment lien is sufficient without execution, and a sheriff's deed to make it specific.

[2] Brainard v. Cooper, 10 N Y. 356 (1852); Arnot v. Post, 6 Hill (N. Y.) 67 (1843).

[3] Gage v. Brewster, 31 N. Y. 218 (1865); Brainard v. Cooper, 10 N. Y. 356 (1852); Winebrener v. Johnson, 7 Abb. (N. Y.) Pr. N. S. 211 (1869).

[4] Emigrant Industrial S. Bank v. Goldman, 75 N. Y. 127, 129 (1878); Payne v. Wilson, 74 N. Y. 348 (1878); Jones v. Harstock, 42 Iowa, 147 (1875).

the English law knows no such lien.[1] As the various states have regulations of their own concerning mechanics' liens, it is impossible to state any very general rules affecting them, except that a notice of the lien is uniformly required to be filed in the office of the clerk of the county where the premises are situated, and that a mortgagee foreclosing is bound to take notice of no liens except those which are filed subsequent to the execution of his mortgage and prior to the commencement of the action and the filing of the *lis pendens*. The rules of law and practice which have been stated as applying to subsequent mortgagees and judgment creditors, it is believed, apply with equal force to the owners of mechanics' liens.

§ 166. **Subsequent lienor, an assignor no longer holding the incumbrance, not necessary.** — No principle of law or practice is more familiar, than that only those parties who are interested in the subject-matter of an action should be brought before the court. It is almost axiomatic that a subsequent lienor, who has parted absolutely with his lien, can have no interest in an action to foreclose a prior mortgage. There are almost no cases which pointedly support this proposition; but it is beyond dispute, as reasoned from analogous cases,[2] that the proposition is true. Chancellor Kent has held it as a general principle, "that a person who has no interest in the suit and is a mere witness, against whom there could be no relief, ought not to be a party;"[3]

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[1] Kneeland on Mechanics' Liens, pp. 8–13.

[2] Andrews v. Gillespie, 47 N. Y. 487 (1872); Christie v. Herrick, 1 Barb. Ch. (N. Y.) 255 (1845); Whitney v. McKinuey, 7 Johns. Ch. (N. Y.) 144 (1823); Ward v. VanBokkelen, 2 Paige Ch. (N. Y.) 289 (1830). These cases are quoted from in *post* §§ 177–180. They uniformly hold that a mortgagee who has made an absolute and unconditional assignment of his mortgage, is not a necessary party to an action brought to foreclose the same mortgage. If such a mortgagee and assignor is not a necessary party, it must certainly follow that a subsequent mortgagee, who has parted with his entire interest in the mortgage, is not a necessary party to an action brought to foreclose a prior mortgage. Most in point, see Winslow v. McCall, 32 Barb. (N. Y.) 241 (1860), relying upon Wetmore v. Roberts, 10 How. (N. Y.) Pr. 51 (1855).

[3] Whitney v. McKinney, 7 Johns. Ch. (N. Y.) 147 (1823).

and further, where an assignment is absolute and "the mortgagee parts with all his interest in the mortgage, and there is nothing special and peculiar in the case, that there is no necessity to make the mortgagee a party to a bill to foreclose."

Moreover, if the assignment were absolute and unconditional on its face, while the mortgagee retained some equitable interest in the mortgage, it would be unjust and contrary to first principles to hold a prior mortgagee foreclosing, responsible for not taking notice of equities existing between a subsequent mortgagee and his assignee, when he had no knowledge of the same. If, however, knowledge of such equities were brought to the mortgagee foreclosing, it would be dangerous for him to omit either the assignor or the assignee of the subsequent mortgage. If a junior mortgagee has been paid in full, he is, of course, no longer a necessary or a proper defendant.[1] All that has been said in this section with reference to subsequent mortgagees and their assignees, applies with equal force to subsequent holders of judgments, mechanics' and other liens, and their assignees.[2]

The principles of law stated in this and the immediately succeeding sections are so axiomatic to the practicing attorney, and are so little discussed by writers on the subject of this work, that it may seem useless to mention them here; but the headings of these sections seemed necessary to the author, in order to sustain and preserve the logical analysis and arrangement of the subject. A slight examination will show that the analysis of this chapter follows in many respects that of the first chapter of this part of the work. The object of this is to embrace every possible and conceivable case of an incumbrance that could arise, whether the courts have rendered decisions thereupon or not.

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[1] McHenry v. Cooper, 27 Iowa, 137 (1869).

[2] In McKee v. Murphy, 34 N. Y. Supr. Ct. (2 J. & S.) 261 (1872), though a judgment creditor had assigned his judgment with a power of attorney, he was held a necessary defendant, the power of attorney not operating as an absolute assignment.

§ 167. **Subsequent lienors, holding any kind of an equitable or contingent interest in the lien, generally necessary.**—Whenever a person holding a subsequent mortgage, judgment or other lien on mortgaged premises assigns his lien conditionally, as a collateral security or otherwise, so that he retains an equitable interest in it, he is a necessary party to an action to foreclose a prior mortgage.[1] The assignee of the subsequent mortgage lien is also a necessary party. It is believed, however, that this proposition should be qualified to the effect, that the plaintiff to the foreclosure must have notice from the record or otherwise of the character and conditions of the assignment. The reason for this rule evidently is, that all outstanding interests in the equity of redemption by lien or otherwise must be reached and covered by the action. The law sustaining the proposition of this section is analogous in principle to that which requires a mortgagor who has apparently parted with his equity of redemption, but still holds an equitable interest in it, to be made a defendant to a foreclosure.[2]

There is another line of cases[3] which, by analogy, support the proposition of this section. They uniformly hold, where a mortgage is assigned as a collateral security, and an action to foreclose is commenced by the assignee or the assignor, the other refusing to become a co-plaintiff, that he can and must be made a party defendant to the action, for the reason that otherwise a pefect decree could not be "made which would protect the mortgagor and the purchaser of the mortgaged premises from any future claims

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[1] In Blair v. Marsh, 8 Iowa, 144 (1859), the assignor and the assignee of a "title bond" were both made parties to the foreclosure of a prior existing mortgage, the title bond having been assigned merely as a collateral security. A junior mortgagee, who has assigned his mortgage as a collateral security, may redeem from a senior mortgagee foreclosing; Manning v. Markel, 19 Iowa, 103 (1865).

[2] See *ante* § 123; Patton v. Smith, 113 Ill. 499 (1885).

[3] Bloomer v. Sturges, 58 N. Y. 168, 177 (1874); Andrews v. Gillespie, 47 N. Y. 487 (1872); Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254 (1845); Slee v. Manhattan Company, 1 Paige Ch. (N. Y.) 48 (1828); Kittle v. VanDyck, 1 Sanf. Ch. (N. Y.) 76 (1843). See *post* §§ 181, 182, and the notes and cases cited.

which the assignor might make."[1] If this law is good for a prior mortgage under foreclosure, why is it not equally good for a subsequent mortgage, under precisely the same circumstances? The only difference is, that in the foreclosure of the prior mortgage, the mortgagee and the assignee are cognizant of the equities between them, while in the latter case the plaintiff may have no knowledge of the equities existing between the subsequent mortgagee and his assignee.

§ 168. Assignee of subsequent mortgage, judgment or other lien, necessary.—A party who acquires unconditionally, by assignment or otherwise, the whole of a junior mortgage, judgment or other lien upon mortgaged premises, becomes at once the party in interest, in place of the original lienor, and is consequently a necessary defendant in an action to foreclose a prior mortgage.[2] This proposition, like those stated in the two preceding sections, is deduced from general principles of law quite as much as it is induced as a conclusion from adjudged cases. Chancellor Walworth, however, has held in an action to foreclose a mortgage, that "it is now well settled, at least in this state, that after an absolute assignment of a chose in action the assignee, at law as well as in equity, is considered the real party to the suit. A decree in equity between the defendant and the assignee would now have the same effect in a court of law as if the assignor was a party to such decree."[3] "This court does

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[1] Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254, 259 (1845), *per* Chancellor Walworth.

[2] In point, Winslow v. McCall, 32 Barb. (N. Y.) 241 (1860), relying upon Wetmore v. Roberts, 10 How. (N. Y.) Pr. 51 (1855), which holds further that the assignee may redeem, the same as the original lienor, if he is omitted as a defendant. In point, Augustine v Doud, 1 Ill. App. 588 (1877). See also White v. Bartlett, 14 Neb. 320 (1883), where the assignment was not recorded and the plaintiff had no knowledge of it; the action was held to cut off the subsequent judgment, although the assignee was not made a defendant.

[3] Ward v. VanBokkelen, 2 Paige Ch. (N. Y.) 289, 295 (1830). A note to this decision by Mr. Paige, the reporter, gives an exhaustive discussion of the question of the assignment of choses in action, citing many cases in chronological order from English and American reports, showing that in the early part of this century the assignor still remained a necessary party, while the assignee was hardly deemed proper.

not look at the nominal parties to a contract. They look at the real parties to it at the time the suit is commenced—the parties in actual interest—and recognize their rights in the same manner as if the contract was executed by or to them. Thus the assignee of a chose in action is recognized as the real party, and this court, rejecting all legal fictions, treats him as such, and insists that the suit shall be brought in his name."[1] The law supporting the proposition stated in this section is analogous to that which makes the purchaser and owner of the equity of redemption by grant from a mortgagor a necessary party to a foreclosure;[2] the only difference being that in the latter case the defendant holds the fee title, while in the former he held only a lien on the fee.

§ 169. **Assignee of subsequent mortgage or lien pendente lite not necessary.** — A person who during the pendency of an action to foreclose a mortgage purchases a mortgage, judgment or other incumbrance upon the mortgaged premises, which is subsequent in its lien to the mortgage under foreclosure, is not a necessary party to the action, and the plaintiff will not be obliged to bring such a purchaser before the court;[3] the purchaser may, however, as he succeeds to all the rights of the subsequent lienor, appear and defend in the name of the party from whom he acquires his lien, or be substituted on application in his place.[4] The statutory enactments of the Code, which were discussed in

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[1] Western Reserve Bank v. Potter, Clarke Ch. (N. Y.) 437 (1841), *per* Vice-Chancellor Whittlesey.

[2] See *ante* §§ 126, 127.

[3] In point, Case v. Bartholow, 21 Kan. 300 (1878), where a subsequent mortgage was purchased pending the foreclosure of a prior mortgage.

[4] See Koch v. Purcell, 45 N. Y. Supr. Ct. (13 J. & S.) 162 (1879), as to the rights of such an assignee with reference to the action, and any surplus arising on the sale. See Fisher on Mortgages, §§ 380, 388, and the English cases cited. See *ante* §§ 131, 132, where a discussion of the common law doctrine of *lis pendens* and of the statutory enactments in the various states is given. It may be generally stated that the principles of law there presented, as applying to the purchaser of the equity of redemption in mortgaged premises during an action to foreclose, apply also to the purchaser of a lien on the same equity during the foreclosure. The statute of *lis pendens* in New York also unquestionably supports this proposition.

the preceding chapter as applying to the equity of redemption, apply with equal force to liens upon that equity.[1]

To sustain the proposition stated in this section, resort must be had to the principle of analogy, as there are no reported cases bearing directly upon the point. As has been shown, the purchaser of the equity of redemption in mortgaged premises, during the pendency of an action to foreclose, is not a necessary defendant;[2] no reason presents itself why the purchaser of a lien on the same equity of redemption under similar circumstances should be made a defendant. It is assumed, of course, that the assignor of the purchaser *pendente lite* is a party defendant to the action; a purchaser *pendente lite*, if his assignor is not a party to the action, is no more bound by the decree of foreclosure than the assignor himself would be. The assignee of a mortgage is an incumbrancer within § 1671 of the New York Code of Civil Procedure, and if he takes title by assignment after, or records his assignment subsequently to, the filing of a *lis pendens*, he is chargeable with notice.[3]

§ 170. Incumbrancer pendente lite not necessary.— Likewise it is reasoned by analogy that a person who obtains a lien by mortgage, judgment[4] or otherwise upon the equity of redemption in mortgaged premises, during the pendency of an action to foreclose, is not a necessary party to the action, providing it was commenced[5] or the *lis pendens* was filed[6] before the lien was obtained or recorded.[7] In such a case, however, while the plaintiff is not bound to bring the incumbrancer before the court, the incumbrancer himself may intervene by petition at any time before the sale, and if allowed by the court to come in at all, he will obtain

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[1] See *ante* § 132.

[2] See *ante* § 132.

[3] Lamont v. Cheshire, 65 N. Y. 30 (1875); Hovey v. Hill, 3 Lans. (N. Y.) 167 (1870).

[4] Montgomery v. Birge, 31 Ark. 491 (1876); Linn v. Patton, 10 W. Va. 187 (1877).

[5] Lyon v. Sanford, 5 Conn. 548 (1825).

[6] Fuller v. Scribner, 16 Hun (N. Y.) 130 (1878); aff'd 76 N. Y. 190 (1879).

[7] Bank of U. S. v. Carroll, 4 B. Mon. (Ky.) 50 (1843). See *ante* § 132.

as good and perfect a standing in the case as any other party, and may defend if he has a defense to offer.[1]

A *lis pendens* is not effective until the complaint is filed, and the complaint can not be filed *nunc pro tunc* so as to affect the rights which a judgment creditor may have acquired in the meantime.[2] In a case where a judgment had been recovered and docketed against the owner of the equity of redemption in mortgaged premises, after the filing of a *lis pendens* and the service of the summons upon one or more of the defendants, but prior to the service upon the owner of the equity, the court would not relieve the bidder at the sale of his bid, on the ground of a defect of parties to the action; the judgment creditor was not a necessary party.[3]

In another case, where no *lis pendens* had been filed and a judgment was recovered and docketed between the time of entering the decree of foreclosure and the day of sale, it was held that the judgment creditor could merely redeem at any time before the sale, but that thereafter his rights would be effectually barred.[4] In the foreclosure of a senior mortgage the owner of a junior recorded mortgage was omitted as a party, as the deed from the original mortgagor to the person executing the junior mortgage had not been recorded, and the senior mortgagee had no notice of

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[1] F. and M. Bank of Milwaukee v. Luther, 14 Wis. 96 (1861). See People's Bank v. Hamilton Mfg. Co., 10 Paige Ch. (N. Y.) 481 (1843), where a creditor obtained a judgment against the owner of the equity of redemption, and docketed the same about a week after the decree of foreclosure was entered, but before the sale; a *lis pendens* had been duly filed at the commencement of the action. Execution was issued and the judgment creditor bid in the premises; he thereupon presented to the court his petition, setting forth all the facts of the case and his defense. Chancellor Walworth recognized the petition, and held it to be the proper practice and procedure, but refused to allow the judgment creditor to intervene, for the reason that his petition did not state a defense in proper form.

[2] Weeks v. Tomes, 16 Hun (N. Y.) 349 (1878); aff'd 76 N. Y. 601 (1879).

[3] Fuller v. Scribner, 76 N. Y. 190 (1879), aff'g 16 Hun (N. Y.) 130 (1878), and distinguishing Rogers v. Bonner, 45 N. Y. 379 (1871); the judgment creditor was a subsequent incumbrancer within the meaning of §§ 1670 and 1671 of the N. Y. Code of Civil Procedure.

[4] McHenry v. Cooper, 27 Iowa, 137, 146 (1869). See Pratt v. Pratt, 96 Ill. 184 (1880), where a second mortgage was executed pending a foreclosure.

the deed or subsequent mortgage from the record or otherwise; the rights of the junior mortgagee were held concluded and cut off by the action.[1] In another case the owner of a recorded unindexed second mortgage was omitted as a party defendant to the foreclosure of a prior mortgage, and the foreclosure was held void as to him.[2]

§ 171. Subsequent mortgagee or lienor a married woman does not alter rule; necessary.—Mortgages, judgments and all other liens upon real estate are now unquestionably personal property. At common-law the husband became upon marriage the owner of his wife's personal property, including, of course, mortgages, judgments, etc., even though they were placed in his wife's name after marriage. In an action to foreclose a prior mortgage the husband of a woman who held a subsequent incumbrance was, undoubtedly, necessary as a party defendant to the action; she also was a necessary party. The common-law rule has, however, been so completely superseded that it is believed there is no state in America where it is now in force. It is safely asserted that the husband of a *feme covert*, who holds a subsequent lien upon premises under foreclosure by a prior mortgagee, is not a necessary party to the action. The wife, however, who holds the lien in her own name, is always as necessary a party as though she were a *feme sole*.[3] Likewise, the wife of a person holding a subsequent lien is not a necessary party, as she has no interest in it.[4]

§ 172. Heirs, devisees, legatees and annuitants of deceased subsequent lienor generally not necessary.—Under the statutes of no state do the heirs at law receive the legal title and possession of the personal property of a deceased person. It is the theory of American law that upon a person's death the title to all his personal property

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[1] Kipp v. Brandt, 49 How. (N. Y.) Pr. 358 (1875).

[2] Mutual Life Ins. Co. v. Dake, 1 Abb. (N. Y.) N. C. 380 (1876); aff'd 87 N. Y. 257 (1881).

[3] See *ante* §§ 159–164.

[4] See Kay v. Whittaker, 44 N. Y 565 (1871).

vests in an executor or administrator, while the title to his real property always vests in his heirs or devisees. Consequently the heirs and devisees of a decedent, who held a subsequent lien upon mortgaged premises, are neither necessary nor proper parties to an action to foreclose a prior mortgage.[1]

In an action where the heirs and the personal representatives of a deceased subsequent mortgagee were all made parties to the foreclosure of a prior mortgage, it was held, where the question was, whether the plaintiff could tax costs for five defendant heirs, that "there was no necessity nor any apparent excuse for making the five children of the subsequent mortgagee parties. The executor fully represented the rights of the decedent as a junior mortgagee, and the heirs at law should not have been made defendants. The extra costs of making them parties must therefore be disallowed."[2] The same proposition is also true of devisees, legatees and annuitants, under a will, for they take no title to the subsequent lien, as it passes at once to the executor, unless it is bequeathed specifically to the devisee, legatee or beneficiary, in which case he, as the immediate owner of the same, would become a necessary defendant. The beneficiary, in such a case, takes title directly, as he would by a specific assignment from the testator in his life-time.[3]

§ 173. Executors and administrators of a deceased subsequent lienor necessary.—As has been previously stated, the entire personal estate of a decedent, both at law and in equity, including mortgages, judgments and all kinds of liens upon real estate, vests in his personal representatives, —that is, in his executors or administrators. Without exception in any state in the Union, the executor or administrator takes the entire legal title to all kinds of liens created upon real estate. Of course, the title which a personal representative has in the goods of a decedent is not

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[1] Shaw v. McNish, 1 Barb. Ch. (N. Y.) 328 (1846). See *ante* §§ 141–144, and the cases cited.

[2] Shaw v. McNish, 1 Barb. Ch. (N. Y.) 328 (1846), *per* Chancellor Walworth.

[3] In Jeneson v. Jeneson, 66 Ill. 260 (1872), a decedent gave one of several notes secured by a mortgage to an heir, who was held a necessary defendant to the foreclosure of a prior mortgage.

the absolute ownership which a person has in his own property; nevertheless, the law treats the personal representative as the absolute owner, with full control and power of disposition, as if the property were his own.

It easily follows that the executor of a deceased subsequent mortgagee or lienor, is a necessary defendant in an action to foreclose a prior mortgage, representing, as he does, the entire interest of the junior lienor.[1] If a subsequent lien is specifically bequeathed, the beneficiary becomes a necessary party in place of the executor. If a subsequent lienor dies during the pendency of an action to foreclose, the action must be revived against his personal representatives. It is intimated that if a deceased subsequent lienor is a non-resident of the state, the plaintiff foreclosing may take out letters of administration for the purposes of the action in the county where the mortgaged premises are situated;[2] but provision is made in the practice of most states for serving the summons upon non-residents by publication or otherwise.

If no administrator or executor has been appointed or has qualified as the personal representative of a deceased subsequent mortgagee or lienor, it is doubtful whether the plaintiff foreclosing a prior mortgage can properly and safely rely upon making only the heirs at law and next of kin of the subsequent lienor parties defendant to the action. This practice is sometimes resorted to where the heirs at law and next of kin are few in number and can be easily served;

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[1] Lockman v. Reilly, 95 N. Y. 64 (1884); Shaw v. McNish, 1 Barb. Ch. (N. Y.) 326 (1846), quoted from in the preceding section; Ger. Sav. Bank v. Muller, 10 N. Y. Week. Dig. 67 (1880); White v. Rittemeyer, 30 Iowa, 268, 272 (1870), citing many cases and authorities. Shields v. Keys, 24 Iowa, 298, 307 (1868), was a foreclosure of a mechanic's lien, citing Baldwin v. Thompson, 15 Iowa, 504 (1864), and Burton v. Hintrager, 18 Iowa, 348 (1865). See *ante* §§ 141–144. In Lockman v. Reilly, 95 N. Y. 64 (1884), *per* Rapallo, J., the premises were bought in by an executor who was plaintiff in the foreclosure of a junior mortgage; on the foreclosure of the senior mortgage the executor of the junior mortgagee was held the only necessary defendant, as the real estate was to be regarded as personalty.

[2] In point, Lothrop's Case, 33 N. J. Eq. (6 Stew.) 246 (1880).

they are, indeed, the actual and ultimate owners of the subsequent lien, but, as has been seen, they are neither necessary nor proper parties where there is a personal representative.[1] Even though it may be inconvenient, and may often necessitate considerable delay, it is nevertheless the safest practice and the one here recommended, to cause an administrator of such deceased subsequent lienor to be appointed before the action to foreclose is commenced, or at least before it proceeds to judgment.[2]

§ 174. **Assignee in bankruptcy and voluntary general assignee of subsequent lienor necessary.**—The case of Bard v. Poole[3] holds quite pointedly that an assignee in bankruptcy, who receives from his assignor an interest in a mortgage, is a necessary defendant in an action for the foreclosure of a prior mortgage. To sustain the proposition of this section, resort is again had to reasoning by analogy, upon which so much of this chapter is dependent. The same rules and illustrations, which have shown an assignee in bankruptcy of the owner of the equity of redemption[4] in mortgaged premises to be a necessary defendant in an action to foreclose, apply, it is believed, with equal force to an assignee in bankruptcy of a person holding a lien upon the same equity of redemption; the assignee is equally a necessary party in both cases.[5] The same rules apply to assignees

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See the preceding section; Fisher on Mortgages, § 359; Whittla v. Halliday, 4 Dru. and War. 267 (1827).

[2] In point, Lothrop's Case, 33 N. J. Eq. (8 C. E. Gr.) 246 (1880), where limited administration was granted for the purposes of the foreclosure. See Koger v. Weakly, 2 Port. (Ala.) 516 (1835); Coursen's Will, 4 N. J. Eq. (3 H. W. Gr.) 408 (1843). In point, Fisher on Mortgages, § 369. See Long v. Storie, 23 L. J. Ch. N. S. 200 (1853), where a creditor was appointed administrator for the purposes of the action.

[3] 12 N. Y. 495, 507 (1855), *per* Denio, J.

[4] See *ante* § 152.

[5] Reference is had to § 168 *ante*, where it appears that the assignee of a subsequent lien by sale and transfer is a necessary party. The same title and interest being transferred to an assignee in bankruptcy, no reason presents itself why the assignee in bankruptcy is not also a necessary defendant. From the proposition presented in §§ 126–128 *ante*, the reasoning by analogy becomes even stronger.

by voluntary general assignment and to receivers of insolvent corporations. If the assignee dies pending the foreclosure and after having been made a defendant, the action must be revived against his successor in office, or the right to redeem will survive to the successor.[1]

§ 175. **General guardian of infant, and committee of lunatic, idiot or habitual drunkard, trustees and beneficiaries, holding subsequent mortgage or lien, necessary.**—If a subsequent mortgage is drawn in the name of the general guardian or committee of an incompetent person, the guardian or committee will, unquestionably, be a necessary party defendant in an action to foreclose a prior mortgage, and the beneficiary will also be a very proper, if not a necessary, party.[2] If, however, the subsequent lien is executed or recovered in the name of the beneficiary, then the infant, lunatic, idiot or habitual drunkard will be a necessary party in his own name, without his guardian of committee appearing as a party to the action. The process of the court, however, is generally required to be served upon the guardian or committee as well as upon the incompetent person.[3]

§ 176. **Purchasers at tax sales, boards of supervisors, state comptrollers and municipal corporations, defendants.**—It is a universal principle of law that unpaid taxes are a lien upon the real estate against which they are assessed prior to mortgages, judgments and all other incumbrances. When real estate is sold for the satisfaction of unpaid taxes, the purchaser likewise acquires a title that is good against all

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[1] Avery v. Ryerson, 34 Mich. 362 (1876).

[2] In Willink v. Morris Canal Banking Co., 4 N. J. Eq. (3 H. W. Gr.) 377 (1843), the trustees and *cestuis que trust* were both held necessary defendants; but in Iowa County v. Mineral Point R. R., 24 Wis. 93 (1869), it was held sufficient to make the trustee representing the bondholders a defendant, and that the bondholders would be bound by the decree, they being too numerous to be brought into the action. See Loehr v. Colborn, 92 Ind. 24 (1883) Shinn v. Shinn, 91 Ill. 477 (1879) also the English cases, Wetherell v. Collins, 3 Madd. 255 (1818), and Osbourn v. Fallows, 1 Russ. & M. 741 (1830), stating circumstances under which the beneficiaries are not necessary parties.

[3] N. Y. Code Civ. Proc. § 426.

pre-existing incumbrances to the extent of his purchase price, unless divested by an incumbrancer redeeming.

Purchasers at general tax sales, and states, counties and cities, for whose benefit any unpaid tax was levied, are not necessary parties to the foreclosure of a mortgage upon the premises taxed; but they are very proper parties as prior incumbrancers for the purpose of determining the exact amount of their claims, and of having them extinguished as liens upon the property, by a provision in the judgment for their payment out of the proceeds of the sale.[1] A purchaser at a tax sale will not be affected by the subsequent foreclosure of a mortgage to which he is not made a party.[2] The purchaser's title is absolute and prior to the mortgage, subject only to be redeemed by the mortgagee. Under the rulings of the courts it is clearly the best practice to make purchasers at tax sales, the owners of tax certificates, and all parties, domestic corporations and others, having any interest in unpaid taxes, parties defendant to a foreclosure, that their claims may be ascertained and paid.[3]

Provision is made in the New York Code of Civil Procedure and in the statutes of some other states, requiring the referee to sell, or the master in chancery, to pay all outstanding taxes, assessments, water rates, etc., from the proceeds of the sale.[4] Where such provision can be made in the decree of sale, it is not so desirable to make parties holding tax certificates defendants to the foreclosure.

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[1] Roosevelt Hospital v. Dowley, 57 How. (N. Y.) Pr. 489 (1878), *per* VanVorst, J. See *post* chap. ix.

[2] Becker v. Howard, 66 N. Y. 5, 8 (1876). But see Adair v. Mergentheim, (Ind.) 13 West. Rep. 852 (1888).

[3] See the cases *supra;* Becker v. Howard, 4 Hun (N. Y.) 359 (1875), *per* E. Darwin Smith, J.; Ayres v. Adair County, 61 Iowa, 728 (1883), *per* Adams, J., discussing at length the rights of a purchaser at a tax sale in relation to a pre-existing mortgage. See Crum v. Cotting, 22 Iowa, 411 (1867). See Straka v. Lander, 60 Wis. 115 (1884), in which action to foreclose, it was alleged that a tax deed of the premises had been issued to one of the defendants and that the plaintiffs had redeemed from the tax liens. The municipality which issued the tax deed was held not to be a necessary party; the question of the validity of the deed or of the redemption could not be determined in the foreclosure.

[4] N. Y. Code Civ. Proc. § 1676.

CHAPTER VIII.

PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE.

PARTIES HOLDING PART OR EQUITABLE INTERESTS IN THE MORTGAGE UNDER FORECLOSURE, OR IN LIENS CONTEMPORARY THEREWITH, NOT JOINING AS PLAINTIFFS, NECESSARY DEFENDANTS.

§ 177. Introductory.
178. Assignor, having made an absolute assignment of the mortgage or no longer holding an interest in it, not necessary.
179. Assignor — When a proper and desirable party.
180. Assignee of a mortgage absolutely assigned, never a necessary defendant.
181. Assignor of a mortgage, assigned conditionally or as collateral security, a necessary party.
182. Assignee of a mortgage assigned collaterally, a necessary defendant in foreclosure by the assignor.
§ 183. Joint or several mortgagees; action commenced by one, the others necessary defendants.
184. Contemporary and equal mortgagees; foreclosure commenced by one, others necessary defendants.
185. Ownership of mortgage doubtful or in dispute; action commenced by one claimant, other claimants advisable defendants.
186. Trustees and beneficiaries sometimes necessary defendants.

§ 177. **Introductory.**—In the two preceding chapters, attention has been given to those parties who were necessary defendants in an action to foreclose a mortgage, in order to extinguish the entire equity of redemption and all the liens that had accrued upon it since the execution of the mortgage. It sometimes occurs that a mortgage is held by joint owners, or that there are liens contemporary with it, or that it is assigned collaterally or conditionally, whereby equitable questions are raised as to its true ownership. Part owners and others having equitable interests in the mortgage under foreclosure may refuse to join as co-plaintiffs. In such cases it is always necessary to make them defendants, that their interests may be extinguished. This rule is based upon the general principle which was early considered[1] in this work,

[1] See *ante* § 70.

that all parties interested in the mortgage or in the mortgaged premises are necessary parties, plaintiff or defendant, in an action to foreclose. It is also a well recognized rule, especially in equitable actions, that a person interested in the subject-matter of an action, who refuses to become or who is omitted as a co-plaintiff, may be made a defendant.[1]

It is to be observed that the parties defendant discussed in this chapter could equally well be parties plaintiff, with one or two exceptions; and that, being omitted or refusing to join as parties co-plaintiff, they become absolutely necessary parties defendant in an action to foreclose, in order to produce at the sale a perfect title and to accomplish the purposes for which a party is necessary, as repeatedly stated in this part of the work. Chancellor Walworth, in considering the necessity of making a party holding an equitable interest in the mortgage a party to the action in order to produce a perfect decree for the purchaser at the sale, has held: "Where the mortgage is assigned as a mere security for the payment of a debt, or where but a part of the mortgage debt is assigned to the plaintiff, the assignor is a necessary party to a bill filed to foreclose the mortgage, so that a perfect decree may be made which will protect the mortgagor and the purchaser of the mortgaged premises under the decree to be made in the suit, from any future claims which the assignor may make, notwithstanding his assignment."[2] A conveyance upon a foreclosure sale, to produce this result, must convey the entire interest of the mortgagor and the mortgagee, and be an entire bar against each of them and against all persons claiming under them.

The New York Code of Civil Procedure provides "that a conveyance upon the sale, made pursuant to a final judgment in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate, only, that would have vested in the mortgagee, if the equity of redemption had been foreclosed. Such a conveyance is as valid, as if it

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[1] N. Y. Code Civ. Proc. § 448.

[2] Christie v. Herrick, 1 Barb. Ch. (N. Y.) 259 (1845); Johnson v. Hart, 3 Johns. Cas. (N. Y.) 322 (1802); Hobart v. Abbot, 2 P. Wms. 643 (1731); N. Y. Code Civ. Proc. § 1632.

was executed by the mortgagor and the mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last section."[1] It is apparent then that if any person, who holds an interest in the mortgage under foreclosure, as part owner or otherwise, is omitted as a party to the action, the decree will not be binding upon him, and his interest will not be cut off; his relation to the subject-matter of the action continues as though the action had never been commenced.

§ 178. Assignor, having made an absolute assignment of the mortgage or no longer holding an interest in it, not necessary.—When the owner of a bond and mortgage makes an absolute and unconditional transfer of the same by assignment or otherwise, he ceases to have any interest in it, and is, consequently, no longer a necessary party to an action to foreclose the mortgage;[2] neither are his heirs, executors or administrators necessary parties.[3] An administrator who assigned a mortgage to an heir as

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[1] N. Y. Code Civ. Proc. § 1632.

[2] Clark v. Mackin, 95 N. Y. 346 (1884); Andrews v. Gillespie, 47 N. Y. 487 (1872); Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254 (1845); Western Reserve Bank v. Potter, Clarke Ch. (N. Y.) 437 (1841); Whitney v. McKinney, 7 Johns. Ch. (N. Y.) 147 (1823); Ward v. Van Bokkelen, 2 Paige Ch. (N. Y.) 295 (1830); Prout v. Hoge, 57 Ala. 28 (1876); Walker v. Bank of Mobile, 6 Ala. 452 (1844); Barraque v. Manuel, 7 Ark. 516 (1847); Markel v. Evans, 47 Ind. 326 (1874); Gower v. Howe, 20 Ind. 396 (1863); but held necessary in Strong v. Downing, 34 Ind. 300 (1870). In point, Wilson v. Spring, 64 Ill. 14 (1872), where the assignor assigned one of a number of notes secured by a mortgage; Williams v. Smith, 49 Me. 564 (1861); Miller v. Henderson, 10 N. J. Eq. (2 Stockt.) 320 (1855). *Aliter*, if the assignment is not absolute, Larimer v. Clemer, 31 Ohio St. 499 (1877); Omohundro v. Henson, 26 Gratt. (Va.) 511 (1875); Scott v. Ludington, 14 W. Va. 387 (1878). See Wright v. Sperry, 21 Wis. 331 (1867), and the notes to *ante* §§ 75–77. Fisher on Mortgages, § 347, and the English authorities cited.

[3] But in North Carolina the heirs of the mortgagee are held necessary parties to a bill of foreclosure; Etheridge v. Vernoy, 71 N. C. 184, 186 (1874); s. c. 70 N. C. 713; Kerchner v. Fairley, 80 N. C. 25 (1879). See also Pullen v. Heron Mining Co., 71 N. C. 567 (1874).

part of his distributive share of the decedent's estate, is not a necessary party to a foreclosure brought by the heir.[1] Chancellor Kent held, in 1823, that "where the assignment is absolute, and the mortgagee parts with all his interest in the mortgage, and there is nothing special or peculiar in the case, the assignee is under no necessity to make the mortgagee a party to a bill to foreclose. The general principle is, that a person who has no interest in the suit, and who is a mere witness, against whom there could be no relief, ought not to be a party."[2]

Another learned jurist, in referring to the history and the reasons for this principle, determined that it is "well settled that where there has been an absolute assignment of all the interest of the mortgagee in the debt secured by the mortgage, he is not a necessary party to a bill to redeem, or to a bill of foreclosure. The reason why it was formerly considered necessary to make the assignor of a chose in action a party to a bill in equity brought by the assignee, I apprehend, must have been, that courts of law did not sanction and protect such assignments considering them a species of maintenance; and the assignor, having the legal title or interest in the thing assigned, might sustain an action at law thereon, nothwithstanding a decree in equity to which he was not a party. This reason has long since ceased, and the above settled rule is now in force."[3]

§ 179. **Assignor—When a proper and desirable party.** —If the assignor has guaranteed the payment or collection of the mortgage debt, he is a necessary party defendant, if a judgment for deficiency is sought against him.[4] If usury, fraud or other defenses or equities existed against the

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[1] Westerfield v. Spencer, 61 Ind. 339 (1878).

[2] Whitney v. McKinney, 7 Johns. Ch. (N. Y.) 147 (1823); Fenton v. Hughes, 7 Ves. 287 (1802). See also McGuffey v. Finley, 20 Ohio, 474 (1851), and the notes to §§ 75–77 *ante*.

[3] Clark v. Mackin, 95 N. Y. 346 (1884); Newman v. Chapman, 2 Rand. (Va.) 93 (1823). See also Chambers v. Goldwin, 9 Ves. Sr. 269 (1804); Ward v. VanBokkelen, 2 Paige Ch. (N. Y.) 295 (1830), *per* Chancellor Walworth.

[4] See *post* § 233, on the liability of an assignor for a judgment of deficiency.

mortgage in its inception or while the mortgagee held it, he will be as assignor a very proper, if not a necessary, party to the foreclosure conducted by his assignee;[1] so also, if the assignment is imperfect in form,[2] or is by parol,[3] the assignor will be held a necessary party. In an action to foreclose, brought by the assignee of the mortgage debt without the mortgage, the assignor has been held a necessary defendant.[4]

It is now well settled that one who transfers a chose in action warrants impliedly, at least, that there is no legal defence to its collection arising out of his own connection with its origin.[5] It has been held that the assignor, under such circumstances, is not a necessary party to the action, for the reason that upon the coming in of the answer setting up usury, fraud, or other defences, the assignee as plaintiff may give notice of such defence to the assignor and offer to him the future conduct of the suit, which would make the judgment binding upon him, and place the plaintiff in the best possible position for maintaining an action against the assignor for a breach of warranty. In such a case it has been held that, "if the assignor was a necessary party to a complete determination of the controversy, she should have been so made under the provsions of § 452, instead of depriving the defendant (mortgagee) of a right to which he was clearly entitled, because of her absence as such party. It was the protection of the interest of the plaintiff (assignee), and not that of the defendant, that made her a necessary party if so at all. By the sale and assignment of the mortgage to the plaintiff's testator, the assignor impliedly warranted that there was no legal defence to its

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[1] Ward v. Sharp, 15 Vt. 115 (1843). See *ante* § 77, last paragraph.

[2] Holdridge v. Sweet, 23 Ind. 118 (1864).

[3] Denby v. Mellgrew, 58 Ala. 147 (1877).

[4] In Bibb v. Hawley, 59 Ala. 403 (1877), the assignor was held a necessary party in case of an unindorsed note where the assignment was by a separate written instrument. See Strong v. Downing, 34 Ind. 300 (1870). See also *ante* §§ 84-86, 97, 98.

[5] Littauer v. Goldman, 72 N. Y. 506 (1878); Andrews v. Gillespie, 47 N. Y. 487 (1872); Delaware Bank v. Jarvis, 20 N. Y. 226 (1859). So held of a bond and mortgage which were usurious and void, and assigned by the mortgagee; Ross v. Terry, 63 N. Y. 613 (1875).

collection arising out of its origin. * * * But it was not necessary to make the assignor a party, to accomplish this object. It is well settled that a purchaser of property, with a warranty of title, upon being sued for the recovery thereof by one claiming a paramount title thereto, may give notice to his vendor of the action, and offer to him the conduct of the defense; and that upon his so doing, the vendor is bound by the judgment in respect to the title, whether or not the defense is undertaken by him."[1]

§ 180. **Assignee of a mortgage absolutely assigned, never a necessary defendant.**—As the assignee of a mortgage becomes its absolute owner, he occupies the position of the original mortgagee in all respects, and of course can sustain no other relation to an action to foreclose than that of plaintiff.[2] He is always, however, a necessary party to the action in some relation, as a perfect title could not be offered at the sale, unless his interest by lien were extinguished. In an action by the mortgagor to redeem, he is, *vice versa*, a necessary defendant, in place of his assignor, the mortgagee.[3]

§ 181. **Assignor of a mortgage, assigned conditionally or as collateral security, a necessary party.**—A mortgagee who assigns his bond and mortgage conditionally, as a collateral security or otherwise, retaining to himself at the same time an equitable interest of any kind, is a necessary party to a foreclosure of the mortgage instituted by the assignee; if he is not joined as a co-plaintiff, he will be a necessary defendant.[4] The logical reason for this rule is,

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[1] Andrews v. Gillespie, 47 N. Y. 492 (1872), *per* Grover, J.

[2] Lennon v. Porter, 68 Mass. (2 Gray), 473 (1854), holding also that a mesne assignee is not a necessary defendant; Burton v. Baxter, 7 Blackf. (Ind.) 297 (1844). See *ante* §§ 73–77, and notes.

[3] Whitney v. McKinney, 7 Johns. Ch. (N. Y.) 147 (1823), *per* Chancellor Kent.

[4] *In re* Estate of Gilbert, 25 N. Y. Wk. Dig. 470 (1887); Dalton v. Smith, 86 N. Y. 176 (1881); Union College v. Wheeler, 61 N. Y. 88 (1874); Bloomer v. Sturges, 58 N. Y. 175 (1874); Bard v. Poole, 12 N. Y. 495 (1855); Wes. Res. Bank v. Potter, Clarke Ch. (N. Y.) 432 (1841); Johnson v. Hart, 3 Johns. Cas. (N. Y.) 322 (1802); Slee v. Manhattan Co., 1 Paige Ch. (N. Y.) 48 (1828);

that a complete decree could not otherwise be made which would protect the mortgagor and the purchaser of the mortgaged premises from any claims which the assignor might subsequently make, as the court would acquire no jurisdiction of him, and an interest in the premises would remain unextinguished.

Thus, in an action where it appeared that a mortgagee had assigned his mortgage as a collateral security, and subsequently made a general assignment for the benefit of creditors, it was held that the assignees or trustees for the creditors succeeded to the rights of the mortgagee, and were necessary defendants in an action to foreclose brought by the pledgee of the mortgage.[1] Kent has stated as cogent reasons why the assignor should be made a defendant where the assignment is made as a collateral security, that he should have an opportunity to redeem his bond and mortgage by paying the debt, and also to show, if he could, that he had in fact paid his debt and

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Kittle v. VanDyck, 1 Sandf. Ch. (N. Y.) 76 (1843). See Hughes v. Johnson, 38 Ark. 285 (1881); St. John v. Freeman, 1 Ind. 84 (1848); Brown v. Johnson, 53 Me. 246 (1865); Cutts v. York Manufacturing Co., 14 Me. 326 (1837); s. c. 18 Me. 190 (1841); Stevens v. Reeves, 33 N. J. Eq. (6 Stew.) 427 (1881); Ackerson v. Lodi Branch R. R., 28 N. J. Eq. (1 Stew.) 542 (1877); Woodruff v. Depue, 14 N. J. Eq. (1 McCart.) 168 (1861), authorities stated in the briefs of the counsel; Miller v. Henderson, 10 N. J. Eq. (2 Stockt.) 320 (1855); Fithian v. Corwin, 17 Ohio St. 118 (1866); Wright v. Sperry, 21 Wis. 331 (1867). See Chew v. Brumagen, 21 N. J. Eq. (6 C. E. Gr.) 520, 529 (1870), exhaustively collating and reviewing the New York cases; reported also in 19 N. J. Eq. (4 C. E. Gr.) 130 (1868); on appeal to the Supreme Court of the United States, the assignor was held not a necessary party; the assignee was held to be a trustee for him to the extent of the surplus over his own debt, for which he held the mortgage as a collateral security; Chew v. Brumagen, 80 U. S. (13 Wall.) 497 (1871); bk. 20 L. ed. 663. In Salmon v. Allen, 11 Hun (N. Y.) 29 (1877), a complicated case, the first pledgee had re-assigned the bond and mortgage as a collateral security for his own obligations; on foreclosure both of the assignees and the original mortgagee were held necessary parties. See also Graydon v. Church, 4 Mich. 646 (1857), where the assignor was not made a party and he subsequently became insolvent; Fisher on Mortgages, § 348; Norrish v. Marshall, 5 Madd. 475 (1821); Hobart v. Abbot, 2 P. Wms. 643 (1731). See also *ante* §§ 87–89, and the notes.

[1] Bard v. Poole, 12 N. Y. 495 (1855), a case often cited.

so was entitled to a re-assignment of the mortgage; and further, that otherwise the mortgaged premises might be sold without his knowledge.[1] In an early case, it was held that the "assignor was, therefore, the principal party interested in the mortgage at the time the bill was filed; and although the legal title to the bond and mortgage was in the plaintiff (assignee) solely, the *equitable interest* was mainly in the assignor. There is no doubt but that she was a necessary party to the suit."[2] This rule holds good, even though the assignment of the mortgage is absolute on its face and expresses a full consideration, when the actual fact is, that only a portion of the consideration was paid, and that such payment was only a loan.[3] Where it appeared in a suit brought by the assignee of a mortgage, assigned as collateral security, to foreclose the same, that it was the intention of the assignor to give such assignee the right to receive the moneys due upon the mortgage and to foreclose the same in his own name, it was held that the assignor was not a necessary party, and that the decree of sale was perfect without him.[4]

§ 182. **Assignee of a mortgage assigned collaterally, a necessary defendant in foreclosure by the assignor.**—A mortgagee who has assigned a mortgage as collateral security for a less amount than the mortgage may, as assignor, file a bill of foreclosure in his own name, especially if the purchaser or assignee holding the mortgage as collateral security refuses to foreclose.[5] As has been seen, the purchaser might have commenced the action and made the mortgagee a defendant, if he refused to become a co-plaintiff;[6] and in that case the assignee would have become

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[1] Johnson v. Hart, 3 Johns. Cas. (N. Y.) 322 (1803); Bard v. Poole, 12 N. Y. 508 (1855). See Compton v. Jones, 65 Ind. 117 (1878), where the debt had been paid, and the assignor was erroneously omitted as a party.

[2] Kittle v. VanDyck, 1 Sandf. Ch. (N. Y.) 78 (1843).

[3] Kittle v. VanDyck, 1 Sandf. Ch. (N. Y.) 78 (1843).

[4] Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254 (1845).

[5] See *ante* §§ 87–89, and notes.

[6] Hoyt v. Martense, 16 N. Y. 231 (1857); Brown v. Johnson, 53 Me. 246 (1865). See *ante* §§ 87–89.

a trustee of the surplus.[1] In case the mortgagee, as assignor, commences an action as sole plaintiff, the assignee, if he refuses to become a co-plaintiff, will be a necessary party defendant.[2] This rule is based upon the same principle stated in the preceding section, that the entire interest of the mortgagee must be brought under the jurisdiction of the court. If that part of the mortgagee's interest which is assigned as a collateral security is not represented in the foreclosure by the assignee, the decree of sale will, of course, be defective, and the purchaser will not acquire the whole interest of the mortgagee and the mortgagor.[3]

If the assignee refuses to become a co-plaintiff, and is made a defendant, the reason why he is made a defendant must be alleged in the complaint, or it will be demurrable;[4] if the objection is not taken by demurrer, it will be considered waived. If the defect does not appear upon the face of the complaint, it may be objected to by any party interested in the action, by answer. The same is also true where the action to foreclose is commenced by the assignee, as described in the preceding section, and the assignor or mortgagee is omitted as a party.[5]

§ 183. Joint or several mortgagees; action commenced by one, the others necessary defendants.— Where a joint or several mortgage is foreclosed by one of the mortgagees, and the remaining mortgagees refuse to unite as co-plaintiffs in the action, they are uniformly held necessary defendants,[6] for the reason that their omission

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[1] Norton v. Warner, 3 Edw. Ch. (N. Y.) 106 (1837).

[2] Norton v. Warner, 3 Edw. Ch. (N. Y.) 106 (1837); Simson v. Satterlee, 6 Hun (N. Y.) 305 (1875); aff'd 64 N. Y. 657 (1876); McMillan v. Gordon, 4 Ala. 716 (1843). So a person who has attached a mortgage debt is held a necessary party defendant; Pine v. Shannon, 30 N. J. Eq. (3 Stew.) 404 (1879). To the contrary, unless the sheriff has obtained actual possession of the papers, see Anthony v. Wood, 19 N. Y. Wk. Dig. 177 (1884).

[3] N. Y. Code Civ. Proc. § 1632.

[4] Carpenter v. O'Dougherty, 2 T. & C. (N. Y.) 427 (1873); N. Y. Code Civ. Proc. § 448.

[5] See *ante* § 89.

[6] See *ante* §§ 78–83, and notes. See also Denison v. League, 16 Tex. 399, 409 (1856); Porter v. Clements, 3 Ark. 364, 380 (1842); Vickers v. Cowell, 1 Beav. 529 (1839). Fisher, on Mortgages, § 349. In Lovell v.

fails to give the court complete jurisdiction over the mortgage debt. Thus, a mortgage had been executed to several creditors to secure their respective claims; on foreclosure by some as plaintiffs, who omitted others as parties to the action, the court held that the omitted parties might maintain a separate action for foreclosure, but that all should have been originally brought before the court.[1]

In an action by A. to foreclose a mortgage executed to A. and B., for a note given to A. alone, B. was held a necessary party;[2] and where a mortgage is given by one of two joint obligors on a note, it is erroneous to file the bill against the mortgagor alone; the other joint maker of the note is a necessary defendant.[3] The holder of one or more of a number of notes secured by a mortgage, is generally a necessary defendant in an action for foreclosure brought by the holder of any other note, providing he does not join as a co-plaintiff; this is specially true if the holder of the note has any interest in the mortgage.[4] If no interest in the mortgage passes with the transfer of the note, the holder of the note is deemed an unnecessary party in some states.[5]

Farrington, 50 Me. 239 (1863), one of two mortgagors refusing to join as a co-plaintiff in an action to redeem was held a necessary defendant.

[1] Howe v. Dibble, 45 Ind. 120 (1873). See Tyler v. Yreka Water Co., 14 Cal. 212 (1859), on the necessity of making them parties; Nashville & D. R. R. Co. v. Orr, 85 U. S. (18 Wall.) 471 (1873); bk. 22 L. ed. 810.

[2] Chrisman v. Chenoweth, 81 Ind. 401 (1882).

[3] Dedrick v. Barber, 44 Mich. 19 (1880). See Fond du Lac Harrow Co. v. Haskins, 51 Wis. 135 (1881).

[4] In Pettibone v. Edwards, 15 Wis. 95 (1862), an action was brought on the last of three notes for the foreclosure of a mortgage, and the holder of the second note was held a necessary defendant. See also Gratton v. Wiggins, 23 Cal. 16 (1863); Lietze v. Claybaugh, 59 Ill. 136 (1871); Preston v. Hodgen, 50 Ill. 56 (1869); Myers v. Wright, 33 Ill. 284 (1864); Murdock v. Ford, 17 Ind. 52 (1861). In Rankin v. Major, 9 Iowa, 297, 300 (1859), two notes were made to A. B. & Co. and secured by a mortgage; one was sold to J. W. R.; A. B. & Co. and J. W. R. united as co-plaintiffs to foreclose. The court held that there was a misjoinder of plaintiffs, and that one of them should have been made a defendant. Seemingly *contra*, see Harris v. Harlan, 14 Ind. 439 (1860); Hensley v. Whiffin, 54 Iowa, 555 (1880); Thayer v. Campbell, 9 Mo. 277 (1845). But see *ante* §§ 84–86, and notes, citing the cases fully and stating the rule in different states.

[5] Hensley v. Whiffin, 54 Iowa, 555 (1880); Kemerer v. Bournes, 53

In the foreclosure of a joint mortgage by the survivor of the mortgagees, the personal representatives of the decedent are not necessary defendants under the doctrine of survivorship in joint tenancy.[1] The rule is otherwise where the mortgage is held by parties in severalty.[2] Where a mortgage was executed to a husband and wife, and the husband died and his administrator assigned it, without the wife joining in the assignment, she was held a necessary defendant in an action brought by the assignee for foreclosure.[3]

§ 184. Contemporary and equal mortgagees; foreclosure commenced by one, others necessary defendants.—Where two or more mortgages, held by different parties, are contemporary and equal liens upon premises, the commencement of a foreclosure by the owner of any of the mortgages as sole plaintiff, will render the remaining mortgagees necessary defendants in the action.[4] This rule is based upon the fact that courts regard the owners of such mortgages the same as they would the owners of a single mortgage given to secure in severalty the respective amounts of the different contemporary mortgages.

§ 185. Ownership of mortgage doubtful or in dispute; action commenced by one claimant, other claimants advisable defendants.—Whenever the ownership of a mortgage is in dispute, or parties other than those to the instrument claim an interest in it, it is the best practice to

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Iowa, 172 (1880); Bell v. Shrock, 2 B. Mon. (Ky.) 29 (1841); Pugh v. Holt, 27 Miss. 461 (1854); Archer v. Jones, 26 Miss. 583 (1853).

[1] Lannay v. Wilson, 30 Md. 536 (1869). See *ante* §§ 81, 82, and notes, for a full presentation of this question.

[2] See *ante* §§ 80, 83 and notes.

[3] Savings Bank v. Freese, 26 N. J. Eq. (11 C. E. Gr.) 453 (1875). See *ante* §§ 81, 82.

[4] Decker v. Boice, 83 N. Y. 215 (1880); Cain v. Hanna, 63 Ind. 408 (1878); Cochran v. Goodell, 131 Mass. 464 (1881). See Eleventh Ward Savings Bank v. Hay, 55 How. (N. Y.) Pr. 444 (1878). In Greene v. Warnick, 64 N. Y. 220 (1876), reversing 4 Hun (N. Y.) 703, it was also held that, where there was an agreement that two mortgages executed at the same time to different parties should be equal liens, the fact that one was recorded first gave it no priority, even in the hands of a *bona fide* assignee who bought it relying upon the record and believing it to be the first lien. For a full list of cases upon the subject of the section, see *ante* § 99.

bring all claimants within the jurisdiction of the court, that all interests may be bound by the decree, and the mortgage completely foreclosed.[1] It often occurs that the legal title to a mortgage is held by one person and the equitable title by another. Thus, where a defendant answers that no valid assignment was made to the plaintiff, he may amend, making his assignor a defendant to determine the question.[2]

§ 186. **Trustees and beneficiaries sometimes necessary defendants.**—In the foreclosure of a trust mortgage by the trustee as plaintiff, it may be stated as a general rule that the beneficiaries or *cestuis que trust* are necessary defendants, unless they are joined as co-plaintiffs in the action.[3] Likewise, if the action is commenced by a beneficiary, the trustees and other beneficiaries are necessary defendants, unless joined as co-plaintiffs.[4] There are some exceptions to these rules, especially in the case of railroad mortgages and where the beneficiaries are very numerous.[5] In a New York case, where a mortgage was made to a person in trust for the payment of several bonds of the mortgagor held by different individuals, the bondholders were held necessary parties to an action brought by the trustee as sole plaintiff.[6]

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[1] See Kellogg v. Smith, 26 N. Y. 18 (1862); Hancock v. Hancock, 22 N. Y. 568 (1860); Peck v. Mallams, 10 N. Y. 509 (1853); Lawrence v. Lawrence, 3 Barb. Ch. (N. Y.) 71 (1848); Slee v. Manhattan, 1 Paige Ch. (N. Y.) 48 (1828). See *post* chap. ix.

[2] Burrows v. Stryker, 47 Iowa, 477 (1877).

[3] Large v. VanDoren, 14 N. J. Eq. (1 McCart.) 208 (1862); Davis v. Hemingway, 29 Vt. 438 (1857); Barkley v. Reay, 2 Hare, 306 (1843); Fisher on Mortgages, § 375 *et seq.* *Contra*, in Maryland, see Hays v. Dorsey, 5 Md. 99 (1853), under the act of 1833, chap. 181; Waring v. Turton, 44 Md. 535 (1876). See *ante* §§ 110–112, where the cases are cited fully.

[4] Dorsey v. Thompson, 37 Md. 25 (1872); Hackensack Water Co. v. DeKay, 36 N. J. Eq. (9 Stew.) 549 (1883); Hays v. Lewis, 21 Wis. 663 (1867). See *ante* § 112.

[5] Swift v. Stebbins, 4 Stew. & P. (Ala.) 447 (1833). See *ante* §§ 110–112.

[6] King v. The Merchants' Exchange Co., 5 N. Y. 547, 556 (1851). And see Turner v. Midland R. R. Co., 24 N. Y. Wk. Dig. 239 (1886); The Mercantile Trust Co. v. The Rochester & Ont. Belt R. Co., 20 N. Y. Wk. Dig. 508 (1885).

CHAPTER IX.

PARTIES DEFENDANT.

PRIOR MORTGAGEES AND ADVERSE CLAIMANTS.

§ 187. Introductory.
188. When prior mortgagees and lienors can not be made defendants.
189. Rights of senior and junior mortgagees to maintain a foreclosure.
190. When prior mortgagees and lienors may be made defendants.
§ 191. Parties having a title paramount to the mortgage, neither proper nor necessary defendants.
192. Adverse claimants neither proper nor necessary defendants.
193. Senior mortgagees or incumbrancers, claimed to be junior lienors, proper defendants for litigating questions of priority.

§ 187. **Introductory.**—It has been repeatedly stated in this work, upon the authority of numerous cases, that the only proper or necessary parties to the foreclosure of a mortgage are the mortgagor and the mortgagee and those persons who have acquired rights under them subsequent to the mortgage. But aside from this general rule, there are cases in which it is proper to make others than such parties defendants to the foreclosure, for the purpose of fully determining the issues involved, or for other purposes which the plaintiff may desire to accomplish. It sometimes happens that it is material to the interests of the mortgagee to make a prior mortgagee or lienor a defendant to the action, for the purpose of ascertaining the exact amount of his incumbrance and of having it paid from the proceeds of the sale; a contest as to priority between mortgages upon the same premises, can be litigated most directly in an action to foreclose, if all the mortgagees are brought within the jurisdiction of the court; and at one time there was a great deal of doubt, as to whether adverse claimaints should not be made defendants to a foreclosure for the purpose of settling their claims. These and other questions as to who can rightly be made parties to a foreclosure for a full determination of

all the issues involved are presented to every practicing attorney. It is the design of this chapter to notice briefly these miscellaneous matters.

§ 188. **When prior mortgagees and lienors can not be made defendants.**—It may be stated as a general rule that persons holding mortgages or liens prior to the mortgage under foreclosure are neither necessary nor proper parties to the action.[1] A foreclosure is an equitable action *in rem*, designed to extinguish the mortgage and to cut off all liens which are subsequent to it upon the premises, and not to affect in any way the title to the premises or the liens upon it prior to the execution of the mortgage. It is the general practice, where persons holding prior mortgages are not made defendants and no provision as to their rights is made in the judgment, to sell the premises subject to such mortgages; no portion of the proceeds of the sale can be applied

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[1] Adams v. McPartlin, 11 Abb. (N. Y.) N. C. 369 (1882); Hamlin v. McCahill, Clarke Ch. (N. Y.) 249 (1840); see the note to this case, citing numerous authorities. See Emigrant Industrial Savings Bk. v. Goldman, 75 N. Y. 127, 131 (1878); Brown v. Volkening, 64 N. Y. 76, 84 (1876); Frost v. Koon, 30 N. Y. 428, 444 (1864); Hancock v. Hancock, 22 N. Y. 568 (1860); Eagle Fire Ins. Co. v. Lent, 6 Paige Ch. (N. Y.) 635 (1837). See Chapman v. West, 17 N. Y. 125 (1858), where the action was to establish a land contract; Lewis v. Smith, 9 N. Y. 502 (1854), aff'g 11 Barb. (N. Y.) 152 (1851); Bank of Orleans v. Flagg, 3 Barb. Ch. (N. Y.) 316 (1848); Holcomb v. Holcomb, 2 Barb. (N. Y.) 20 (1847); Smith v. Roberts, 62 How. (N. Y.) Pr. 196, 200 (1881); aff'd 91 N. Y. 470, 477 (1883); Payne v. Grant, 23 Hun (N. Y.) 134 (1880); Vanderkemp v. Shelton, 11 Paige Ch. (N. Y.) 28 (1844); Western Ins. Co. v. Eagle Fire Ins. Co., 1 Paige Ch. (N. Y.) 284 (1828). See also Koch v. Purcell, 45 N. Y. Supr. Ct. (13 J. & S.) 162, 173 (1879); also Hotchkiss v. Clifton Air Cure, 4 Keyes (N. Y.) 170 (1868), explaining the remedy of a bidder at the sale, when the referee varies the terms of sale from the directions of the judgment. In point, White v. Holman, 32 Ark. 753 (1878); Broward v. Hoeg, 15 Fla. 370 (1875); Pattison v. Shaw, 6 Ind. 377 (1855); Tome v. Mer. Loan Co., 34 Md. 12 (1870); Dawson v. Danbury Bank, 15 Mich. 489 (1867); Hudnit v. Nash, 16 N. J. Eq. (1 C. E. Gr.) 550 (1862); Williamson v. Probasco, 5 N. J. Eq. (4 Halst.) 571 (1851); Forrer v. Kloke, 10 Neb. 373, 377 (1880); Warren v. Burton, 9 S. C. 197 (1877); Weed v. Beebe, 21 Vt. 495, 502 (1849); Jerome v. McCarter, 94 U. S. (4 Otto), 734, 736 (1876); bk. 24 L. ed. 136; Hagan v. Walker, 55 U. S. (14 How.) 29, 37 (1852); bk. 14 L. ed. 312. See Fisher on Mortgages, §§ 350–353, and the English cases cited. *Contra*, see Case v. Bartholow, 21 Kan. 300 (1878).

to their payment.[1] A decree of sale can generally have no effect upon the rights of prior lienors, whether they are made parties to the action or not.[2] The proposition of this section also applies where the prior lien is a judgment[3] or a mechanic's lien.[4] A prior lienor can not properly be made a defendant to an action to foreclose or enforce a mechanic's lien.[5]

§ 189. **Rights of senior and junior mortgagees to maintain a foreclosure.**—In a recent case it appeared that after a junior mortgagee had commenced an action to foreclose, the prior mortgagee also commenced a foreclosure, making a defendant the junior mortgagee, who answered that an action was pending for the foreclosure of the junior mortgage to which the prior mortgagee had been made a defendant, and asked the foreclosure of the prior mortgage as well as the foreclosure of his own; the court held after reviewing the authorities at length, that the fact that the prior mortgagee was made a defendant to the foreclosure of a junior mortgage did not affect his rights at all, and that he might disregard the foreclosure of the junior mortgage and prosecute his own foreclosure to a sale.[6] If a prior mortgagee who has been made a defendant to the foreclosure of a junior mortgage dies, or his interest devolves on another pending the action, the proceeding may go on without reviving or continuing it against his personal representative or successor, as he was not a necessary party to the foreclosure.[7]

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[1] Bache v. Doscher, 67 N. Y. 429 (1876).

[2] See the cases *supra;* Smith v. Roberts, 91 N. Y. 470, 477 (1883).

[3] Frost v. Koon, 30 N. Y. 428, 444 (1864); Kent v. Popham, 6 N. Y. Civ. Proc. 337 (1884), holding that complaint should be dismissed as to judgment creditor, with costs.

[4] Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127, 132 (1878).

[5] Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127, 132 (1878); Holcomb v. Holcomb, 2 Barb. (N. Y.) 20 (1847); Vanderkemp v. Shelton, 11 Paige Ch. (N. Y.) 28 (1844); Smith v. Schaffer, 46 Md. 573 (1877).

[6] Adams v. McPartlin, 11 Abb. (N. Y.) N. C. 369 (1882). See Straight v. Harris, 14 Wis. 509 (1861); Strobe v. Downer, 13 Wis. 10 (1860).

[7] Hancock v. Hancock, 22 N. Y. 568 (1860).

Where in an action to foreclose a mortgage one having a subsequent mortgage is made a party defendant, and such party is also the owner of mortgages prior to that of the plaintiff, he may answer in the action and ask to have such prior mortgages paid out of the proceeds of the sale before applying any portion thereof to the satisfaction of the plaintiff's mortgage.[1] In New York it is the usual practice, where prior incumbrancers are improperly made parties to a foreclosure, to order the action to be dismissed as to such defendants upon their application, without prejudice to their or the plaintiff's rights in any other proceeding.[2] If the action is not dismissed as to them, their rights may be expressly reserved in the decree;[3] or they may disregard the action, as the decree can have no effect whatever upon their rights.[4]

§ 190. **When prior mortgagees and lienors may be made defendants.**—As an exception to the proposition of the two preceding sections, a prior incumbrancer by mortgage, judgment or otherwise, may be made a defendant to the foreclosure of a junior mortgage for the purpose of having the amount of his claim ascertained and paid out of the proceeds of the sale, but such a purpose must be specifically indicated and the prior claim set forth in full in the complaint;[5] even in such a case it will be impossible to compel the prior lienor to accept payment from the proceeds of the sale unless his lien has matured and is due and payable,[6] and

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[1] Doctor v. Smith, 16 Hun (N. Y.) 245 (1878).

[2] Corning v. Smith, 6 N. Y. 82 (1851); Kent v. Popham, 6 N. Y. Civ. Proc. 337 (1884).

[3] San Francisco v. Lawton, 18 Cal. 465 (1861). See Wilkerson v. Daniels, 1 G. Greene (Iowa), 179 (1848).

[4] See the cases cited in the first note to § 188 *ante*.

[5] Smith v. Davis, 4 N. Y. Civ. Proc. 158 (1883), discussing the point in a note and citing many cases; Smith v. Roberts, 91 N. Y. 470 (1883); Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127, 132 (1878); Metropolitan Trust Co. v. Tonawanda R. R. Co., 18 Abb. (N. Y.) N. C. 368 (1887); Holcomb v. Holcomb, 2 Barb. (N. Y.) 20 (1847); Vanderkemp v. Shelton, 11 Paige Ch. (N. Y.) 28 (1844); Fisher on Mortgages, §§ 350–353.

[6] Frost v. Yonkers Savings Bank, 70 N. Y. 553, 557 (1877); Hamlin v. McCahill, Clarke Ch. (N. Y.) 249 (1840); Western Reserve Bank v. Potter, Clarke Ch. (N. Y.) 439 (1841); Western Ins. Co. v. Eagle

it is doubtful whether a court will then decree the payment of a prior lien from the proceeds of the sale, unless the prior lienor has appeared and consented to the decree.[1] It is not advisable to make a prior mortgagee a party to the suit, unless he previously indicates a willingness to have the whole title sold under the foreclosure and to have all incumbrances paid out of the proceeds in the order of their priority.[2]

It is believed that in a proper case the English rule concerning prior mortgages will be followed in our courts. Under this rule, if a subsequent mortgagee desires to sell the whole estate, he can make the prior mortgagee or lienor a party to the suit and require him to consent to such a sale or to refuse it at once. If he consents, a sale of the whole estate will be decreed; otherwise, the decree will be for a sale subject to his prior lien, the exact amount, terms and conditions of which can be ascertained in the suit and made known at the sale, so that a purchaser can know accurately the incumbrances subject to which he is buying the title.[3]

Fire Ins. Co., 1 Paige Ch. (N. Y.) 284 (1828).

[1] White v. Holman, 32 Ark. 753 (1878); Norton v. Joy, 6 Ill. App. 406 (1880); Warner v. Dewitt Co. Bank, 4 Ill. App. 305 (1878); Persons v. Alsip, 2 Ind. 67 (1850); Troth v. Hunt, 8 Blackf. (Ind.) 580 (1847); Clarke v. Prentice, 3 Dana (Ky.) 469 (1835); Champlin v. Foster, 7 B. Mon. (Ky.) 104 (1846); Waters v. Bossel, 58 Miss. 602 (1881); Hudnit v. Nash, 16 N. J. Eq. (1 C. E. Gr.) 550 (1862); Roll v. Smalley, 6 N. J. Eq. (2 Halst.) 464 (1847); Evans v. McLucas, 12 S. C. 56 (1878); Raymond v. Holborn, 23 Wis. 57 (1868); Jerome v. McCarter, 94 U. S. (4 Otto), 734 (1876), bk. 24 L. ed. 136; Hagan v. Walker, 55 U. S. (14 How.) 29, 37 (1852); bk. 14 L. ed. 312; Finley v. Bank of United States, 24 U. S. (11 Wheat.) 304 (1826); bk. 6 L. ed. 480. See Dunn v. Raley, 58 Mo. 134 (1874), as to what allegations must be made in the complaint; Gargan v. Grimes, 47 Iowa, 180 (1877); Anonymous, 8 N. J. Eq. (4 Halst.) 174 (1849). See also Tootle v. White, 4 Neb. 401 (1876), in point. If the prior mortgagee consents to a sale, he can not afterward commence a foreclosure of his own mortgage; Rowley v. Williams, 5 Wis. 151 (1856).

[2] Vanderkemp v. Shelton, 11 Paige Ch. (N. Y.) 28 (1844); Clarke v. Prentice, 3 Dana (Ky.) 469 (1835); Champlin v. Foster, 7 B. Mon. (Ky.) 104 (1846); Ducker v. Belt, 3 Md. Ch. 13 (1851); Rucks v. Taylor, 49 Miss. 552 (1873); Miller v. Finn, 1 Neb. 254 (1871).

[3] Langton v. Langton, 7 DeG., M. & G. 29 (1855); Wickenden v. Rayson, 6 DeG., M. & G. 210 (1855); Parker v. Fuller, 1 Russ & M. 656 (1830); Delabere v. Norwood, 3

In Indiana, contrary to the practice in nearly all other states, a prior incumbrancer is held a proper party to the foreclosure of a junior mortgage, and when made a party will be bound by the decree;[1] so also in Nebraska, if the prior mortgage is due.[2]

§ 191. **Parties having a title paramount to the mortgage, neither proper nor necessary defendants.**—Persons who own an interest in mortgaged premises paramount to the mortgage, are neither necessary nor proper parties to its foreclosure, for the reason that they did not acquire their rights under the mortgagor or the mortgagee, subsequent to the execution of the mortgage.[3] Whether they are made parties or not, the decree in the action will not in any way affect their rights. Thus a widow, who did not sign a mortgage executed by her husband, should not be made a defendant to its foreclosure; and even if she is made a defendant, her rights will not be affected in any way by

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Swans, 144 *n.* (1818). See Bigelow v. Cassedy, 26 N. J. Eq. (11 C. E. Gr.) 557 (1875); Potts v. N. J. Arms Co., 17 N. J. Eq. (2 C. E. Gr.) 516 (1865); Gihon v. Belleville Co., 7 N. J. Eq. (3 Halst.) 531 (1849); Jerome v. McCarter, 94 U. S. (4 Otto), 734, 736 (1876); bk. 24 L. ed. 136, and the cases cited in the opinion. See also Perdicaris v. Wheeler, 8 N. J. Eq. (4 Halst.) 68 (1849); Persons v. Merrick, 5 Wis. 231 (1856).

[1] Masters v. Templeton, 92 Ind. 447 (1883), citing numerous Indiana cases, also holds that claims adverse to the title may be litigated in a foreclosure; Merritt v. Wells, 18 Ind. 171 (1862).

[2] White v. Bartlett, 14 Neb. 320 (1883).

[3] Lewis v. Smith, 9 N. Y. 502, 514 (1854), affirming 11 Barb. (N. Y.) 153 (1851); Walsh v. Rutgers, 13 Abb. (N. Y.) Pr. 33 (1861); Rathbone v. Hooney, 58 N. Y. 463, 467 (1874); Merchants' Bank v. Thompson, 55 N. Y. 711 (1873); Lee v. Parker, 43 Barb. (N. Y.) 611, 614 (1865); Hamlin v. McCahill, Clarke Ch. (N. Y.) 249 (1840), and the note; Bram v. Bram, 34 Hun (N. Y.) 487, 491 (1885); Gage v. Perry, 93 Ill. 176 (1879); McAlpin v. Zitzer, 119 Ill. 273 (1887); s. c. 8 West. Rep. 345; Wilkinson v. Green, 34 Mich. 221 (1876); Comstock v. Comstock, 24 Mich. 39 (1871); Horton v. Ingersoll, 13 Mich. 409 (1865); Wurcherer v. Hewett, 10 Mich. 453 (1862); McClure v. Holbrook, 39 Mich. 42 (1878); Price's Ex'rs v. Lawton, 27 N. J. Eq. (12 C. E. Gr.) 325 (1876), citing numerous cases; Hekla Fire Ins. Co. v. Morrison, 56 Wis. 133 (1882), citing numerous cases; Macloon v. Smith, 49 Wis. 200 (1880); Palmer v. Yager, 20 Wis. 91 (1865); Pelton v. Farmin, 18 Wis. 222 (1864). See the cases cited in the following section.

the decree.[1] This is specially true if the complaint does not contain allegations setting forth her real rights in the property and asking to have them foreclosed; and even with such allegations in the complaint, it was held in one case that the judgment passing upon her rights and foreclosing them was erroneous and void.[2]

A person claiming dower by title paramount to the mortgage can not be brought into court in a foreclosure and made to contest the validity of her dower. Whether she is made a party or not, her rights will remain unaffected by the action; the sale should be made subject to her dower. This rule also applies to persons holding an estate in remainder or reversion, where the life estate or the intermediate interests of the beneficiary have been mortgaged.[3]

§ 192. Adverse claimants neither proper nor necessary defendants.—It is now an established rule in practice that a foreclosure suit is not a proper action in which to litigate the rights of persons who claim title to mortgaged premises in hostility to the mortgagor.[4] In New York it has been

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[1] Lewis v. Smith, 9 N. Y. 502, 514 (1854), affirming 11 Barb. (N. Y.) 153 (1851); Merchants' Bank v. Thomson, 55 N. Y. 7, 11 (1873); Lanier v. Smith, 37 Hun (N. Y.) 529 (1885).

[2] Merchants' Bank v. Thomson, 55 N. Y. 7, 11 (1873); Payn v. Grant, 23 Hun (N. Y.) 134 (1880); Bradley v. Parkhurst, 20 Kan. 462 (1878); Lounsbury v. Catron, 8 Neb. 469 (1879); Shellenbarger v. Biser, 5 Neb. 195 (1876); Wicke v. Lake, 21 Wis. 410 (1867); Roche v. Knight, 21 Wis. 324 (1867). See Pool v. Horton, 45 Mich. 404 (1881).

[3] Rathbone v. Hooney, 58 N. Y. 463, 467 (1874). See Standish v. Dow, 21 Iowa, 363 (1866), a case of trust.

[4] Lewis v. Smith, 9 N. Y. 502, 514 (1854), affirming 11 Barb. (N. Y.) 153 (1851); Frost v. Koon, 30 N. Y. 428, 444 (1864); Corning v. Smith, 6 N. Y. 82 (1851); Bank of Orleans v. Flagg, 3 Barb. Ch. (N. Y.) 316 (1848); Meiggs v. Thomson, 66 How. (N. Y.) Pr. 466 (1884); Payn v. Grant, 23 Hun (N. Y.) 134 (1880); Eagle Fire Co. v. Lent, 6 Paige Ch. (N. Y.) 635, 638 (1837). See also Brown v. Volkening, 64 N. Y. 76, 84 (1876); Marlow v. Barlew, 53 Cal. 456 (1879); Crogan v. Minor, 53 Cal. 15 (1878); San Francisco v. Lawton, 18 Cal. 465 (1861); Gage v. Perry, 93 Ill. 176 (1879); Gage v. Board of Directors, 8 Ill. App. 410 (1881); Carbine v. Sebastian, 6 Ill. App. 564 (1880); Pancost v. Travelers' Ins. Co., 79 Ind. 172 (1881); Pattison v. Shaw, 6 Ind. 377 (1855); Comly v. Hendricks, 8 Blackf. (Ind.) 189 (1846); Wilkinson v. Green, 34 Mich. 221 (1876); Summers v. Bromley, 28

determined that where a party setting up such a claim is made a defendant to the foreclosure of a mortgage, the decree will be held erroneous and will be refused, if it passes upon his rights, though made after a hearing upon the pleadings and proofs.[1] The mortgagee has no right to make one, who claims adversely to the title of the mortgagor and prior to the mortgagee, a party defendant for the purpose of trying the validity of his adverse claim of title.[2]

The bill of foreclosure should be dismissed as to an adverse claimant, unless the plaintiff alleges in his complaint and is prepared to prove, that the facts upon which he relies arose subsequently to the execution of the mortgage.[3] Disputes involving the title to the mortgaged premises, arising out of circumstances ante-dating the execution of the mortgage, can not be litigated in a foreclosure, but must be tried by ejectment or other suitable action apart from the foreclosure;[4] but where the title was acquired at a tax sale subsequent to the mortgage, the purchaser was held a proper party.[5] It is

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Mich. 125 (1873), citing New York cases; Comstock v. Comstock, 24 Mich 39 (1871); Wurcherer v. Hewitt, 10 Mich. 453 (1862); Chamberlain v. Lyell, 3 Mich. 448 (1855); Banning v. Bradford, 21 Minn. 308 (1875); Newman v. Home Ins. Co., 20 Minn. 422 (1874); Bogey v. Shute, 4 Jones (N. C.) Eq. 174 (1858); Lyman v. Little, 15 Vt. 576 (1843); Lange v. Jones, 5 Leigh (Va.) 192 (1834); Peters v. Bowman, 98 U. S. (8 Otto), 56 (1878); bk. 25 L. ed. 91; Dial v. Reynolds, 96 U. S. (6 Otto), 340 (1877); bk. 24 L. ed. 644. See Chicago Theological Seminary v. Gage, 103 Ill. 175 (1882); Shellenbarger v. Biser, 5 Neb. 195 (1876); Coe v. N. J. Midland Ry., 31 N. J. Eq. (4 Stew.) 105 (1879). See the cases cited in the preceding section.

[1] Lewis v. Smith, 9 N. Y. 502, 514 (1854); Corning v. Smith, 6 N. Y. 82 (1851); Eagle Fire Co. v. Lent, 6 Paige Ch. (N. Y.) 635 (1837).

[2] Eagle Fire Co. v. Lent, 6 Paige Ch. (N. Y). 635 (1837). See the English authorities cited in this case.

[3] Corning v. Smith, 6 N. Y. 82 (1851); Meigs v. Thomson, 66 How. (N. Y.) Pr. 466 (1884); s. c. 5 N. Y. Civ. Proc. 106, containing an exhaustive note on parties defendant to foreclosures; Keeler v. McNeirney, 6 N. Y. Civ. Proc. 363 (1883).

[4] Eagle Fire Co. v. Lent, 6 Paige Ch. (N. Y.) 635 (1837); Brundage v. Domestic and Foreign Missionary Society, 60 Barb. (N. Y.) 204, 213 (1871); Keeler v. McNeirney, 6 N. Y. Civ. Proc. 363 (1883). See Price's Ex'rs v. Lawton, 27 N. J. Eq. (12 C. E. Gr.) 325 (1876).

[5] Horton v. Ingersoll, 13 Mich. 409 (1865); Carbine v. Sebastian, 6 Ill. App. 564 (1880). See Chicago

not right that the mortgagee, in pursuing his remedies, should be delayed or hindered by litigation upon a question of title which does not affect his rights in any way. In Indiana and Kansas, however, adverse claims may be litigated in a foreclosure.[1]

§ 193. Senior mortgagees or incumbrancers, claimed to be junior lienors, proper defendants for litigating questions of priority.—As has been stated in the two preceding sections, parties who claim adversely or paramount to the mortgagor are not even proper defendants in the foreclosure of a mortgage; but parties who claim subsequently to the mortgagor, but adversely and paramountly to the mortgagee, are proper, if not necessary, defendants to a foreclosure for the purpose of litigating questions of priority in lien between the mortgage under foreclosure and their claims. This rule allows such questions only as affect the rights of the mortgagee to be brought into the action for litigation.[2] "Whether a defendant's equities are prior and superior to the rights of the plaintiff under his mortgage, or junior and subordinate thereto, must necessarily be determined in the judgment for a foreclosure of the plaintiff's mortgage. The defendant is not contesting the title of the mortgagor, but simply asserts a right under him prior in point of time to the mortgage. The question of priority between the two is necessarily involved in the action and proper to be determined in it."[3]

If a mortgagee or incumbrancer claiming priority is not made a defendant, his rights will be in no way affected by

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Theological Sem. v. Gage, 103 Ill. 175 (1882). *Contra*, Adair v. Mergentheim, (Ind.) 13 West. Rep. 852 (1888); Roberts v. Wood, 38 Wis. 60 (1875).

[1] Masters v. Templeton, 92 Ind. 447, 451 (1883); Bradley v. Parkhurst, 20 Kan. 462 (1878); Nooner v. Short, 20 Kan. 624 (1878).

[2] Brown v. Volkening, 64 N. Y. 76, 84 (1876); Bank of Orleans v. Flagg, 3 Barb. Ch. (N. Y.) 316 (1848); Payn v. Grant, 23 Hun (N. Y.) 134 (1880); Krutsinger v. Brown, 72 Ind. 466 (1880); Cochran v. Goodell, 131 Mass. 464 (1881); Dawson v. Danbury Bank, 15 Mich. 489, 495 (1867); Hoppock v. Ramsey, 28 N. J. Eq. (1 Stew.) 414 (1877); Board of Supervisors v. Mineral Point R. R., 24 Wis. 93 (1869).

[3] Brown v. Volkening, 64 N. Y. 76, 84 (1876), *per* Allen, J.

the action. It is often necessary to bring additional parties into the action for a complete determination of the questions involved in the issue; in such cases the application may be made by the plaintiff or the defendant, or the court on its own motion may order such parties as it deems necessary to be brought within its jurisdiction, but it must be a fact in each case that the party who is brought into court claims some right or interest that is adverse to the claims of the mortgagee foreclosing. The practice of making a defendant to a foreclosure every party who claims an interest in the mortgage or in the premises, in order to make a complete determination or settlement of all questions affecting the mortgage or the premises, is broadening and increasing in its application by the courts of all our states.

In New York it is provided that "any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party defendant, for the complete determination or settlement of a question involved therein."[1]

Whenever the plaintiff desires to litigate questions of priority, which may affect his mortgage, he must state his claims specifically in his complaint and demand separately the judgment of priority to which he believes himself entitled. Likewise, the defendant must raise by answer all of his claims to priority, or he will be deemed to have waived them in the foreclosure. His silence, however, will not necessarily prevent his maintaining an action as plaintiff for affirmative relief.

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[1] N. Y. Code Civ. Proc. §§ 447, 448. The same principle has been enacted in the codes of some other states.

CHAPTER X.

PARTIES DEFENDANT—LIABLE FOR THE MORTGAGE DEBT.

GENERAL PRINCIPLES—POINTS IN PRACTICE.

§ 194. Introductory.
195. General principles—At common-law.
196. General principles—Statutory.
197. Theory of the English and common-law practice.
198. Common-law and chancery practice opposed to judgments for deficiency.
199. General principles—Statutory provisions modifying the common-law rule.
§ 200. Points in practice—The complaint.
201. Points in practice—The decree of foreclosure.
202. Decree should fix order of liability.
203. Decree must follow prayer of the complaint.
204. Points in practice—The judgment for deficiency.

PARTIES ORIGINALLY LIABLE.

§ 205. Introductory.
206. Mortgagor, signing the bond or note or covenanting in the mortgage payment of the debt, liable.
207. All persons signing the bond or note which the mortgage accompanies liable.
208. All persons guaranteeing the bond and mortgage at its inception liable.
209. A married woman signing the bond or other obligation liable—General principles.
210. A married woman signing the bond or other obligation liable—Act of 1884 in New York.
211. A married woman signing the bond or other obligation liable—Rule in New York prior to 1884, and in most states at present.
§ 212. Personal liability of married woman mortgaging her separate estate.
213. Persons originally liable, deceased, their estates liable—Personal representatives proper parties.
214. Personal representatives proper defendants under recent decision in New York.
215. Persons originally liable, deceased, their heirs and devisees not proper parties.
216. Remedies against heirs and devisees.
217. Person originally liable, making an assignment in bankruptcy or voluntarily, assignee proper.

§ 194. Introductory.—In the consideration of parties defendant to an action to foreclose a mortgage, attention has been given in the foregoing pages to those parties alone who were necessary to enable the plaintiff to exhaust his entire

remedy against the land in a perfect manner,—that is, to those parties who were necessary, in order to wipe out the entire interest of the mortgagee and the mortgagor in the premises at the time of the execution of the mortgage, and to offer a perfect title to a purchaser at the sale, or such a title as the courts would compel a purchaser to accept.

The examination of questions affecting such parties has been completed; but now, after the plaintiff's remedy against the mortgaged premises has been entirely exhausted, there remains for investigation the interesting question, whether he has any other remedy for the collection of his mortgage debt, and if so, what and against whom. The statutes and decisions affecting these questions are in their growth a splendid historical illustration of the expansive and liberal tendencies of our equity system. There was a time in the law of mortgages when the mortgagee had no remedy for the collection of his debt, except an action *in rem* against the land; even to-day, the general principle underlying that old English law is preserved in part by our courts, in making the land the primary fund for the payment of the debt.

At present, however, both in England and in America, the plaintiff has generally a personal remedy by action at law against all persons who have, in any way, made themselves liable for the payment of the mortgage debt; and most of the states have made provisions for the enforcement of that remedy in the action of foreclosure, obtaining as a result, if the proceeds of the sale of the premises are insufficient to pay the debt, what is commonly known as a judgment for deficiency.

It is proposed in this chapter and in the following chapter to consider those parties who may be made defendants in an action to foreclose a mortgage, for the purpose of obtaining a judgment for deficiency against them; no particular consideration need be given to parties against whom this personal remedy may be enforced in a separate action at law. No person who has merely become liable for the mortgage debt and who has no interest in the mortgaged premises can, in any sense, be said to be a necessary party to a foreclosure, except for the purpose of exhausting in the same action

every remedy for collecting the debt. The use of the word "necessary," with this meaning, is not common in the reported cases; the word "proper" is more often used by the courts, as it indicates an option on the part of the plaintiff to make such a person a defendant. In the following pages, then, clearness and accuracy will be better obtained, if parties are considered as *liable* or *not liable* for the mortgage debt, instead of being considered as "necessary" or "proper" to the action; for if it is once determined that a party is liable, the plaintiff may make him a party or not, according to his intention of pursuing his personal remedy against him, due regard being had always to the relation of principal and surety which the defendant may sustain to any other person who is liable.

§ 195. **General principles—At common-law.**—The pursuit of a remedy against the land for the collection of a mortgage debt has always been equitable in its nature. In early English law the land was the only source from which payment could be enforced. As the law of mortgages was developed, and it became thoroughly established that a mortgage was only a security, there grew up the use of a bond or note as the instrument of indebtedness, which the mortgage accompanied merely as a collateral security; a covenant of payment of the debt was sometimes incorporated into the mortgage and used instead of a bond.

With the introduction of the covenant of payment and the use of a bond or note, there grew up a line of cases[1] in English and in American law which sustained an action at law for the recovery of the debt, independently of the mortgaged premises, and also for the recovery of any balance which might remain unpaid after applying the proceeds of a sale of the land to the payment of the debt. In an early action at law, brought on a bond to recover a deficiency arising on a foreclosure and sale, the defense was interposed that the bond and mortgage had been extinguished by the

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[1] Dunkley v. VanBuren, 3 Johns. Ch. (N.Y.) 330 (1818), citing English authorities; Globe Ins. Co. v. Lansing, 5 Cow. (N. Y.) 380 (1826); 3 Powell on Mortgages, 1003.

foreclosure. The court said, "The question presented is, whether a foreclosure and sale of the premises mortgaged as a collateral security is an extinguishment of the debt due on the bond. It most clearly is not, any further than to the extent of the money produced by the sale of the mortgaged premises."[1]

§ 196. **General principles—Statutory.**—The practice at law and in equity for the collection of a mortgage debt has been modified and assisted, from time to time, in England and in the various states, by statutory provisions. Under the common-law foreclosure of a mortgage, the distinguishing characteristic of the practice with reference to persons liable for the mortgage debt was, that they could not be made parties defendant for the purpose of obtaining a judgment for deficiency against them; a judgment for deficiency could not be recovered against the mortgagor, even where he was the sole defendant to the action.[2] The universal and only practice was for the plaintiff to sue at law on the bond or other instrument of indebtedness, which made the defendants liable for any deficiency which might remain unpaid.[3] An action to foreclose under that practice was in no sense *in personam*, but rather *in rem*.[4] In those states where statutory provisions have not been made for obtaining a judgment of deficiency in an action to

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[1] Globe Ins. Co. v. Lansing, 5 Cow. (N. Y.) 381 (1826), *per* Savage, Ch. J. As early as 1799, Lord Thurlow held in Aylet v. Hill, 2 Dick. 551, that "a mortgagee might proceed on his bond, notwithstanding he had obtained a decree of foreclosure." See Dunkley v. VanBuren, 3 Johns. Ch. (N. Y.) 330 (1818); also Southworth v. Scofield 51 N. Y. 513 (1873), where an action was maintained for an unpaid balance.

[2] Dunkley v. VanBuren, 3 Johns. Ch. (N. Y.) 330 (1818); Fleming v. Sitton, 1 Dev. & B. (N. C.) Eq. 621 (1837).

[3] Globe Ins. Co. v. Lansing, 5 Cow. (N. Y.) 381 (1826); Dunkley v. Van Buren, 3 Johns. Ch. (N. Y.) 330 (1818); Hunt v. Lewin, 4 Stew. & P. (Ala.) 138 (1833); Taylor v. Townsend, 6 Mass. 264 (1810); Amory v. Fairbanks, 3 Mass. 562 (1793).

[4] White v. Williams, 3 N. J. Eq. (2 H. W. Gr.) 376 (1836). The *scire facias* practice of foreclosure in Illinois gives only a judgment *in rem*; see Osgood v. Stevens, 25 Ill. 89 (1860), for an illustration. Statutory foreclosures by advertisement in New York accomplish only the same result.

foreclose a mortgage, this same common-law practice of a separate action at law on the instrument of indebtedness, remains the only procedure that the plaintiff has.

In most of the states statutory provision is now made, however, for joining all persons liable for the debt in the action to foreclose, and for decreeing a personal judgment of deficiency therein against them; but even in those states the common-law practice is not abolished but remains in force, with the single condition that to exercise it, permission to sue at law must first be obtained of the court in which the mortgage was foreclosed.[1] But if the mortgagee commences his action without first obtaining permission of the court, he can afterwards without prejudice procure an order *ex parte*, *nunc pro tunc*, granting permission.[2] The court is not bound to grant the permission as a matter of right; and it seems that where the mortgagee has voluntarily refrained from asking a decree for any deficiency, some satisfactory reason must be assigned for permitting him to institute a separate action at law for its recovery.[3]

§ 197. Theory of the English and common-law practice. —When, in 1786, it was first decided that the mortgagee after a foreclosure sale in chancery could bring an action at law for the balance of the debt unpaid, it was a universal principle of practice, and one which still remains in force in some states, that relief in equity and also at law could not

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[1] N. Y. Code Civ. Proc. § 1628; Equitable Life Ins. Co. v. Stevens, 63 N. Y. 341 (1875); Matter of Collins, 17 Hun (N. Y.) 289 (1879). See *post* § 200. This permission is not required in Ohio; Avery v. Vansickle, 35 Ohio St. 270 (1879); nor in Iowa, but an action at law on the debt and one to foreclose the mortgage can not be maintained at the same time; Brown v. Cascaden, 43 Iowa, 103 (1876); County of Dubuque v. Koch, 17 Iowa, 229 (1864). The N. Y. Code Civ. Proc. § 1628 is prohibitory only to parties foreclosing, and does not apply to a grantor who sues his grantee on a contract of assumption of payment of the mortgage debt; Scofield v. Doscher, 72 N. Y. 494 (1878), aff'g 10 Hun (N. Y.) 582; Campbell v. Smith, 71 N. Y. 26 (1877), aff'g 8 Hun (N. Y.) 6.

[2] McKernan v. Robinson, 84 N. Y. 105 (1881), aff'g 23 Hun (N. Y.) 289; a *nunc pro tunc* order to bring and continue an action was granted and sustained in Earl v. David, 20 Hun (N. Y.) 527 (1880); aff'd 86 N. Y. 634 (1881).

[3] Equitable Life Ins. Co. v. Stevens, 63 N. Y. 341 (1875), *per* Rapallo, J.

be decreed in the same action.[1] It was for this reason that Chancellor Kent decided in an early case, that on a bill to foreclose a mortgage the mortgagee was confined to his remedy on the mortgaged premises, and that the suit could not be extended to the mortgagor's other property nor against his person, in case the property mortgaged was not sufficient to pay the debt for which it was pledged, and that the mortgagee's further remedy was at law.[2]

A court of equity could not ordinarily decree the payment of the balance remaining unpaid after the foreclosure, unless the debt, apart from the mortgage, was such as a court of chancery would have jurisdiction of and could enforce. But the courts in some states have departed from this rule so far as to render a judgment for deficiency in an action to foreclose, where the mortgagor is the sole defendant,[3] on the ground that an action against him, in which a decree is sought for the foreclosure of the title, as well as for a judgment against him for deficiency, would not embrace different causes of action, but different remedies for the same cause.[4]

§ 198. **Common-law and chancery practice opposed to judgments for deficiency.**—When, however, a judgment for deficiency is sought against a third person who is liable for the debt, another principle of law interferes and prevents his being made a party to the foreclosure. It has always been a rule of practice in chancery and in common-law, as well as under most codes, that though actions arising out of the same transactions or connected with the same subject-matter may be united and different remedies demanded therein, yet the causes of action must be so united and the

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[1] 2 Hilliard on Mortgages, 293; 4 Kent, 183, and English cases cited.

[2] Dunkley v. VanBuren, 3 Johns. Ch. (N. Y.) 330 (1818). See Stevens v. Dufour, 1 Blackf. (Ind.) 387 (1825); also the statute of 1824, and Youse v. M'Creary, 2 Blackf. (Ind.) 243 (1829); Markle v. Rapp, 2 Blackf. (Ind.) 268 (1829), holding that suit should first be brought on the bond.

[3] In Wightman v. Gray, 10 Rich. (S. C.) Eq. 518, 531 (1859), Chancellor Wardlaw reviews the history of this question in South Carolina, referring to the act of 1840.

[4] In point, Fithian v. Monks, 43 Mo. 502, 515 (1869), *per* Wagner, J., collating and reviewing the authorities at length.

remedies so demanded as to affect all parties to the action in the same manner, and to bind them all to the performance of the same judgment.[1] This rule is so fundamental and essential that no system of law or practice can do without it; it can be departed from only with the sanction of statutory provisions in special cases.

§ 199. General principles—Statutory provisions modifying the common-law rule.—The common-law rule of procedure for the collection of an unpaid balance in a foreclosure, as above explained, has been modified in most of our states, as will be observed by reference to their statutory provisions respecting foreclosures conducted by equitable actions. The general result is, that in an action to foreclose a mortgage a judgment *in personam*[2] against the mortgagor

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[1] Jones on Mortgages, (3d ed.) § 1710.

[2] N. Y. Code Civ. Proc. § 1627; Hunt v. Lewin, 4 Stew. & P. (Ala.) 138 (1833); Ala. Rev. Code, § 3479; Hunt v. Dohrs, 39 Cal. 304 (1870); Englund v. Lewis, 25 Cal. 337 (1864); Cormerais v. Genella, 22 Cal. 116 (1863), citing the statutes of 1860 and 1861; Rowland v. Leiby, 14 Cal. 156 (1859); Rollins v. Forbes, 10 Cal. 299 (1858); Stevens v. Campbell, 21 Ind. 471 (1863); Duck v. Wilson, 19 Ind. 190 (1862); Grimmell v. Warner, 21 Iowa, 11 (1866); Cooley v. Hobart, 8 Iowa, 358 (1859), distinguishing Sands v. Wood, 1 Iowa, 263 (1855), and Wilkerson v. Daniels, 1 G. Green (Iowa), 179, 188 (1848); Code of Iowa, § 2084; Kentucky Code, § 376; formerly otherwise, Crutchfield v. Coke, 6 J. J. Marsh. (Ky.) 89 (1831); Morgan v. Wilkins, 6 J. J. Marsh. (Ky.) 28 (1831); Johnson v. Shepard, 35 Mich. 115 (1876); Fredman S. & T. Co. v. Dodge, 3 McAr. C. C. 529 (1879). See also Fleming v. Kerkendall, 31 Ohio St. 568 (1877); Larimer v. Clemmer, 31 Ohio St. 499 (1877); Conn v. Rhodes, 26 Ohio St. 644 (1875); King v. Safford, 19 Ohio St. 587 (1869); see the act of February 19, 1864. In Missouri a personal judgment for a deficiency may be recovered against the mortgagor, but not against third parties who are liable for the mortgage debt, as a foreclosure in that state is strictly an *action at law*, and not in equity; Fithian v. Monks, 43 Mo. 502 (1869), citing the statute. In Wisconsin such a decree was not allowable under the Revised Statutes of 1858; Faesi v. Goetz, 15 Wis. 231 (1862,) stated the ground of the objection to such a decree as a misjoinder of causes of action; Borden v. Gilbert, 13 Wis. 670 (1861); Walton v. Goodnow, 13 Wis. 661 (1861). But the Laws of 1862, chap. 243, made provisions for judgments of deficiency similar to those of the New York statute; Bishop v. Douglass, 25 Wis. 696 (1870); Baird v. McConkey, 20 Wis. 297 (1866); Burdick v. Burdick, 20 Wis. 348 (1866). In New Jersey the rule was for many years the same as it now is in New York; Jarman v. Wiswall, 24 N. J.

and all parties liable for the mortgage debt may be decreed for any residue of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds pursuant to the directions contained in the decree.

This rule differs from the common-law rule in the two points of allowing a remedy at law and in equity to be pursued in the same action, and of allowing the joinder of parties who are not interested equally or in the same manner in the subject-matter. This innovation was first made in New York by the adoption of the Revised Statutes;[1] the original statute was subsequently incorporated into the first Code, and reads as follows, as amended in the Code of Civil Procedure: "Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage, may be made a defendant in the action; and if he has appeared, or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein."[2] The statutory provisions of Wisconsin, Nebraska, North Carolina, South Carolina,[3] Florida, and many other states, are substantially the same.

The Supreme Court of the United States in 1864, in order to assimilate the practice in the circuit courts to the general practice in the state courts, adopted the rule that in all suits in equity for the foreclosure of mortgages in the circuit courts, or in any of the courts of the territories, a judgment may be rendered for any deficiency found due after applying

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Eq. (9 C. E. Gr.) 267 (1873), a leading case; but by the act of 1880, chap. 255, it was provided that a decree for a deficiency should not be entered in a foreclosure against parties who were personally liable for the mortgage debt. The common-law practice of a separate action at law is now the only procedure in that state; Allen v. Allen, 34 N. J. Eq. (7 Stew.) 493 (1881); Naar v. Union and Essex Land Co., 34 N. J. Eq. (7 Stew.) 111 (1881); Newark Savings Inst. v. Forman, 33 N. J. Eq. (6 Stew.) 436 (1881).

[1] 2 N. Y. Rev. Stat. 191.

[2] N. Y. Code Civ. Proc. § 1627. See Schwinger v. Hickok, 53 N. Y. 283 (1873); Bank of Rochester v. Emerson, 10 Paige Ch. (N. Y.) 359 (1843); McCarthy v. Graham, 8 Paige Ch. (N. Y.) 480 (1840).

[3] Gray v. Toomer, 5 Rich. (S. C.) L. 261, 266 (1852).

the proceeds of the sale to the satisfaction of the mortgage debt. This rule applies also to the courts of the District of Columbia.[1]

§ 200. **Points in practice —The complaint.** — When statutory provisions first allowed a judgment for deficiency to be rendered against all persons liable for the mortgage debt in an action to foreclose, the courts, to protect persons so liable, adopted a rule requiring the plaintiff to state his cause of action fully in his complaint, and also to make a specific demand that the decree of foreclosure adjudge that the persons so liable pay any deficiency which might arise,[2] and the order in which they should be severally liable. It often occurs among practicing attorneys, that the demand for a judgment of deficiency is made in the most general way against the parties personally liable, but this practice is not commendable ; it is much better and safer to make the demand specifically, according to the order of liability of the several persons who are holden for the mortgage debt.

If no demand is made against a person who is liable for the unpaid balance, judgment can not be taken against him,[3] but the plaintiff may still have a separate action at law; not, however, without the leave of the court in which the action to foreclose was brought. If the plaintiff intends to exercise his right of action against any person so liable, it is best to do so in the action to foreclose,—for, when application is made for leave to bring a separate action at law, the tendency of the courts is to require a good cause for the

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[1] Cross v. DeValle, 68 U. S. (1 Wall.) 5 (1863); bk. 17 L. ed. 515; 7 Wash. Law Rep. 2.

[2] Equitable Life Ins. Co. v. Stevens, 1 N. Y. Wk. Dig. 465 (1875); Luce v. Hinds, Clarke Ch. (N. Y.) 453, 457 (1841); Leonard v. Morris, 9 Paige Ch. (N. Y.) 90 (1841). In point, Simonson v. Blake, 20 How. (N. Y.) Pr. 484 (1861); s. c. 12 Abb. (N. Y.) Pr. 331, citing the old Code, § 275. See Tucker v. Leland, 75 N. Y. 186 (1878); Manhattan Life Ins. Co. v. Glover, 14 Hun (N. Y.) 153 (1878); Foote v. Sprague, 13 Kan. 155 (1874); Giddings v. Barney, 31 Ohio St. 80 (1876). Whenever a judgment for a deficiency is demanded against a married woman, facts must be alleged showing the liability of her separate estate; McGlaughlin v. O'Rourke, 12 Iowa, 459 (1861).

[3] Giddings v. Barney, 31 Ohio St. 80 (1876).

same to be shown.[1] An action at law can also be maintained on the note or bond, or the covenant in the mortgage, without resorting to an equitable foreclosure, in order to obtain a personal judgment against those liable for the payment of the mortgage debt.[2] In some states actions at law on the bond, and for foreclosure in equity, can be maintained at the same time.[3]

§ 201. **Points in practice—The decree of foreclosure.**—The judgment of foreclosure should provide in the first place, if the proceeds of the sale are insufficient to pay the amount reported due to the plaintiff, with the interest and expenses of the sale and the costs of the action, that the referee specify the amount of such deficiency in his report of sale, and the defendants personally liable for the mortgage debt pay the same to the plaintiff.[4] Under the New York Code of Civil Procedure direction is also made for the payment of taxes, assessments and water rates, which are liens upon the property sold;[5] and in ascertaining the amount of the deficiency the taxes, assessments, etc., are to be deducted as though they were part of the original debt.[6]

§ 202. **Decree should fix order of liability.**—The judgment should provide in the second place, when it is rendered

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[1] See *ante* §§ 195, 196, and the cases cited on this point; McKernan v. Robinson, 84 N. Y. 105 (1881); Scofield v. Doscher, 72 N. Y. 491 (1878), citing Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294 (1841).

[2] Burr v. Beers, 24 N. Y. 178 (1861); Rosevelt v. Carpenter, 28 Barb. (N. Y.) 426 (1858); Brown v. Cascaden, 43 Iowa, 103 (1876); Banta v. Wood, 32 Iowa, 469, 474 (1871); Stephens v. Greene Co. Iron Co., 11 Heisk. (Tenn.) 71 (1872); Ober v. Gallagher, 93 U. S. (3 Otto), 199 (1876); bk. 23 L. ed. 829. The action can also be maintained against any person who has guaranteed the payment of the bond and mortgage; Hand v. Kennedy, 45 N. Y. Supr. Ct. (13 J. & S.) 385 (1879).

[3] Very v. Watkins, 18 Ark. 546 (1857); Fairman v. Farmer, 4 Ind. 436 (1853), based upon the statute of 1831; Ely v. Ely, 72 Mass. (6 Gray), 439 (1856); Wilhelm v. Lee, 2 Md. Ch. Dec. 322 (1849); Brown v. Stewart, 1 Md. Ch. Dec. 87 (1847). See Mayer v. Farmers' Bk., 44 Iowa, 212, 214 (1876), and Code, §§ 3163, 3164 (1876), holding that a personal judgment recovered on the bond will be a lien on the mortgaged premises from the date of the recording of the mortgage, and that the premises can be sold under execution on the judgment.

[4] N. Y. Code Civ. Proc. §§ 1626, 1627; Supreme Court Rule 61.

[5] N. Y. Code Civ. Proc. § 1676.

[6] See *post* § 204.

against several persons, some of whom are primarily liable as principals, and others are liable only secondarily as sureties, that it be enforced first against the principal debtors, and then, so far as it remains unsatisfied only, against the sureties in the order of their liability, which should also be fixed;[1] upon the decree of foreclosure, as it fixes the order of the liability of the sureties, will be based the judgment for deficiency.

In a case where a mortgagee had assigned a bond and mortgage, guaranteeing their payment, and an action was brought against the mortgagor and guarantor, and the usual decree of foreclosure and sale was demanded with a judgment for deficiency against both, Chancellor Walworth held, as to the proper form of decree, that "the proper decree, where the mortgagor is himself a party to the suit, and is primarily liable for the payment of the deficiency, and a third person is made a party defendant who is only secondarily liable, is to decree the payment of the deficiency by the principal debtor in the first instance; and to decree payment of the amount of such deficiency against his co-defendant who stands in the situation of his surety merely, only in case it can not be collected of the principal debtor, after the return of an execution against such principal debtor unsatisfied. The decree in such cases should also direct that, in case the amount of the deficiency is paid by the defendant who is only secondarily liable for such deficiency, he shall have the benefit of the decree, for the purpose of obtaining satisfaction for the same amount, with the interest thereon, from the defendant who is primarily liable. * * *

After the usual decree for the foreclosure and sale of the mortgaged premises, and the payment of the debt and costs out of the proceeds of such sale, and a decree over against the mortgagor personally for the deficiency, if any, the decree must further direct, that if the complainant is not able to collect the amount of such deficiency out of the estate of the mortgagor, upon the issuing of an execution,

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[1] In point, Hand v. Kennedy, 45 N.Y. Supr. Ct. (13 J. & S.) 385 (1879); Youngs v. Trustees, 31 N. J. Eq. (4 Stew.) 290 (1879).

against his property, to the sheriff of the county in which he resides, or of the county where he last resided in this state, the defendants (assignors), upon the return of such execution unsatisfied, pay so much of such deficiency as remains unpaid. * * * The decree must further direct that, if they pay the amount thus decreed against them personally, or if the same is collected out of their property, they shall have the benefit of the decree against the mortgagor, for the purpose of enabling them to obtain remuneration from him, to the same extent."[1]

§ 203. **Decree must follow prayer of the complaint.**— The judgment for foreclosure, in fixing the order of liability, must follow the demand in the complaint, if judgment is taken by default or upon the report of a referee. This judgment is not a personal one in any sense, but is more in the nature of a judgment *in rem;* the plaintiff can not, therefore, have a contingent personal judgment in the decree of foreclosure against any of the defendants.[2] Judgments of foreclosure are too often entered without decreeing the respective liabilities of the different parties to the action. This may not render the judgment itself defective in any way, but it often causes litigation among the defendants in order to determine their respective liabilities.

A judgment for deficiency can not be rendered against a person liable for the debt, "unless he has appeared or has been personally served with the summons" or has submitted himself to the jurisdiction of the court.[3] Jurisdiction over

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[1] Jones v. Steinberg, 1 Barb. Ch. (N. Y.) 252 (1845). In Luce v. Hinds, Clarke Ch. (N. Y.) 456 (1841), a case similar in all respects to Jones v. Steinberg, Vice-Chancellor Whittlesey says, "I shall be, therefore, compelled to decree against the defendant, according to the prayer of the complainant's bill. The order must be a reference to a master to compute the amount due,—the final order will be for the sale of the mortgaged premises, and a personal decree against the obligor, Hinds, for the deficiency, and in case an execution against Hinds does not realize the money, an execution must afterwards go against Stow (guarantor) for any balance due after sale of the premises, and execution unsatisfied against the obligor Hinds."

[2] Cobb v. Thornton, 8 How. (N. Y.) Pr. 66 (1852). See Welp v. Gunther, 48 Wis. 543, (1879).

[3] N. Y. Code Civ. Proc. § 1627. The same rule prevails in Ohio;

the person is a prior requisite in New York practice, and doubtless is in the practice of other states. Consequently a personal judgment for deficiency can not be obtained against a non-resident, unless he appears in the action; and though such a judgment be docketed against a non-resident after service by publication or otherwise, it will be irregular and void.[1]

§ 204. Points in practice—The judgment for deficiency. —The judgment for deficiency, which courts are now generally authorized to decree against parties personally liable for the mortgage debt, is a judgment for the balance of the debt remaining unsatisfied after a sale of the mortgaged premises, and the application of the proceeds of the sale to its payment.[2] If part of the debt is due and part not due, the judgment for deficiency can be rendered only for what is due; a personal judgment can not be legally rendered for a debt which has not matured.[3] The first step is to ascertain the amount of the unpaid balance. The judgment consequently can not be rendered even contingently, until after the master in chancery or the referee appointed to sell has made and filed his report.[4] It is the usual practice for the referee to state the amount of deficiency in his report of sale, and upon the confirmation of the report judgment for the deficiency may be docketed.[5] It seems from recent

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publication of the summons does not give jurisdiction for a personal judgment against a defendant; Wood v. Stanberry, 21 Ohio St. 142 (1871).

[1] Gibbs v. Queen Ins. Co., 63 N. Y. 131 (1875); Schwinger v. Hickok, 53 N. Y. 280 (1873).

[2] See Mutual Life Ins. Co. v. Southard, 25 N. J. Eq. (10 C. E. Gr.) 337 (1874), for the practice in New Jersey, which is very similar to that in New York. See the cases cited below.

[3] Skelton v. Ward, 51 Ind. 46 (1875); Smith v. Osborn, 33 Mich. 410 (1876).

[4] Cobb v. Thornton, 8 How. (N. Y.) Pr. 66 (1852). See Lipperd v. Edwards, 39 Ind. 165 (1872).

[5] Bank of Rochester v. Emerson, 10 Paige Ch. (N. Y.) 359 (1843); McCarthy v. Graham, 8 Paige Ch. (N. Y.) 480 (1840); Bache v. Doscher, 41 N. Y. Supr. Ct. (9 J. & S.) 150 (1876); aff'd 67 N. Y. 429. In California there can be no judgment for a deficiency, till the referee has made his return that a balance remains unpaid after the sale; Hunt v. Dohrs, 39 Cal. 304 (1870), citing the Practice Act, § 246. See also Culver v. Rogers, 28 Cal. 520 (1865); Englund v. Lewis, 25 Cal. 337

decisions that a confirmation of the referee's report of sale is not necessary prior to issuing execution.[1]

The sum paid for the premises at the foreclosure sale must be taken as a conclusive determination of their value as between the parties to the suit.[2] In determining the amount of the judgment for deficiency, there must be deducted from the proceeds of the sale the costs and expenses of the plaintiff's attorney in conducting the action, the expenses and fees of the referee making the sale, and all taxes,[3] assessments and water rates[4] which are liens upon the property sold; the amount of the proceeds then remaining is to be deducted from the amount of the debt and interest as stated in the decree of foreclosure, and the balance will furnish the amount for the judgment of deficiency.

It has been held erroneous to enter a judgment for deficiency for a portion of the mortgage debt which has become due, although, because the premises were so situated that they could not be sold in parcels, the entire proceeds of the foreclosure sale were applied to pay the debt due and to become due.[5]

(1864); Cormerais v. Genella, 22 Cal. 116 (1863); Rowland v. Leiby, 14 Cal. 156 (1859).

[1] Bache v. Doscher, 41 N. Y. Supr. Ct. (9 J. & S.) 150 (1876); aff'd 67 N. Y. 429; Bicknell v. Byrnes, 23 How. (N. Y.) Pr. 486 (1862); Cobb v. Thornton, 8 How. (N. Y.) Pr. 66 (1852); Springsteen v. Gillett, 30 Hun (N Y.) 260 (1883); Moore v. Shaw, 15 Hun (N. Y.) 428 (1878); aff'd 77 N. Y. 513 (1879). In Wisconsin a prior order of confirmation is necessary; Laws of 1862, chap. 243; Tormey v. Gerhart, 41 Wis. 54 (1876); also in Nebraska, Clapp v. Maxwell, 13 Neb. 542 (1882). See White v. Zust, 28 N. J. Eq. (1 Stew.) 107 (1877). In Michigan a special application must be made to the court, before execution can issue on a judgment of deficiency; McCricket v. Wilson, 50 Mich. 513 (1883); Gies v. Green, 42 Mich. 107 (1879). In Leviston v. Swan, 33 Cal. 480 (1867), it was held that the clerk should enter up judgment for the deficiency on the filing of the referee's report of sale without the further order of the court.

[2] In point, Snyder v. Blair, 33 N. J. Eq. (6 Stew.) 208 (1880), collating and reviewing the cases.

[3] N. Y. Code Civ. Proc. § 1676; Cornell v. Woodruff, 77 N. Y. 203 (1879); Fleishauer v. Doellner, 60 How. (N. Y.) Pr. 438 (1881).

[4] Marshall v. Davis, 78 N. Y. 414, 422 (1879), reversing 16 Hun (N. Y.) 606; Argald v. Pitts, 78 N. Y. 239 (1879); Cornell v. Woodruff, 77 N. Y. 205 (1879).

[5] Taggert v. San Antonio, etc., 18 Cal. 460 (1861); Skelton v. Ward, 51 Ind. 46 (1875); Darrow v.

PARTIES ORIGINALLY LIABLE.

§ 205. **Introductory.**—For the purpose of a logical analysis, the subject-matter of this chapter and the following chapter will be considered under the sub-divisions, *Parties Originally Liable* and *Parties Subsequently Liable.* Some writers have considered the following subject-matter under the headings, Parties Primarily Liable and Parties Secondarily Liable; but this division is not logical except as primary means original, and secondary means subsequent; furthermore, the words "primary" and "secondary" are too suggestive of the relation of principal and surety, which would certainly not be a logical division of this subject, as the relation is so variable and subject to change, whenever a new party becomes related to a bond and mortgage in such a way as to make himself personally liable for the debt.

The logical division, Original and Subsequent, also furnishes an opportunity to consider the parties liable in chronological order. In the following part of this chapter, then, attention is to be given to parties who originally became liable for the mortgage debt,—that is, to those who became liable at the inception of the bond and mortgage. It is to be remarked again, that parties are not considered with reference to their being "necessary" or "proper," but with reference to their *liability*, it remaining at the option of the plaintiff whether he will make them parties or not, due regard being had always to the relation of principal and surety.

§ 206. **Mortgagor, signing the bond or note or covenanting in the mortgage for payment of the debt, liable.**—The fact that a mortgagor who signs a bond or note, which is accompanied by a mortgage, for the payment of a sum of money, or who covenants in the mortgage without a bond or note to pay the same, is liable for the payment of that sum, rests upon the fundamental principle of law, that every man must perform his contracts and is liable for any breach

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Scullin, 19 Kan. 57 (1877); Smith v. Osborn, 33 Mich. 410 (1876); Danforth v. Coleman, 23 Wis. 528 (1868).

of them.[1] There is scarcely a case in which the question of deficiency is considered that does not give an *obiter dictum*, that the mortgagor is the first person to become liable for the payment of the debt.[2] That his relation as principal may be changed to that of surety, will be seen hereafter; but his name once subscribed to the contract of indebtedness, he will always remain liable.

If no note, bond or other legal obligation was given with the mortgage, the plaintiff will be confined to the mortgaged premises for his remedy,[3] unless the claim on which the mortgage is founded was an equitable one, or there was a debt existing independent of the mortgage.[4] The same is true where the debt is barred by the statute of limitations, or the obligor has been discharged in bankruptcy proceedings.[5]

§ 207. **All persons signing the bond or note which the mortgage accompanies liable.**—In an action to foreclose a bond and mortgage, where the bond has been executed by

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[1] Schwinger v. Hickok, 53 N. Y. 280 (1873); Hunt v. Chapman, 51 N. Y. 555 (1873); Curtiss v. Tripp, Clarke Ch. (N. Y.) 317 (1840); Marsh v. Pike, 10 Paige Ch. (N. Y.) 595 (1844): Bank of Rochester v. Emerson, 10 Paige Ch. (N. Y.) 359 (1843); Leonard v. Morris, 9 Paige Ch. (N. Y.) 90 (1841). See National Fire Ins. Co. v. McKay, 21 N. Y. 191, 193 (1860), where Comstock, Ch. J., says *obiter*, "S. was the mortgagor and was personally bound for the payment of the debt." See Wadsworth v. Lyon, 93 N. Y. 201 (1883); Price v. State Bank, 14 Ark. 50 (1853); Snell v. Stanley, 58 Ill. 31 (1871); Stevens v. Campbell, 21 Ind. 471 (1863); Darrow v. Scullin, 19 Kan. 57 (1877); Foote v. Sprague, 13 Kan. 155 (1874), where the notes were all due by the terms of an interest clause and judgment for the whole amount was held proper; Conn. Mut. Life Ins. Co. v. Tyler, 8 Biss. C. C. 369 (1878), holding that the fact that a mortgagor has conveyed his equity of redemption in the premises does not release him from his personal liability on the bond. See *contra* in New Jersey since the act of 1880, which provides that a judgment for deficiency shall not be decreed in a foreclosure; Allen v. Allen, 34 N. J. Eq. (7 Stew.) 493 (1881); Naar v. Union & E. L. Co., 34 N. J. Eq. (7 Stew.) 111 (1881).

[2] Calvo v. Davies, 73 N. Y. 211, 215 (1878); Birnie v. Main, 29 Ark. 591 (1874).

[3] Coleman v. VanRensselaer, 44 How. (N. Y.) Pr. 368 (1873); Hunt v. Lewin, 4 Stew. & P. (Ala.) 138 (1833); Fletcher v. Holmes, 25 Ind. 458 (1865); VanBrunt v. Mismer, 8 Minn. 232 (1863).

[4] Gaylord v. Knapp, 15 Hun (N. Y.) 87 (1878). "Every mortgage implies a loan and every loan a debt;" Critcher v. Walker, 1 Murph. (N. C.) 488 (1810).

[5] Kinloch v. Mordecai, 1 Speer's (S. C.) Eq. 464 (1844).

persons other than the mortgagors, as well as by the mortgagors, it is proper to make such obligors parties to the action and to demand against any or all of them a judgment for deficiency, as they are all liable upon the bond for the debt.[1] This is also true if the instrument of indebtedness is a note[2] or other form of obligation.[3] The authority to join such obligors in an action to foreclose a mortgage and to demand a personal judgment for deficiency against them, is derived from the codes and statutes of the several states.[4]

In a recent foreclosure in New York, where the bond had been signed by others than the mortgagors, the court held: "The Revised Statutes provide that if the mortgage debt be secured by the obligation or other evidence of debt, of any other person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases. The same provision is, in substance, continued in the Code. These authorities justify the plaintiff in joining in this action all the parties to the bond, the payment of which is secured by the mortgage sought to be foreclosed, and in demanding a judgment against all the obligors for any deficiency which may arise."[5]

If a husband executes with his wife a bond, to secure which a mortgage is given on her separate real estate, he will be liable for a personal judgment in a foreclosure.[6] A person who has signed the bond or note, but not the

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[1] Scofield v. Doscher, 72 N. Y. 491 (1878); Bathgate v. Haskin, 59 N. Y. 533 (1875); Thorne v. Newby, 59 How. (N. Y.) Pr. 120 (1880). In point, Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294, 295 (1841).

[2] Davenport Plow Co. v. Mewis, 10 Neb. 317 (1880).

[3] Fond du Lac Harrow Co. v. Haskins, 51 Wis. 135 (1881).

[4] N. Y. Code Civ. Proc. § 1627.

[5] Thorne v. Newby, 59 How. (N. Y.) Pr. 120 (1880), *per* VanVorst, J.; Sprague v. Jones, 9 Paige Ch. (N. Y.) 395 (1842), was very similar, in that the bond was signed by two persons and the mortgage by only one; both obligors on the bond were held liable for a judgment of deficiency.

[6] Conde v. Shepard, 4 How. (N. Y.) Pr. 75 (1849).

mortgage, is not an indispensable party to maintain the action or to perfect the title, as he has no interest in the premises.[1]

Where statutory provision has not been made for judgments of deficiency, the obligation upon the bond can be enforced only by a separate action at law. Folger, J., has said, in considering this question, that the statute "was enacted to give the court in which the foreclosure of the mortgage was had full jurisdiction over the whole subject, and to save the necessity of actions at law, and to allow one court to dispose of the whole subject, instead of compelling parties to resort to other tribunals; * * * and is applicable to every case where the owner of the mortgage has any personal security for the mortgage debt, whether it be the bond of the mortgagor or the covenant of another person."[2]

§ 208. **All persons guaranteeing the bond and mortgage at its inception liable.**—All persons who guarantee the payment or collection of a bond and mortgage by a separate instrument, at the time of their execution or before their transfer, are liable for the mortgage debt and may be made parties to an action to foreclose, for the purpose of recovering a judgment for deficiency against them as stated in the preceding section.[3]

There are almost no cases ruling directly upon this question, but from analogous cases[4] and the general principles of law applicable to guarantors and sureties, the proposition of this section is unquestionably true. In an action where it appeared that the mortgagee had assigned his mortgage,

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[1] Deland v. Mershon, 7 Clarke (Iowa), 70 (1858). In Milroy v. Stockwell, 1 Cart. (Ind.) 35 (1848), it was held that such an obligor was a necessary party, and that upon his death the action should be revived against his personal representatives.

[2] Scofield v. Doscher, 72 N. Y. 491, 493 (1878).

[3] Mathews v. Aikin, 1 N. Y. 595 (1848); Curtis v. Tyler, 9 Paige Ch. (N. Y.) 435 (1842); Guion v. Knapp, 6 Paige Ch. (N. Y.) 43 (1836); Burdick v. Burdick, 20 Wis. 348 (1866). See Grant v. Griswold, 82 N. Y. 569 (1880); Hunt v. Purdy, 82 N. Y. 486 (1880).

[4] Jones v. Steinbergh, 1 Barb. Ch. (N. Y.) 250 (1845); Luce v. Hinds, Clarke Ch. (N. Y.) 453 (1841); Bristol v. Morgan, 3 Edw. Ch. (N. Y.) 142 (1837); Curtis v. Tyler, 9 Paige Ch. (N. Y.) 435 (1842).

guaranteeing its payment, and subsequently taken the bond of a third person as a further security for the payment of such mortgage, Chancellor Walworth held that the third person was liable for a judgment of deficiency in the foreclosure, saying, "It is well settled, however, that where a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity and to discharge such indebtedness, the principal creditor is, in equity, entitled to the full benefit of that security."[1]

§ 209. A married woman signing the bond or other obligation liable—General principles.—With the general growth during the past century in England and in America of legislation and decisions, enlarging the powers of married women over the disposition of their property, there has been developed a corresponding or correlative line of decisions in the courts, holding them and their separate estates responsible for any breach of their contracts. It is not within the scope of this work to discuss the history or principles of this very interesting branch of the law.[2] Our attention must be confined simply to a general statement of the latest rulings of the courts upon the question of a married woman's liability for the payment of a mortgage debt, and to showing that she is a proper party to a foreclosure, if a judgment for deficiency is desired against her. The common-law doctrine, which rendered a married woman totally incapable of making contracts, practically remains in force in no state, but has been modified by legislation or innovations of the courts,

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[1] Curtis v. Tyler, 9 Paige Ch. (N. Y.) 435 (1842), giving citations in point. In Maure v. Harrison, 1 Eq. Ca. Abr. 93 (1692), it was held that in equity a bond creditor was entitled to the benefit of all counter-bonds or collateral security given by the principal debtor to his surety.

[2] The history of the law affecting married women's contracts and their control of their separate property is ably discussed by Leonard A. Jones in his Treatise on Mortgages (3d ed.), §§ 106–118. The history and principles of the same law in the state of New York are given in greater detail by Abner C. Thomas in his Treatise on the Law of Mortgages (2d ed.), §§ 605–619. To the student of equity jurisprudence, the development of this branch of the law in England and America is very interesting, as its different stages can be so accurately traced in the legislation and decisions of the two countries

until, at present, it is a universal rule that a married woman can bind her separate estate for all purposes that may be necessary to enable her to hold and enjoy the same.

§ 210. **A married woman signing the bond or other obligation liable—Act of 1884 in New York.**—The New York act of 1884 in relation to the rights and liabilities of married women, has rendered obsolete a great majority of the decisions adjudicating the liabilities of married women and their separate estates for the performance of their contracts under the acts of 1848–49 and 1860–62. That act provides that "A married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary."[1]

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[1] Laws of 1884, chap. 381. This act was passed May 28, 1884, and by its provisions took effect immediately, so that all contracts made prior to May 28, 1884, are to be adjudicated according to the statutes and decisions in force prior to that date. It is also provided, "that this act shall not affect nor apply to any contract that shall be made between husband and wife."

The position of Sanford E. Church, Chief Judge of the New York Court of Appeals, in relation to questions affecting a married woman's liability for her contracts, must be recognized here; his opinions have, undoubtedly had a strong influence in effecting the passage of this act. His decisions have, at least, been almost prophetic. In the leading case of the Manhattan B. & M. Co. v. Thompson, 58 N. Y. 84 (1874), he said: "If, when the legislature changed the common law in essential particulars in regarding the interests in property of the husband and wife to a considerable extent as distinct and independent, and in recognizing the capacity of the wife to judge and provide for what her own welfare requires in acquiring and holding the legal title to property, and managing and disposing of the same as if unmarried and without subjection to the control of her husband, the courts had adopted as a reasonable and legitimate sequence, the correlative rule of capacity to contract debts as if unmarried, restricted only to their collection from separate property, it might well be claimed that the rights of married women would have been as well if not better protected practically, sound public policy, and business morality more promoted, and a flood of expensive and vexatious litigation prevented.

"Courts of equity in England have uniformly exercised a power of enforcing contracts of married women against their separate estates, which has practically produced this result (2 P. Wms. 144; 1 Cr. & Ph.

This law can, of course, have no *ex post facto* application and for a decade, at least, the decisions under the old statutes will be of importance, and must be applied to cases arising on contracts made prior to 1884. All decisions which have been rendered in New York upon the liability of a person obligated for a mortgage debt, to have a judgment for deficiency rendered against him, will, hereafter, apply with equal force to a married woman. In Massachusetts[1] and some other states, substantially the same law is in force, while in England the courts of equity have never held otherwise than that a married woman's separate estate was liable for every debt she might contract in any way. Regarding her separate estate she can contract as freely as a man; and her estate is equally liable for all her obligations, whatever their form or nature.[2] At law, however, she and her separate estate are not liable.

§ 211. A married woman signing the bond or other obligation liable—Rule in New York prior to 1884, and in most states at present.—The decisions which make a married woman who has signed a bond or other obligation, to which a mortgage is collateral, liable for a judgment of deficiency in an action to foreclose a mortgage, are, under the same state of facts, precisely the same in their reasoning and conclusions as those which establish her liability for the performance of her other contracts. The cases are numerous in fixing her liability upon ordinary contracts, and by analogy are applicable to her liability in mortgage foreclosures where a judgment for deficiency is sought against her.[3]

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48). But our courts have adopted more conservative principles, and it is better to adhere to them *until the legislature in its wisdom and power shall see fit to change them.*" To the same effect is his opinion in Yale v. Dederer, 68 N. Y. 334 (1877); this case was three times before the Court of Appeals; 18 N. Y. 265 (1858); 22 N. Y. 450 (1860); 68 N. Y. 334 (1877).

[1] Nourse v. Henshaw, 123 Mass. 96 (1877).

[2] Manhattan B. & M. Co. v. Thompson, 58 N. Y. 80, 85 (1874); Yale v. Dederer, 22 N. Y. 450 (1860).

[3] If the wife has signed the mortgage alone and not the bond, it will be erroneous to demand a personal judgment against her; Gebhart v. Hadley, 19 Ind. 270 (1862); in Buell v. Shuman, 28 Ind. 464 (1867), she had signed the note also, but was held not personally liable. In Brick v. Scott, 47 Ind. 299 (1874),

Church, Ch. J., who made a careful study of the liability of the separate estate of a married woman for her contracts, concluded that such liability may be enforced,—1. When created in or about carrying on a separate trade or business of the wife ;[1] 2. When the contract relates to, or is made for the benefit of, her separate estate ;[2] 3. When the intention to charge her separate estate is expressed in the instrument or contract by which the liability is created.[3] These three propositions substantially embody the law as it exists in most of the states ; some states follow the rule of the English courts of equity as stated in the preceding section, and a few have gone as far as New York in the act of 1884. "The general principles applicable to this subject have been too firmly settled by repeated adjudications, to justify a reconsideration of the grounds upon which they were arrived at. The most important of these principles is, that the statutes of 1848–49 and 1860–62 did not operate to remove the general disability of married women to bind themselves by their contracts, not even to the extent of their separate estates. This made it necessary to define specifically, in what cases and under what circumstances such contracts could or ought to be enforced against

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the court went so far as to hold void a mortgage given on her separate estate, the proceeds of which went to the husband ; apparently overruled, however, in Herron v. Herron, 91 Ind. 278 (1883). See also McCarty v. Tarr, 83 Ind. 444 (1882) ; Moffitt v. Roche, 77 Ind. 48 (1881) ; Martin v. Cauble, 72 Ind. 67 (1880). In Sperry v. Dickinson, 82 Ind. 132 (1882), the wife covenanted in the mortgage to pay a note, and she was held liable. See Merchants' Nat. Bk. v. Raymond, 27 Wis. 567 (1871), where no question seems raised but that a *feme covert* is bound as much by her contracts as a *feme sole*. Rogers v. Weil, 12 Wis. 664 (1860). The statute of Indiana is peculiar in that it provides that a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner ; and such contract, as to her, shall be void. Rev. Stat. (1881), chap. 71, § 5119.

[1] Frecking v. Rolland, 53 N. Y. 422 (1873) ; Barton v. Beer, 35 Barb. (N. Y.) 78 (1861).

[2] Ballin v. Dillaye, 37 N. Y. 35 (1867) ; Owen v. Cawley, 36 N. Y. 600 (1867).

[3] Yale v. Dederer, 22 N. Y. 450 (1860); Yale v. Dederer, 18 N. Y. 265 (1858) ; Mack v. Austin, 29 Hun (N. Y.) 534 (1883). See Penn. Coal Co. v. Blake, 85 N. Y. 226 (1881) ; Layman v. Shultz, 60 Ind. 541 (1878) ; Brick v. Scott, 47 Ind. 299 (1874) ; McGlaughlin v. O'Rourke, 12 Iowa, 459 (1861).

their separate property, and the difficulty of accomplishing this purpose has led to most of the litigation on the subject."[1]

§ 212. Personal liability of married woman mortgaging her separate estate.—To the above must be added a fourth proposition that a mortgage given by a married woman on her separate estate is always valid against her to the extent of the value of the mortgaged lands, the reason for this being that the mortgage is a specific charge upon a specific part of her separate estate,—"an appropriation only of so much of her estate as the mortgage covers."[2] This proposition is universally sustained in the English and American courts, and for its reason relates back to the broad principle that a married woman can mortgage her real estate.[3]

Payne v. Burnham,[4] in which also the opinion was written by Church, Ch. J., is a leading case upon the question of a married woman's liability for a judgment of deficiency in the foreclosure of a bond and mortgage which she executed jointly with her husband. The mortgage in that case was executed on her separate estate, but she received no part of the loan, the entire amount going to her husband; she was held not liable for a judgment of deficiency. If, however,

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[1] Manhattan B. & M. Co. v. Thompson, 58 N. Y. 80, 82 (1874), *per* Church, Ch. J.; Corn E. Ins. Co. v. Babcock, 42 N. Y. 613 (1870); s. c. 35 How. (N. Y.) Pr. 216; Ballin v. Dillaye, 37 N. Y. 35 (1867); Owen v. Cawley, 36 N. Y. 600 (1867); Yale v. Dederer, 18 N. Y. 282 (1858); s. c. 22 N. Y. 460 (1860); 68 N. Y. 329 (1877); Vrooman v. Turner, 8 Hun (N. Y.) 78 (1876); reversed in part, 69 N. Y. 280. *Contra*, Brown v. Herman, 14 Abb. (N. Y.) Pr. 394 (1862).

[2] Payne v. Burnham, 62 N. Y. 74 (1875); Corn E. Ins. Co. v. Babcock, 42 N. Y. 613 (1870); Kidd v. Conway, 65 Barb. (N. Y.) 158 (1873); Manhattan L. Ins. Co. v. Glover, 14 Hun (N. Y.) 154 (1878). See Spear v. Ward, 20 Cal. 660 (1862); Eaton v. Nason, 47 Me. 132 (1860); Black v. Galway, 24 Pa. St. 18 (1854); Voorhies v. Granberry, 5 Baxt. (Tenn.) 704 (1875); Hollis v. Francois, 5 Tex. 195 (1849). See Penn. act of 1848.

[3] See *ante* § 134.

[4] 62 N. Y. 69 (1875), reversing 2 Hun (N. Y.) 143; 4 T. & C. (N. Y.) 678. See Williamson v. Duffy, 19 Hun (N. Y.) 312 (1879); McKeon v. Hagan, 18 Hun (N. Y.) 65 (1879); Manhattan Life Ins. Co. v. Glover, 14 Hun (N. Y.) 153 (1878). In Rourk v. Murphy, 12 Abb. (N. Y.) N. C. 402 (1883), she bound her separate estate expressly.

she had received a part only of the consideration for which the bond signed by her was given, she would have been held liable for the deficiency.[1] In a case where a married woman received the consideration of a mortgage upon her promise to repay it, it was held that it was borrowed for the benefit of her separate estate. She answered that she was a married woman not carrying on any separate business; a demurrer to the answer by the complainant was sustained.[2] The complaint must state specifically the grounds on which a judgment for deficiency is demanded against a married woman; otherwise, a personal judgment taken upon default will be held void.[3]

A bond and mortgage executed by a married woman to secure part of the purchase money for premises conveyed to her, will render her liable for a judgment of deficiency in an action to foreclose, on the theory that the transaction is for the benefit of her separate estate.[4] In an action to foreclose a purchase money mortgage, Park, J., said, "I do not understand how it can be said that a debt, contracted on the purchase of property which the purchaser takes into possession and enjoys, is not a debt contracted for the benefit of the purchaser's estate."[5]

§ 213. Persons originally liable, deceased, their estates liable—Personal representatives proper parties.—Where a mortgagor or other person who was personally liable for a deficiency on the foreclosure of a mortgage is dead, his personal representatives may be made parties to an action

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[1] Jones v. Merritt, 23 Hun (N. Y.) 184 (1880).

[2] Williamson v. Duffy, 19 Hun (N. Y.) 312 (1879).

[3] Manhattan Life Ins. Co. v. Glover, 14 Hun (N. Y.) 153 (1878).

[4] Ballin v. Dillaye, 37 N. Y. 35 (1867); s. c. 35 How. (N. Y.) Pr. 216; Flynn v. Powers, 35 How. (N. Y.) Pr. 279 (1868); Vrooman v. Turner, 8 Hun (N. Y.) 78 (1876), reversed in part, 69 N. Y. 280; Chase v. Hubbard, 99 Pa. St. 226 (1881); Shnyder v. Noble, 94 Pa. St. 286 (1880); Brunner's Appeal, 57 Pa. St. 46 (1868).

[5] Ballin v. Dillaye, 37 N. Y. 35 (1867); Rogers v. Ward, 90 Mass. (8 Allen), 387 (1864); Basford v. Pearson, 89 Mass. (7 Allen), 505 (1863); Stewart v. Jenkins, 88 Mass. (6 Allen), 300 (1863); Ames v. Foster, 85 Mass. (3 Allen), 541 (1862). But in Pemberton v. Johnson, 46 Mo. 342 (1870), she was held not personally liable.

to foreclose the mortgage, and a decree may be rendered therein that the deficiency be paid out of the estate in their hands in the due course of its administration.[1]

This proposition was first advanced by Chancellor Walworth in Leonard v. Morris,[2] and has never been seriously questioned. He held, "Where the person who is thus secondarily liable for such deficiency is dead, I can at present see no legal objection to making his personal representatives parties to the suit for the purpose of obtaining a decree against them for the payment of such deficiency out of the estate of the decedent in their hands, to be paid in a due course of administration. * * * No decree can be made for the payment of the deficiency out of the estate of the decedent, so as to entitle the complainant to an execution thereof in this court, until a full account of the administration of the estate has been taken; except in those cases where the executors and administrators admit assets sufficient to pay the complainant's debt, and all other debts of an equal and of a higher class which were due by the decedent."

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[1] Fliess v. Buckley, 90 N. Y. 286 (1882); Glacius v. Fogel, 88 N. Y. 439 (1882); Lockwood v. Fawcett, 17 Hun (N. Y.) 147 (1879); Scofield v. Doscher, 10 Hun (N. Y.) 582 (1877); aff'd 72 N. Y. 491. For the practice in South Carolina, see Gray v. Toomer, 5 Rich. (S. C.) L. 261 (1852). In Drayton v. Marshall, Rice's (S. C.) Eq. 373 (1839), personal representatives were held proper parties; and it was further held that the balance of a mortgage debt was entitled to priority of payment out of the general estate over simple contract debts. See Edwards v. Sanders, 6 S. C. 316 (1874). See Rodman v. Rodman, 64 Ind. 65 (1878), supporting the text, and holding that there can be no decree over for a deficiency unless the personal representatives are made parties. See the earlier case of Newkirk v. Burson, 21 Ind. 129 (1863), to the contrary. In Prieto v. Duncan, 22 Ill. 26 (1859), a decree for deficiency was taken against the estate of a deceased mortgagor, none of his personal representatives having been made parties; on appeal it was held error, and the court followed the New York rule in Leonard v. Morris, 9 Paige Ch. (N. Y.) 90 (1841). In Bennett v. Spillars, 7 Tex. 600 (1852), the New York rule was established for Texas, though no authorities are cited in the opinion, *per* Hemphill, Ch. J. *Contra* to the text is Pechaud v. Rinquet, 21 Cal. 76 (1862), and Fallon v. Butler, 21 Cal. 24 (1862), holding that a judgment for deficiency can not be rendered against personal representatives, but that the actual deficiency can be presented to them for payment in the due course of administration.

[2] 9 Paige Ch. (N. Y.) 90, 92 (1841).

§ 214. **Personal representatives proper defendants under recent decision in New York.** — Judge Miller of the New York Court of Appeals cited this case with approval in 1882, saying, "If the mortgaged premises were inadequate and the security thus failed, the debt was still existing for what was unpaid, and the remedy was perfect against the mortgagor under the statute, which was evidently designed for the purpose of avoiding the necessity of two separate actions. If the mortgagor was alive, the judgment would have been against him personally, and upon his decease his estate would have been liable to pay the same, and his executors or administrators could have been compelled to apply funds in their hands in liquidation of the judgment. That the action was brought after the mortgagor's death, and against the executors, can make no difference, and does not relieve them from the liability which the testator had incurred, and which they would be obliged to meet, had the judgment preceded his death. The foreclosure of the mortgage was in fact against the executors, who were standing in the place of the mortgagor, and the judgment was against his representatives, who were liable to satisfy the same out of any assets of the mortgagor in their hands. It is very clear upon principle that the representatives are liable to pay the debt of a deceased party in any event. But if any doubt can properly arise, it is settled by the statute which authorizes actions to be maintained by and against executors in all cases in which the same might have been maintained by or against their respective testators. The case of Leonard v. Morris holds distinctly that when the mortgagor or other party personally liable for the deficiency in a foreclosure case is dead, his personal representatives may be parties to the suit, to enable the complainant to obtain a decree that the deficiency be paid out of the estate in their hands in a due course of administration. The rule stated is well settled, and if any different one was adopted, the execution of a bond would be an idle ceremony in case of the maker's death."[1]

[1] Glacius v. Fogel, 88 N. Y. 439 (1882).

In an action to foreclose, where judgment was demanded against the survivor of two obligors, and further that on the return of an execution against him unsatisfied the balance be adjudged to be a debt against the estate of the deceased obligor, to be paid by his administrator in the due course of administration, the court held that a decree could not be made against the estate of the decedent in the same action.[1] But it is doubtful whether this is good law

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[1] Vice-Chancellor Whittlesey, in writing the opinion in Rhoades v. Evans, Clarke Ch. (N. Y.) 170 (1840), says: "These provisions would authorize a personal decree against Evans, and against Rochester if he was living, for any such balance; but will it authorize such decree against Rochester's administrator, he being dead? Such decree is authorized only when such *balance is recoverable at law*. This bill is filed against Evans and the administrator, widow and heirs of Rochester. For the purpose of obtaining a sale of the land, all these are rightly made parties; but can they be joined for the purpose of a personal decree against them jointly? This question is answered by an answer to the question whether they could be jointly sued upon the bond at law. The decisions and well settled principles of our courts clearly and decidedly answer this question in the negative. Evans and the administrator of Rochester could not be joined as defendants in a suit at law upon the bond. Evans must be sued as survivor. Then, this is not a debt which is recoverable at law, in the mode which the complainant has sought to recover it in this court; and, consequently, there can be no decree against the administrator of Rochester in this court. But the complainant asks this court to determine the amount due from Rochester's estate upon this demand, after the premises are sold, and after an execution has been returned unsatisfied against Evans. It seems to me that this is a matter which does not belong to the jurisdiction of this court, at least in the present shape of the cause. The surrogate has jurisdiction to marshal Rochester's assets, and direct how they shall be paid. Other creditors have an interest in the amount of this debt, and in settling this amount, and they are not before the court to contest this claim; and I doubt whether a decision of this court would be binding upon them in any manner whatever. If they had notice of this proceeding, they might possibly contest this claim, or they might see that the mortgaged premises produced enough to pay the mortgage debt, so as to relieve the personal fund; but they are not here, and I can not make a decree which shall bind them in any manner.' This case is cited in no decision, and it is plainly overruled in substance by Glacius v. Fogel, 88 N. Y. 439 (1882); Lockwood v. Fawcett, 17 Hun (N. Y.) 147 (1879); Leonard v. Morris, 9 Paige Ch. (N. Y.) 90, 92 (1841).

under the more recent decisions.[1] If the plaintiff fails to make the representatives of a deceased person, who was liable for the mortgage debt, parties to the action or does not demand a judgment of deficiency against them, he can present his claim for an unpaid balance to the personal representatives, and if payment is refused, an action can be maintained against them to recover the deficiency,—only, however, by leave of the court in which the mortgage was foreclosed.[2]

§ 215. **Persons originally liable, deceased, their heirs and devisees not proper parties.**—As has been seen from the decisions cited in the preceding section, the personal representatives of a deceased obligor are proper parties to an action to foreclose a mortgage, for the purpose of determining the amount of any deficiency that may arise, and of establishing a claim to be presented and paid in the due course of the administration of the estate of the decedent. Another line of decisions holds distinctly that the heirs of a deceased person, who was liable for the mortgage debt, are not proper parties to an action to foreclose a mortgage, where a judgment for deficiency is sought against his estate.[3] If the decedent owned the equity of redemption and was at the time liable for the payment of the mortgage debt, his heirs and devisees are, of course, necessary parties for cutting off the equity of redemption which descended to them; but a judgment for deficiency can, in no event, be demanded against them in the same action.[4]

§ 216. **Remedies against heirs and devisees.** — The remedy against the heirs and devisees must be exhausted in

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[1] See the cases, *supra*. In Trimmier v. Thomson, 10 Rich. (S. C.) N. S. 164, 178 (1877), an exhaustive opinion was written by Haskells, A. J., who held, in an action upon a joint and several bond, where one of the obligors had died and the verdict was generally for money, that separate judgments could be rendered against the survivor and the executors of the deceased obligor. See Daniels v. Moses, 12 S. C. 130 (1879).

[2] Glacius v. Fogel, 88 N. Y. 440 (1882); Scofield v. Doscher, 72 N. Y. 491 (1878). See *ante* §§ 195, 196, and the notes.

[3] See Alexander v. Frary, 9 Ind. 481 (1857).

[4] Cundiff v. Brokaw, 7 Ill. App. 147 (1881). See *ante* §§ 141–144.

a subsequent action to charge lands which have descended to them with the payment of the decedent's debts.[1]

In the case of Leonard v. Morris,[2] quoted in the preceding section, this proposition was pointedly presented to Chancellor Walworth, who said: "Admitting that it may be proper to make the personal representatives of a deceased mortgagor or guarantor parties to a bill of foreclosure, where it is probable there may be a deficiency, there is no case in which it is allowable to make heirs or devisees who have no interest in the mortgaged premises parties to a bill of foreclosure, with a view to reach the estate descended or devised to them, to satisfy an anticipated deficiency upon the sale of the mortgaged premises. To authorize the filing of a bill against heirs or devisees, to obtain satisfaction of a debt which is not a specific lien upon the estate descended or devised to them, the complainant must show by his bill that the personal estate of the decedent was not sufficient to pay the debt, or that the complainant has actually exhausted his remedy against the personal estate and the personal representatives and next of kin, etc. And it is impossible to do this as to the deficiency in a mortgage case where, at the time of filing the bill to foreclose the mortgage, it can not be known that there will be any deficiency whatever.

In proceedings against heirs or devisees, the statute also requires the complainant to state in his bill, with convenient certainty, the real estate descended or devised. Again, the Revised Statutes have prohibited the bringing of any suit against heirs or devisees of any real estate, in order to charge them with a debt of the testator or intestate, within three years from the time of granting letters testamentary or of administration upon his estate. * * * The guardian *ad litem* of the infant defendant, therefore, instead of putting in a general answer, and consenting to a decree against such infant, should have raised objection, either in his answer or by demurrer, that the bill was improperly filed against the heirs and devisees. The bill must be dismissed as to the heirs

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[1] Sutherland v. Rose, 47 Barb. (N. Y.) 144 (1866); Merchants' Ins. Co. v. Hinman, 15 How. (N. Y.) Pr. 182 (1857).

[2] 9 Paige Ch. (N. Y.) 92 (1841).

and devisees of the obligor, but without prejudice to the complainant's rights to proceed against them by a new suit to charge them with the payment of any deficiency which may exist after the sale of the mortgaged premises, and which can not be collected from the estate of the mortgagor, nor from the personal estate of the obligor, after due proceedings had before the surrogate."[1]

§ 217. **Person originally liable, making an assignment in bankruptcy or voluntarily, assignee proper.**—It is advanced here as an original proposition that an assignee in bankruptcy, or by general assignment, of a person who was, at the time of the assignment, liable for the mortgage debt, is a proper party to an action to foreclose a mortgage, and one against whom a judgment for deficiency can be demanded and decreed, to be paid in the due course of his administration upon the estate of the bankrupt. This proposition has been presented to no court, as far as can be ascertained, but it is believed that it would be sustained, as the cases cited in the four preceding sections strongly support it by analogy. An assignee is only a representative of the bankrupt, and a creature of the law, the same as a personal representative is of a decedent. The distinction should be made, however, that the demand against an assignee must be made before the final settlement of his accounts and his discharge, for after his trust is performed his relations to and his duties with the property of the bankrupt are completely ended.

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[1] Leonard v. Morris, 9 Paige Ch. (N. Y.) 90, 92 (1841); Fliess v. Buckley, 22 Hun (N. Y.) 551 (1880). In Fliess v. Buckley, 24 Hun (N. Y.) 515 (1881), aff'd 90 N. Y. 286 (1882), Dykman, J., said: "The plaintiffs must first resort to the decedent's personal estate; that failing, they have their remedy against the heirs and devisees."

CHAPTER XI.

PARTIES DEFENDANT—LIABLE FOR THE MORTGAGE DEBT.

PARTIES SUBSEQUENTLY LIABLE.

§ 218. Introductory.
219. Purchaser of mortgaged premises subject to the mortgage not liable.
220. Rule in New Jersey fixing liability of purchaser subject to mortgage.
221. Rule in New York.
222. Purchaser of mortgaged premises, assuming payment of the mortgage, liable—General principles.
223. Purchaser becomes principal debtor and mortgagor only a surety.
224. What words and acts of assumption held binding.
225. Usury or defective title no defence to contract of assumption.
226. Theories of law upon which a mortgagee is allowed the benefit of the contract of assumption.
227. Purchaser not personally liable when his grantor is not personally liable, though he assumes payment of the mortgage.
228. Assumption of mortgage by subsequent mortgagee does not make him personally liable to prior mortgagee.
§ 229. New York cases reviewed.
230. Grantor can not release his grantee, assuming a mortgage, from his liability to the mortgagee in New York.
231. Contrary ruling in New Jersey.
232. Intermediate purchaser, having assumed payment of the mortgage, liable.
233. Assignor of a mortgage guaranteeing payment or collection liable.
234. Intermediate assignors of a mortgage guaranteeing payment liable.
235. Assignors of a mortgage, covenanting as to title and against defences, liable.
236. All persons guaranteeing payment or collection of a bond and mortgage by a separate instrument liable.
237. Married women obligating themselves in any of the preceding ways generally liable.
238. Persons subsequently liable in any of preceding ways, deceased, their estates liable—Personal representatives proper parties; heirs and devisees not proper parties.

§ 218. **Introductory.**—Subsequent to the execution of a bond and mortgage, and consequent upon the establishment of the relation of mortgagor and mortgagee, with their respective benefits and liabilities, the title of the mortgagor to his lands, and of the mortgagee to his bond and mortgage, may be so transferred as to change their respective relations; and to bring persons who where strangers to the execution

of the mortgage into such a relation to it, or to the equity of redemption, as to make them liable for the mortgage debt.

In this chapter consideration will be given to such parties as were strangers to the original transaction between the mortgagee and the mortgagor, but who have subsequently become liable for the payment of the indebtedness secured. The subject-matter of this chapter has been of constantly increasing importance in the law, owing to the increased number of conveyances in the Eastern States, and to the facility with which mortgages and real estate titles are now transferred. The whole general subject is intimately connected with the law of principal and surety; but it is without the province of this work to give any attention to that branch of the law, except indirectly, and reference must be had to special treatises on that subject.

There are two principal ways in which this subsequent liability for a mortgage debt may be created. The *mortgagor* may create it, by conveying his equity of redemption in the mortgaged premises, and binding his grantee to assume the payment of the mortgage; or the *mortgagee* may create it in an assignment, by guaranteeing the payment or collection of the mortgage, or by making other covenants in respect to it. Questions affecting the contract of assumption of the payment of a mortgage have grown into such importance from their frequency and variety, that they might well be made the subject of a legal monograph; but for the purposes of this work, only the general and well established principles of law affecting the subject need be stated. The decisions in New York, however, are fully given in the following pages.

§ 219. **Purchaser of mortgaged premises subject to the mortgage not liable.**—It is now well settled in all courts, where a mortgagor conveys his equity of redemption to a purchaser, without mentioning the mortgage in the instrument of conveyance, or by stating therein that the deed is made subject to the mortgage,[1] or by merely reciting

[1] Stebbins v. Hall, 29 Barb. (N. Y.) 524 (1859), collating and reviewing the cases; Binsse v. Paige, 1 Keyes (N. Y.) 87 (1863); Collins v.

the mortgage, that the grantee is not thereby made liable for the mortgage debt; and a judgment for deficiency can not be demanded against him in an action to foreclose the mortgage.[1] A grantee who takes "subject" to a mortgage simply contracts that the debt shall be paid out of the mortgaged land.[2] The phrase "under and subject" is binding between the parties as a covenant of indemnity, but it gives the mortgagee no rights against the purchaser.

A purchaser at a judicial sale, which is made subject to a mortgage,[3] does not become personally obligated for the mortgage debt.[4] There is no implied promise or covenant of a personal obligation; the premises are the primary fund for the payment of the debt; but beyond their value, the purchaser is in no way liable. Even where a deed recited that the mortgage had been estimated as a part of the consideration money, and had been deducted therefrom, it has been decided that the grantee assumed no personal liability for its payment.[5] Where the language was, "subject * * * to

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Rowe, 1 Abb. (N. Y.) N. C. 97 (1876), and the note to the case, in which are collated and analyzed the cases interpreting and fixing the meaning of the language employed in various deeds to express and to refer to the existence of a mortgage on the premises. See Wadsworth v. Lyon, 93 N. Y. 201 (1883); Carter v. Holahan, 92 N. Y. 498 (1883); Post v. Tradesmen's Bank, 28 Conn. 430, 432 (1859); Rapp v. Stoner, 104 Ill. 618 (1882); Lewis v. Day, 53 Iowa, 575, 579 (1880), collating and reviewing the cases; Canfield v. Shear, 49 Mich. 313 (1882); Strohauer v. Voltz, 42 Mich. 444 (1880); Slater v. Breese, 36 Mich. 77 (1877); Woodbury v. Swan, 58 N. H. 380 (1878); Merriman v. Moore, 90 Pa. St. 78 (1879); Samuel v. Peyton, 88 Pa. St. 465; Moore's Appeal, 88 Pa. St. 450 (1879); Girard Trust Co. v. Stewart, 86 Pa. St. 89 (1878); Ins. Co. v. Addicks, 12 Phila. (Pa.) 490; Moore's Estate, 12 Phila. (Pa.) 104 (1882); Weber v. Zeiment, 30 Wis. 283 (1872); Tanguay v. Felthousen, 45 Wis. 30 (1878); Cleveland v. Southard, 25 Wis. 479 (1870).

[1] Belmont v. Coman, 22 N. Y. 438 (1860), a leading case; Hull v. Alexander, 26 Iowa, 569, 572 (1869); Carleton v. Byington, 24 Iowa, 173 (1867); McLenahan v. McLenahan, 18 N. J. Eq. (3 C. E. Gr.) 101 (1866), collating the English authorities.

[2] Ludington v. Harris, 21 Wis. 239 (1866).

[3] Taylor v. Mayer, 93 Pa. St. 42 (1880).

[4] Lening's Estate, 52 Pa. St. 135 (1866); Wager v. Chew, 15 Pa. St. 323 (1850); Price v. Cole, 35 Tex. 461 (1871). In Porter v. Parmley, 52 N. Y. 185 (1873), no mention was made of a mortgage.

[5] Belmont v. Coman, 22 N. Y. 438 (1860). See Dingeldein v. Third Ave. R. R. Co., 37 N. Y. 575 (1868),

a mortgage * * * which forms the consideration money of this deed," the grantee was held not liable.[1]

§ 220. **Rule in New Jersey fixing liability of purchaser subject to mortgage.**—In New Jersey the rule is quite different, and the courts have held that equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt.[2] Vice-Chancellor VanFleet[3] very clearly distinguishes the rules in New York and in New Jersey in reviewing Belmont v. Coman.[4] "It was there held," he says, "that where lands are conveyed subject to a mortgage, and the amount of the mortgage is deducted from the purchase money agreed upon, no personal liability is thereby created against the purchaser, but that the true exposition of the intent of the parties under such an arrangement is, that so much of the purchase money as is represented by the mortgage is not to be paid by the purchaser to anybody, but shall be paid out of the land, and in that manner only. Such interpretation would undoubtedly carry into effect the intention of the parties where the interest sold is merely the equity of redemption, and the purchase money agreed upon represents simply the value of the mortgagor's interest in the mortgaged premises over the mortgage debt; but where the purchase money agreed upon represents the whole value of the premises free from the mortgage, and one of the mortgagor's objects in selling is to relieve himself from the mortgage debt, the vendor would seem, according to the plain meaning of the arrangement, to have a clear right to the whole sum agreed to be paid, or, if part is kept back to pay the mortgage, that the purchaser shall be required either so to apply it, or to indemnify the mortgagor against the mortgage debt; such I understand to be the

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distinguishing Belmont v. Coman, *supra*. In point, Fiske v. Tolman, 124 Mass. 254 (1878), where the language was, "subject to a mortgage * * * which is part of the above-named consideration."

[1] Trotter v. Hughes, 12 N. Y. 74, 78 (1854).

[2] Tichenor v. Dodd, 2 N. J. Eq. (3 H. W. Gr.) 454, 455 (1844); Twichell v. Mears, 8 Biss. C. C. 211 (1878).

[3] Heid v. Vreeland, 30 N. J. Eq. (3 Stew.) 591, 593 (1879); Belmont v. Coman, 22 N. Y. 438 (1860).

[4] 22 N. Y. 438 (1860).

principle established by the adjudications of this state, and in my view there can be no doubt it is founded on justice and reason."

§ 221. **Rule in New York.**—In the recent case of Smith v. Truslow,[1] the court cited Belmont v. Coman[2] with approval, but seemed to limit it by saying, "It would be otherwise, and the contention of the appellant should prevail if, as he assumes, the mortgage debt formed part of the consideration of the purchase and was to be paid by the purchasers, or if he retained its amount." This would seem to indicate that the New York courts incline toward the New Jersey rule as more equitable and just. Much depends in each case upon the real intention of the parties. If it could be shown that it was the intention of the grantee to assume payment, then such language as has been given above would be construed to bind him personally.[3] Again, although a deed may expressly bind a purchaser with the assumption and payment of prior mortgages, he would not be holden if it could be shown that such contract of assumption was inserted without his knowledge, and that he had no intention of binding himself personally.[4]

§ 222. **Purchaser of mortgaged premises, assuming payment of the mortgage, liable—General principles.**—If the purchaser of an equity of redemption assumes the payment of an existing mortgage on the premises, he thereby becomes personally liable for its payment, and may be made a defendant for the purpose of obtaining a judgment for deficiency against him.[5] If a purchaser assumes only a portion of the

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[1] 84 N. Y. 660, 661 (1881), *per* Danforth, J. But see Bennett v. Bates, 94 N. Y. 354 (1884), *per* Ruger, Ch. J., in point.

[2] 22 N. Y. 438 (1860).

[3] Andrews v. Wolcott, 16 Barb. (N. Y.) 21 (1852).

[4] Smith v. Truslow, 84 N. Y. 660 (1881); Kilmer v. Smith, 77 N. Y. 226 (1879). See the following sections and notes.

[5] Calvo v. Davies, 73 N. Y. 212 (1878); Trotter v. Hughes, 12 N. Y. 74 (1854); Russell v. Pistor, 7 N. Y. 171, 174 (1852); Mutual Life Ins. Co. v. Davies, 44 N. Y. Supr. Ct. (12 J. & S.) 172 (1878), and the cases cited; Wales v. Sherwood, 52 How. (N. Y.) Pr. 413 (1876); Drury v. Clark, 16 How. (N. Y.) Pr. 424 (1857); Mills v. Watson, 1 Sween. (N. Y.) 374 (1869). See Bache v.

mortgage debt, he will be obligated for the payment of no more than he assumes.[1] And where the conveyance is to two or more tenants in common, they will be held jointly and not severally liable, though their interests in the property may not be proportionally the same.[2] If the grantee purchases only a portion of the premises and assumes the entire mortgage, he will be liable for the whole debt.[3]

After the contract of assumption is made, the grantor becomes a mere surety for the debt. It is queried whether he can require the mortgagee to foreclose when the mortgage becomes due, and whether he has any remedy by which he

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Doscher, 67 N. Y. 429 (1876); Rapp v. Stoner, 104 Ill. 618 (1882); Rogers v. Herron, 92 Ill. 583 (1879); Scarry v. Eldridge, 63 Ind. 44 (1878); Price v. Pollock, 47 Ind. 362 (1874); Ross v. Kennison, 38 Iowa, 396 (1874); Thompson v. Bertram, 14 Iowa, 476 (1863), citing Burr v. Beers, 24 N. Y. 178 (1861), and relying upon Moses v. The Clerk, 12 Iowa, 140 (1861), and Corbett v. Waterman, 11 Iowa, 87 (1860); Schmucker v. Sibert, 18 Kan. 104 (1877); Unger v Smith, 44 Mich. 22 (1880); Booth v. Conn. Mut. Life Ins. Co., 43 Mich. 299 (1880); Miller v. Thompson, 34 Mich. 10 (1876); Follansbee v. Johnson, 28 Minn. 311 (1881); Vreeland v. VanBlarcom, 35 N. J. Eq. (8 Stew.) 530 (1882); Brewer v. Maurer, 38 Ohio St. 543 (1883), an important case; Bishop v. Douglass, 25 Wis. 696 (1870). In the early cases of Missouri a purchaser assuming payment was held not liable under the statute; Code of 1855, chap. 113, § 11; Fithian v. Monks, 43 Mo. 502, 515 (1869); but under a later statute a purchaser has been held liable; Heim v. Vogel, 69 Mo. 529 (1879). The liability must, however, be enforced in an action apart from the foreclosure; Fitzgerald v. Barker, 70 Mo. 685 (1879). In Hand v. Kennedy, 83 N. Y. 149 (1880), W. purchased certain premises in his own name, but in fact for himself, K. and H. jointly, giving a purchase money mortgage signed by himself alone as part payment; subsequently W. conveyed to K. and H. undivided interests in the property, they assuming to pay specified proportional parts of the mortgage; in an action to recover a judgment for deficiency, Earl, J., held K. and H. liable to the mortgagee, and that there was a sufficient consideration to sustain their contract of assumption. See Williams v. Gillies, 28 Hun (N. Y.) 175 (1882), where the agreement to assume a part was oral, and the court excluded evidence of the oral agreement.

[1] Bowne v. Lynde, 91 N. Y. 92 (1883); Harlem Savings Bank v. Mickelsburgh, 57 How. (N. Y.) Pr. 106 (1878); Logan v. Smith, 70 Ind. 597 (1880); Snyder v. Robinson, 35 Ind. 311 (1871); Logan v. Smith, 62 Mo. 455 (1876).

[2] Fenton v. Lord, 128 Mass. 466 (1880).

[3] Wilcox v. Campbell, 106 N. Y. 325 (1887). See Higham v. Harris, 108 Ind. 246; s. c. 5 West. Rep. 643 (1886).

can protect himself except that of paying his bond and mortgage, and becoming thereby subrogated to the rights of the mortgagee.[1] The bargain to assume payment being made between the mortgagor and his grantee, the mortgagee is a stranger to it; he is at first in privity with neither of the parties to the contract; yet he was, at an early day, held to be entitled to seize its benefits and to compel the grantee to perform his covenant. The debt becomes the grantee's own debt, and constitutes a portion of the consideration for the conveyance; and the right to enforce the obligation is not changed by the fact that payment is to be made to the mortgagee, instead of to the vendor of the property. The theories of law, on which this proposition has at different times rested, will be mentioned in a following section.

The form of remedy in New York, New Jersey[2] and most other states, is that the grantee is liable upon his covenant; while in Connecticut,[3] Massachusetts,[4] and Rhode Island,[5] assumpsit is held to be the proper remedy. In an action by the grantor against his grantee, on a contract of assumption, the measure of damages is the unpaid amount of the mortgage.[6]

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[1] Marshall v. Davies, 78 N. Y. 415 (1879), *per* Rapallo, J.; Mills v. Watson, 1 Sweeny (N. Y.) 374 (1869).

[2] Klapworth v. Dressler, 13 N. J. Eq. (2 Beas.) 62 (1860), *per* Green, Chancellor, relying upon New York cases, and citing Green v. Crockett, 2 Dev. & B. (N. C.) Eq. 390 (1839). See Stiger v. Mahone, 24 N. J. Eq. (9 C. E. Gr.) 426 (1874), *per* Runyon, Chancellor, limited in Crowell v. Currier, 27 N. J. Eq. (12 C. E. Gr.) 152 (1876). See Crowell v. Hospital, 27 N. J. Eq. (12 C. E. Gr.) 650 (1876). The above cases were superseded in part by chap. 255 of the laws of 1880, providing that a judgment for deficiency can not be recovered in an action to foreclose. The contract of assumption remains valid to the mortgagee, but it can be enforced only in a separate action at law. Near v. Union & E. L. Co., 34 N. J. Eq. (7 Stew.) 111 (1881); Allen v. Allen, 34 N. J. Eq. (7 Stow.) 493 (1882); Newark Savings Inst. v. Forman, 33 N. J. Eq. (6 Stew.) 436 (1881).

[3] Chapman v. Beardsley, 31 Conn. 116 (1862).

[4] Williams v. Fowle, 152 Mass. 385 (1889); Lappen v. Gill, 129 Mass. 349 (1880); Fenton v. Lord, 128 Mass. 456 (1880). See Drury v. Tremont Imp. Co., 95 Mass. (13 Allen), 168 (1866); Brainerd v. Dewey, 66 Mass. (12 Cush.) 297 (1853).

[5] Urquhart v. Brayton, 12 R. I. 109 (1880).

[6] Reed v. Paul, 131 Mass. 129 (1881); Locke v. Homer, 131 Mass. 93 (1881); Furnas v. Durgin, 119 Mass. 500 (1876).

§ 223. **Purchaser becomes principal debtor and mortgagor only a surety.**—As between the mortgagor and his grantee who assumes payment, the grantee becomes the primary debtor while the mortgagor occupies the new relation of a surety responsible to the mortgagee alone.[1] The land stands as the primary fund out of which the debt must be satisfied in the first instance; if that is insufficient, it will rest upon the purchaser to redeem his promise made to the mortgagor to pay the obligation. Both the purchaser and the mortgagor are, of course, proper parties to the action to foreclose, as both are debtors liable to the plaintiff, although they sustain to each other the relation of principal and surety.[2] As a general rule the grantor as a surety will be discharged from his liability by any alteration of the obligation under which he is holden, according to the rules which govern the relation of principal and surety.

Thus, a change of the terms of a bond and mortgage, by agreement between the grantee assuming payment and the mortgagee, made without the knowledge or consent of the mortgagor, canceling a stipulation in the original mortgage providing for releases of part of the mortgaged premises when required, will discharge the mortgagor of all liability for a judgment of deficiency.[3] "That an agreement by the creditor with the principal debtor, extending the time for the payment of the debt, without the consent of the surety, discharges the latter, is established by numerous authorities."[4]

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[1] Drury v. Clark, 16 How. (N. Y.) Pr. 424 (1857); Mills v. Watson, 1 Sween. (N. Y.) 374 (1869).

[2] Wadsworth v. Lyon, 93 N. Y. 201 (1883); Flagg v. Thurber, 14 Barb. (N. Y.) 196 (1851); modified in 9 N. Y. 483 (1854); Crawford v. Edwards, 33 Mich. 354 (1876); Huyler v. Atwood, 26 N. J. Eq. (11 C. E. Gr.) 504 (1875).

[3] Paine v. Jones, 76 N. Y. 274 (1879), aff'g 14 Hun (N. Y.) 577 (1878), relying upon Calvo v. Davies, 73 N. Y. 211 (1878). See Marshall v. Davies, 78 N. Y. 414 (1879), reversing 16 Hun (N. Y.) 606 (1879). But in Woodruff v. Stickle, 28 N. J. Eq. (1 Stew.) 549 (1877), it was stipulated in the mortgage that the mortgagee should release lands at the mortgagor's request when at least $300 per acre was paid; the fact that the mortgagor's grantee released at a less price, was held not to discharge or relieve the mortgagor from his personal liability on the bond.

[4] Spencer v. Spencer, 95 N. Y. 353 (1884); Murray v. Marshall, 94 N. Y. 611 (1884); Calvo v. Davies, 73

§ 224. What words and acts of assumption held binding.—Specific words are not necessary to bind the purchaser, but the intent to assume the mortgage must be clear and certain. The expression "subject to the payment" of a mortgage has been repeatedly held to bind the purchaser;[1] so also "subject, however, to the assumption as part of the consideration" of a mortgage, bound the grantee personally.[2] And the expression "which the grantee assumes and agrees to hold the grantor harmless from," was held to render the grantee liable to the mortgagee.[3] In a mortgage where the assumption clause read, "which the party of the *first* part hereby agrees to pay," it was construed to mean the party of the *second* part.[4] An agreement to assume payment of the interest can not be construed so as to impose a liability for

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N. Y. 211, 216 (1878), aff'g 8 Hun (N. Y.) 222, *per* Andrews, J.; Jester v. Sterling, 25 Hun (N. Y.) 344 (1881). See Meyer v. Lathrop, 10 Hun (N. Y.) 66 (1877), to the contrary; but overruled in Paine v. Jones, 14 Hun (N. Y.) 577, 580 (1878). See Penfield v. Goodrich, 10 Hun (N. Y.) 41 (1877), where there was no contract of assumption and the mortgagor was held not discharged from his liability on the bond by an extension of time by the mortgagee to the purchaser. See Corbett v. Waterman, 11 Iowa, 86 (1860), holding the mortgagor not discharged by an extension of time.

[1] Carley v. Fox, 38 Mich. 387 (1878); Samuel v. Peyton, 88 Pa. St. 465 (1879); Burke v. Gummey, 49 Pa. St. 518 (1865); Woodward's Appeal, 38 Pa. St. 322 (1861). See Davis' Appeal, 89 Pa. St. 272 (1879), which seems to overrule Burke v. Gummey, 49 Pa. St. 518 (1865), on this language. See Merriman v. Moore, 90 Pa. St. 78 (1879); in point, Dingeldein v. Third Ave. R. R. Co., 37 N. Y. 575, 578 (1868), *per* Hunt, Ch. J., considering the question at length; Collins v. Rowe, 1 Abb. (N. Y.) N. C. 97 (1876), and the note, exhaustively collating the cases on this point and distinguishing them. See Bennett v. Bates, 94 N. Y. 354 (1884).

[2] Douglass v. Cross, 56 How. (N. Y.) Pr. 330 (1878), *per* VanVorst, J., distinguishing Collins v. Rowe, 1 Abb. (N. Y.) N. C. 97 (1876), where the language was, "subject, nevertheless, to the payment of one-eighth of a certain mortgage now on the premises," which was held not to bind the grantee. And in Hoy v. Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 74, 78, 563, 568 (1868), Chancellor Zabriskie says, "The clause in the deed 'subject to the payment of all liens now on said premises' can not be construed into a covenant to pay the liens. It is only a limitation of the covenants of warranty and against incumbrances."

[3] Muhlig v. Fiske, 131 Mass. 110 (1881); Locke v. Homer, 131 Mass. 93 (1881).

[4] Fairchild v. Lynch, 42 N. Y. Supr. Ct. (10 J. & S.) 265 (1877).

the principal sum.[1] Even a parol promise by the purchaser to assume a mortgage may be enforced, as the contract of assumption is held to exist independent of and apart from the deed, though nearly always engrossed upon it.[2]

It is not necessary for the grantee to sign the deed in order to bind himself with the payment of the mortgage debt which he assumes; his acceptance of the deed, with knowledge of its terms, imposes the obligation upon him as effectually as though he signed it;[3] if, however, there is no actual acceptance or intention to assume the mortgage, the grantee will not be holden for the debt, for the reason that there has been no meeting of minds, and consequently no contract.

Thus, if an assumption clause is inserted in an unusual place in the deed, so that it escapes the notice of the grantee, and he had no intention to assume payment, he will not be held responsible to the mortgagee;[4] so also if the scrivener

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[1] Manhattan Life Ins. Co. v. Crawford, 9 Abb. (N. Y.) N. C. 365 (1879).

[2] Taintor v. Hemingway, 18 Hun (N. Y.) 458 (1879); aff'd 83 N. Y. 610 (1880), where the deed was made subject to the mortgage, and an oral agreement to pay it was held to be valid. See Harlem Sav. Bank v. Mickelsburgh, 57 How. (N. Y.) Pr. 106 (1878). In point, Ely v. McNight, 30 How. (N. Y.) Pr. 97 (1864), where the question of parol assumption is considered at length. Slauson v. Watkins, 44 N. Y. Supr. Ct. (12 J. & S.) 73 (1878). In Pike v. Seiter, 15 Hun (N. Y.) 402 (1878), a husband in a land contract, and subsequently orally, assumed the payment of a mortgage, but he caused the deed to be made in his wife's name; he, instead of his wife, was held personally liable. See Merriman v. Moore, 90 Pa. St. 78 (1879); McDill v. Gunn, 43 Ind. 315 (1873); Ream v. Jack, 44 Iowa, 325 (1876); Lamb v. Tucker, 42 Iowa, 118 (1875); Bowen v. Kurtz, 37 Iowa, 239 (1873); Miller v. Thompson, 34 Mich. 10 (1876); Crowell v. Hospital, 27 N. J. Eq. (12 C. E. Gr.) 650 (1876); Ketcham v. Brooks, 27 N. J. Eq. (12 C. E. Gr.) 347 (1876). See Wilson v. King, 27 N. J. Eq. (12 C. E. Gr.) 374 (1876), where the proof was held insufficient, and the case failed for that reason.

[3] Bowen v. Beck, 94 N. Y. 86 (1883); Ricard v. Sanderson, 41 N. Y. 179, 181 (1869); Wales v. Sherwood, 52 How. (N. Y.) Pr. 413 (1876), and the cases cited.

[4] Deyermand v. Chamberlain, 88 N. Y. 658 (1882); Kilmer v. Smith, 77 N. Y. 226 (1879); Trustees of Dispensary of N. Y. v. Merriman, 59 How. (N. Y.) Pr. 226 (1880); Parker v. Jenks, 36 N. J. Eq. (9 Stew.) 398 (1883); Culver v. Badger, 29 N. J. Eq. (2 Stew.) 74 (1874); Bull v. Titsworth, 29 N. J. Eq. (2 Stew.) 73 (1878). In VanHorn v.

inserts an assumption clause without the knowledge of either party, or if it be fraudulently inserted.[1] In a case where a deed, containing an assumption clause, was executed merely for the purpose of transferring the title, the grantee was held not liable.[2] But as against a *bona fide* purchaser of a mortgage and notes before maturity, who relied in part upon the contract of assumption, such mistakes and frauds could not be pleaded in defense, and the grantee would be held personally liable.[3] It is not necessary for the mortgagee to be notified of the conveyance; the purchaser becomes, at once, liable to him for the debt. It is necessary that the conveyance be absolute in its terms,[4] and that it transfer the whole, or an undivided part, of the premises.

§ 225. **Usury or defective title no defence to contract of assumption.**—A failure of title is held to be a good defense for a purchaser, who assumed the payment of a mortgage, against his personal liability, for the reason that there is a failure of the consideration upon which the contract of assumption was based.[5] Judge Miller, of the New York

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Powers, 26 N. J. Eq. (11 C. E. Gr.) 257 (1875), a husband caused a deed containing an assumption clause to be executed to his wife without her knowledge; she was held not personally liable. Precisely the same facts and ruling appear in Munson v. Dyett, 56 How. (N. Y.) Pr. 333 (1878). See Albany City S. Inst. v. Burdick, 87 N. Y. 40 (1881). In Best v. Brown, 25 Hun (N. Y.) 223 (1881), the grantee refused acceptance of a deed containing an assumption clause, yet the grantor recorded the deed; the grantee was held not personally liable.

[1] Fuller v. Lamar, 53 Iowa, 477 (1880). See Albany City S. Inst. v. Burdick, 87 N. Y. 40 (1881), reversing 20 Hun (N. Y.) 104; s. c. 56 How. (N. Y.) Pr. 500 (1878), as to the amount of evidence of fraud that is necessary.

[2] Deyermand v. Chamberlain, 22 Hun (N. Y.) 110 (1880); aff'd 88 N. Y. 658 (1882). See Best v. Brown, 25 Hun (N. Y.) 223 (1881).

[3] Hayden v. Snow, 9 Biss. C. C. 511 (1880).

[4] Garnsey v. Rogers, 47 N. Y. 233 (1872). See Flagg v. Munger, 9 N. Y. 483–499 (1854), where there was an acceptance of the deed conditionally at first, but subsequently made absolute on the giving by the vendor of a conditional bond; a breach of this was held to discharge the purchaser from any personal liability on the contract of assumption, *per* Denio and Edwards, JJ.

[5] Dunning v. Leavitt, 85 N. Y. 30 (1881), reversing 20 Hun (N. Y.) 178; Thorp v. Keokuk Coal Co., 48 N. Y. 253 (1872); s. c. 47 Barb. (N. Y.) 439 (1866); Garnsey v. Rogers, 47 N. Y. 233 (1872); Curtiss v. Bush,

Court of Appeals, limited this rule in 1878, by saying: "It is held that where a grantee of mortgaged premises takes a deed of the same subject to the mortgage, and thereby assumes to pay the mortgage, he is estopped from contesting the consideration and validity of the mortgage. * * * The general rule is, that there must be an *eviction* before any relief can be granted, on the ground of a failure of title or consideration. So long as he remains in the peaceful and quiet possession of the premises, or until he surrenders possession of the same to a paramount title, the mortgagor or the purchaser who assumes the payment of the mortgage, has no defense to the same."[1] After the contract of assumption has been made the grantee can not plead the defense of usury;[2] nor can he ordinarily question the consideration or validity of the mortgage.[3]

§ 226. **Theories of law upon which a mortgagee is allowed the benefit of the contract of assumption.**— There are two theories of law upon which a mortgagee may base his right to hold a purchaser, who has assumed the payment of his mortgage, personally liable for the mortgage debt; first, the theory of equitable subrogation. by which a creditor is entitled to all the collateral securities which his debtor has obtained to re-enforce the primary obligation;[4] and second, the theory that if one person makes a promise to another for the benefit of a third person, that third person may maintain an action on the promise.[5] The first of these

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39 Barb. (N. Y.) 661 (1863). In point, Benedict v. Hunt, 32 Iowa, 27, 30 (1871); Hulfish v. O'Brien, 20 N. J. Eq. (5 C. E. Gr.) 230 (1869); Hile v. Davidson, 20 N. J. Eq. (5 C. E. Gr.) 228 (1869).

[1] Parkinson v. Sherman, 74 N. Y. 88, 92 (1878); Ritter v. Phillips, 53 N. Y. 586 (1873); Thorp v. Keokuk Coal Co., 48 N. Y. 253 (1872); Freeman v. Auld, 44 N. Y. 50 (1870); Shadbolt v. Bassett, 1 Lans. (N. Y.) 121 (1869). On the question of eviction, see Dunning v. Leavitt, 85 N. Y. 30 (1881).

[2] Hartley v. Harrison, 24 N. Y. 170 (1861).

[3] Freeman v. Auld, 44 N. Y. 50 (1870). See Hartley v. Tatham, 1 Robt. (N. Y.) 246 (1863), on estoppel.

[4] Trotter v. Hughes, 12 N. Y. 74, 79 (1854). See *post* § 230.

[5] Ross v. Kennison, 38 Iowa, 396 (1874). For an exhaustive collection and explanation of cases in all the English and American courts, applying this principle, see the note to Cocker's Case, 17 Eng. Rep. 757, 768 (1876), Moak's notes.

is as old as English law itself, and was the earliest of the two theories to be applied to mortgage foreclosures, when the statute was passed authorizing the recovery of a personal judgment for deficiency in an action to foreclose a mortgage.[1] The doctrine of subrogation is still, in many states, the only one upon which the mortgagee's right to hold the purchaser responsible for the debt rests.[2]

But in New York Judge Denio of the Court of Appeals, about 1861,[3] advanced the second theory in application to mortgage foreclosures, in a case where the doctrine of subrogation would not sustain the conclusions which he desired to reach. This second theory has grown in strong favor with New York courts wherever it has been possible to apply it; and there are only two cases (presented in the next two sections) in which the doctrine of the right of a third party to enforce such a promise made for his benefit, can not be applied to mortgage foreclosures.[4] In Vrooman v. Turner[5] Judge Allen distinguished and harmonized the cases based upon these two theories, and showed that both were still in force and applied by New York courts to mortgage cases. The second theory, however, seems to be the favorite.

Under the theory of subrogation, a mortgagee could enforce his rights against a purchaser only in the equitable action of foreclosure and not in a separate action at law;[6] but with the adoption of the second theory, it was held that a mortgagee could exercise his rights against a purchaser in an action at law, and without foreclosure;[7] the practice of

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[1] Garnsey v. Rogers, 47 N. Y. 233 (1872); Trotter v. Hughes, 12 N. Y. 74 (1854); Marsh v. Pike, 10 Paige Ch. (N. Y.) 595 (1844); Dias v. Bouchaud, 10 Paige Ch. (N. Y.) 446 (1843); Curtis v. Tyler, 9 Paige Ch. (N. Y.) 432 (1842).

[2] See Crowell v. Hospital, 27 N. J. Eq. (12 C. E. Gr.) 650, 657, (1876), where the question is fully discussed.

[3] Burr v. Beers, 24 N Y. 178 (1861); Lawrence v. Fox, 20 N. Y. 268 (1859). The courts of Iowa have adopted the second theory; Ross v. Kennison, 38 Iowa, 396 (1874).

[4] Dunning v. Leavitt, 85 N. Y. 39 (1881); Hand v. Kennedy, 83 N. Y. 149, 154 (1880); Pardee v. Treat, 82 N. Y. 385 (1880); Thorp v. Keokuk Coal Co., 48 N. Y. 253 (1872).

[5] 69 N. Y. 282 (1877).

[6] King v. Whiteley, 10 Paige Ch. (N. Y.) 465 (1843).

[7] Thorp v. Keokuk Coal Co., 48 N. Y. 253 (1872); Burr v. Beers, 24 N. Y. 178 (1861); Mechanics' Savings Bank v. Goff, 13 R. I. 516 (1882);

enforcing this right in an action at law is not, however, encouraged by the courts.

§ 227. **Purchaser not personally liable when his grantor is not personally liable, though he assumes payment of the mortgage.**—A grantee of mortgaged premises, who purchases subject to a mortgage which he assumes and agrees to pay, will not be held liable for a deficiency arising on a foreclosure and sale, unless his grantor was also personally liable, legally or equitably, for the payment of the mortgage.[1] "It is well settled that to make a promise of this nature effective, it must be made by a person personally liable, legally or equitably, for the mortgage debt, and if there is a break anywhere in the chain of liability, all the subsequent promises are without obligation."[2]

This proposition has been three times squarely before the court of last resort in the state of New York,[3] and the result has always been a judgment of affirmance. The rule was first based, by Chancellor Walworth,[4] in 1843, upon the doctrine of subrogation. Judge Denio applied the same doctrine

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In point, Fitzgerald v. Barker, 70 Mo. 685 (1881); Sparkman v. Gove, 44 N. J. L. (15 Vr.) 252 (1882); the grantor may also sue the purchaser, Figart v. Halderman, 75 Ind. 564 (1881). See also Meech v. Ensign, 49 Conn. 191 (1881). In New Jersey, since the passage of chap. 255, laws of 1880, this right can be exercised only in an action at law; Naar v. Union & E. L. Co., 34 N. J. Eq. (7 Stew.) 111 (1881); Allen v. Allen, 34 N. J. Eq. (7 Stew.) 493 (1881).

[1] Dunning v. Leavitt, 85 N. Y. 30 (1881); Cashman v. Henry, 75 N. Y. 103 (1878); s. c. 55 How. (N. Y.) 234; s. c. 44 N. Y. Supr. Ct. (12 J. & S.) 93 (1878); Vrooman v. Turner, 69 N. Y. 280 (1877); Thorp v. Keokuk Coal Co., 48 N. Y. 253 (1872); Trotter v. Hughes, 12 N. Y. 74 (1854); Munson v. Dyett, 56 How. (N. Y.) Pr. 333 (1878); King v. Whitely, 10 Paige Ch. (N. Y.) 465 (1843). In point, Brewer v. Maurer, 38 Ohio St. 543, 550 (1883), citing the leading cases in New York and other states.

[2] Wise v. Fuller, 29 N. J. Eq. (2 Stew.) 257, 266 (1878), in which the Chancellor relies upon the New York cases. See Crowell v. Currier, 27 N. J. Eq. (12 C. E. Gr.) 152, 155 (1876); reviewed on appeal in 27 N. J. Eq. (12 C. E. Gr.) 650 (1876); Norwood v. DeHart, 30 N. J. Eq. (3 Stew.) 412 (1879); Arnaud v. Grigg, 29 N. J. Eq. (2 Stew.) 482 (1878).

[3] Vrooman v. Turner, 69 N. Y. 280 (1877); Trotter v. Hughes, 12 N. Y. 74 (1854); King v. Whitley, 10 Paige Ch. (N. Y.) 465 (1843).

[4] King v. Whitely, 10 Paige Ch. (N. Y.) 465 (1843).

in 1854; but in 1861, in the leading case of Burr v. Beers,[1] he preferred the second doctrine, that if one person makes a promise to another for the benefit of a third person, that third person may maintain an action on the promise. In 1872[2] and in 1881[3] he sustained and applied the same doctrine.

But Vrooman v. Turner[4] is the leading case upon the proposition of this section and harmonizes the two doctrines, showing that the proposition can be based on either, and stating as the fundamental reason of the rule, that there is no consideration to support the contract of assumption. If the promise of the grantee to the grantor is void for want of consideration, a third party can, of course, claim no advantage from it. "To give a third party who may derive a benefit from the performance of the promise, an action, there must be first, an intent by the promisee (purchaser) to secure some benefit to the third party, and second, some privity between the two, the promisee (purchaser) and the party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally."[5]

In Pennsylvania it has been held that the purchaser is liable upon his assumption of a mortgage, although the agreement to assume be contained in a deed from a grantor who was under no personal liability to pay the mortgage; and contrary to the New York cases, it has been held that the agreement could not be said to be without consideration inasmuch as the price of the land was a consideration.[6]

§ 228. Assumption of mortgage by subsequent mortgagee does not make him personally liable to prior mortgagee.—A stipulation in a mortgage, whereby the mortgagee assumes and agrees to pay a prior mortgage on

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[1] 24 N. Y. 179 (1861).

[2] Thorp v. Keokuk Coal Co., 48 N. Y. 253 (1872).

[3] Dunning v. Leavitt, 85 N. Y. 37 (1881).

[4] 69 N. Y. 283 (1877), *per* Allen, J., reversing 8 Hun (N. Y.) 78 (1876).

[5] Vrooman v. Turner, 69 N. Y. 280, 283 (1877).

[6] Merriman v. Moore, 90 Pa. St. 78, 81 (1879), distinguishing Samuel v. Peyton, 88 Pa. St. 465 (1879), which is seemingly contrary to the text.

the premises, does not impose upon him such a personal liability for the prior mortgage debt, as can be enforced against him by the prior mortgagee.[1] The stipulation in such cases is not a promise made by the mortgagee to the mortgagor for the benefit of the prior mortgagee, but is a promise for the benefit of the mortgagor alone; it is to protect his property by advancing money to pay his debt.[2] But where a senior mortgagee, in consideration of the conveyance to him of the equity of redemption, assumes the payment of a junior mortgage, he is personally bound to pay it and to relieve the grantor and mortgagor from his liability.[3] The question presented in this section first came before the Court of Appeals of New York in 1869 in Ricard v. Sanderson,[4] when the reverse of the above proposition was sustained, and a person, who had taken a deed as a security merely and assumed payment of the prior mortgage, was held personally liable.

§ 229. **New York cases reviewed.**—The proposition of the preceding section was, however, pointedly sustained by Judge Rapallo, in 1872, in the leading case of Garnsey v. Rogers,[5] where a subsequent mortgagee, who had assumed the payment of a prior mortgage, was held not liable to the prior mortgagee, but to the mortgagor alone. Judge Rapallo explains this conflict of opinion by the fact that in Garnsey v. Rogers the subsequent mortgage, containing the stipulation, was canceled and the mortgaged premises were restored to the mortgagor, the stipulation becoming, as to the parties to it, extinguished, while in Ricard v. Sanderson it does not appear that the debt for which the deed was

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[1] Pardee v. Treat, 82 N. Y. 385 (1880), reversing 18 Hun (N. Y.) 298; in point, Root v. Wright, 84 N. Y. 72 (1881); Campbell v. Smith, 71 N. Y. 26 (1877), affirming 8 Hun (N. Y.) 6 (1876). But see Babcock v. Jordan, 24 Ind. 14 (1865), and Racouillat v. SanSevain, 32 Cal. 376 (1867), where the opposite view seems to be held.

[2] In point, Arnaud v. Grigg, 29 N. J. Eq. (2 Stew.) 482, 486 (1878), *per* Chancellor Runyon, distinguishing Campbell v. Smith, 71 N. Y. 26 (1877), and relying upon Garnsey v. Rogers, 47 N. Y. 233 (1872), saying that the contract of assumption is not for the benefit of the mortgagee.

[3] Huebsch v. Scheel, 81 Ill. 281 (1876).

[4] 41 N. Y. 179 (1869).

[5] 47 N. Y. 233 (1872).

given as a security had been extinguished at the time of the foreclosure, or that the premises had been reconveyed in pursuance of any condition or defeasance on which the deed was given.[1] But Judge Andrews, who has written a majority of the opinions in the Court of Appeals concerning questions affecting the assumption of a mortgage, pointedly overruled Ricard v. Sanderson, in 1880, in Pardee v. Treat,[2] although he did not refer to the case in his opinion.

The distinguishing question as to whether a person, who assumes the payment of a mortgage in a subsequent deed or mortgage, is personally liable to a prior mortgagee, is, was the contract of assumption in aid of the grantor alone; or was it also for the benefit of the mortgagee? Judge Andrews says in the above case, "We think the true result of the decisions upon the effect of an assumption clause in a deed is, that it can only be enforced by a lienor, where in equity the debt of the grantor secured by the lien becomes, by the agreement between him and his grantee, who assumes the payment, the debt of the latter. On the other hand, if the assumption is in aid of the grantor, upon the security of the land, and not as between them, a substitution of the liability of the grantee for that of the grantor, or in other words, if, in equity as at law, the grantor remains the principal debtor, then the assumption clause is a contract between the parties to the deed alone, and the liability of the grantee for any breach of his obligation, is to the grantor only."[3]

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[1] See Campbell v. Smith, 71 N. Y. 26, 28 (1877), aff'g 8 Hun (N. Y.) 6 (1876), *per* Church, Ch. J., distinguishing Garnsey v. Rogers, 47 N. Y. 233 (1872), on the question of deeds being merely a creditor's security.

[2] 82 N. Y. 385 (1880).

[3] In further reviewing and distinguishing Garnsey v. Rogers, Judge Andrews says, at page 388, "In that case the covenant was contained in a deed from Hermance to the defendant, Rogers, absolute in form, which was in equity a mortgage, the deed having been given to secure a debt owing by the grantor to Rogers, upon a parol defeasance, that upon payment of the debt Rogers should reconvey the premises. The plaintiff was the owner of mortgages which were liens on the premises when the conveyance to Rogers was made. The question decided in King v. Whitely, 10 Paige Ch. (N. Y.) 465 (1843), did not arise. The grantor of Rogers was himself liable to pay the mortgage, and if Rogers had stood in the position of an absolute purchaser of the land, his liability to the plaintiff, either in an equitable

§ 230. **Grantor can not release his grantee, assuming a mortgage, from his liability to the mortgagee in New York.**—It is now settled in New York, that where a grantee in an absolute conveyance of lands assumes and agrees to pay a mortgage thereon, an absolute and irrevocable obligation is created in favor of the mortgagee, which can not be released or affected by any act or agreement of the grantor to which the mortgagee does not assent.[1] The contrary of this proposition was held in Stephens v. Casbacker,[2] in the Supreme Court. But Justice Bockes, in the later case of Douglas v. Wells,[3] squarely overrules Stephens v. Casbacker, and after an exhaustive review of all the cases upon the question, concludes with an affirmance of the proposition of this section, attaching great importance to the opinion of Rapallo, J., in Garnsey v. Rogers:[4] "It must be considered that when such an assumption is made on an absolute conveyance of land, it is unconditional and irrevocable. The grantor can not retract his conveyance, nor the grantee his promise or undertaking; but when contained in a mortgage, the

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or legal action, could not upon the authorities, have been questioned. But the court held that the deed, being in equity a mortgage, the covenant by Rogers to pay the incumbrances was, in legal effect, a covenant to make advances for the benefit of his grantor upon the security of the land. The promise was not, therefore, a promise made for the benefit of the plaintiff, although he might be benefited by its performance. It was not a case for equitable subrogation, because the mortgage debts remained the debts of the grantor who continued, in equity at least, the owner of the land. The refusal to enforce the covenant did not proceed upon the ground of want of consideration."

[1] Douglas v. Wells, 18 Hun (N. Y.) 88 (1879). In point, Ranney v. McMullen, 5 Abb. (N. Y.) N. C. 246 (1878). See the opinion of the referee in Ranney v. Peyser, 5 Abb. (N. Y.) N. C. 259 (1876), collating and reviewing the authorities. In Fairchilds v. Lynch, 46 N. Y. Supr. Ct. (14 J. & S.) 1 (1880), the grantor (mortgagor) by mesne assignments became the owner of the bond and mortgage; on the doctrine of merger this was held to release the grantee from his personal covenant, though the mortgage had been assigned to a third person. See also Talburt v. Berkshire, 80 Ind. 434 (1881).

[2] 8 Hun (N. Y.) 116 (1876). See Hartley v. Harrison, 24 N. Y. 170 (1861).

[3] 57 How. (N. Y.) Pr. 378 (1879); Ranney v. McMullen, 5 Abb. (N. Y.) N. C. 246 (1878); Fleischauer v. Doellner, 58 How. (N. Y.) Pr. 190 (1879); Devlin v. Murphy, 56 How. (N. Y.) Pr. 326 (1878).

[4] 47 N. Y. 242 (1872). See Judson v. Dada, 79 N. Y. 379 (1880).

conveyance is defeasible." This ruling is limited to those cases where the grant is absolute and the promise unconditional.

If conditions are in any way connected with the contract of assumption, the grantor may, sometimes, release his grantee. Thus, where an oral agreement was made contemporaneous with the deed and contract of assumption, that the grantor would take the land back at any time, should the grantee become dissatisfied with the purchase, and release the grantee from his covenant in the original deed, a release by the grantor was held to discharge the grantee from all liability to the mortgagee for a judgment of deficiency.[1] It has been intimated that, if the mortgagee had received no knowledge of the contract of assumption, the grantor might then release his grantee.[2] But Bockes, J., has set aside that intimation as being without authority.[3] A grantor can not release his grantee from his contract of assumption as against a purchaser of the mortgage, who has relied upon the contract of assumption as it appeared on record.[4] The proposition of this section is best sustained upon the second of the foregoing theories, that if one person makes a promise to another, upon a valuable consideration for the benefit of a third person, that third person can maintain an action on the promise.[5]

§ 231. **Contrary ruling in New Jersey.**—In New Jersey, however, the right of a mortgagee to take advantage of the contract of assumption against a purchaser is based upon

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[1] Devlin v. Murphy, 56 How. (N. Y.) Pr. 326 (1878); s. c. 5 Abb. (N. Y.) N. C. 242 (1878), *per* VanVorst, J., reviewing Stephens v. Casbacker, 8 Hun (N. Y.) 116 (1876). See Fleischauer v. Doellner, 58 How. (N. Y.) Pr. 190 (1879), *per* VanVorst, J., distinguishing Devlin v. Murphy, *supra*, under nearly the same state of facts. In Laing v. Byrne, 34 N. J. Eq. (7 Stew.) 52 (1881), the grantor took a reconveyance of the land, reassuming the mortgage, and the grantee was held thereby discharged from any liability.

[2] Paine v. Jones, 14 Hun (N. Y.) 577 (1878); aff'd 76 N. Y. 274 (1879); Whiting v. Geary, 14 Hun (N. Y.) 498, 500 (1878). In point, Gilbert v. Sanderson, 56 Iowa, 349 (1881); Brewer v. Maurer, 38 Ohio St. 543 (1883).

[3] Douglass v. Wells, 18 Hun (N. Y.) 88 (1879).

[4] Hayden v. Drury, 3 Fed. Rep. 782, 789 (1880).

[5] Douglass v. Wells, 18 Hun (N. Y.) 88, 92 (1879). See *ante* § 226.

the doctrine of subrogation; and contrary to the New York decisions, it is held that the grantor may release his purchaser from his personal liability to the mortgagee, even after the commencement of a foreclosure, and though the contract be absolute and unconditional. Thus where a release of an assumption was orally agreed upon before suit was brought to foreclose the mortgage, but was not executed in writing till after suit was brought, but was for a valuable consideration and without the grantor's knowledge of the suit, it was held to relieve the grantee from all liability to the mortgagee.[1]

But where the release was executed by an insolvent grantor without consideration and after notice of foreclosure, for the sole and admitted purpose of defeating the mortgagee's claim in equity for a deficiency, it was held void. "This act of release or discharge, to be effectual, must be done *bona fide*, and not merely for the purpose of thwarting the mortgagee and depriving him of an equity to which he is entitled. Where a person in consideration of a debt due from him agrees with his creditor that he will, in discharge of it, pay the amount to the creditor of the latter, in discharge or on account of a debt due from the latter to him, though the agreement may be *bona fide* rescinded by the parties to it for consideration or reasons satisfactory to themselves and without account or liability to the creditor, who is not a party to it, yet if the promisee be insolvent, and the rescission be merely a forgiving of the debt for the mere purpose of defrauding the creditor of the promisee, or protecting the promisor against his liability, the rescission will not avail in equity."[2] In another case, where a mortgagor re-purchased of his grantee, who had assumed payment, he in turn assuming payment, the grantee of the mortgagor was held discharged from all liability, for

[1] O'Neill v. Clarke, 33 N. J. Eq. (6 Stew.) 444 (1881).

[2] Trustees for Public Schools v. Anderson, 30 N. J Eq. (3 Stew.) 366, 368 (1879). See also the same case reported on appeal *sub nom.* Young v. Trustees, 31 N. J. Eq. (4 Stew.) 290, 297 (1879), *per* Depue, J., collating and reviewing the cases in a long opinion, and holding that a *bona fide* release by the grantor will discharge the grantee from all liability to the mortgagee.

the reason that the mortgage had not become due and that the mortgagee had suffered no injury.[1]

It is thus seen what an important part these two doctrines of subrogation and of a contract for the benefit of a third person, have played in the development of the law adjudging the rights of parties interested in the contract of assumption of a mortgage. Even to-day there is a lack of agreement among the courts as to which doctrine should prevail in the interpretation of the contract. But the theory of a benefit for a third person is the broadest, most equitable and most susceptible of application to the various cases that have arisen, and it is in growing favor with the courts.

§ 232. Intermediate purchaser, having assumed payment of the mortgage, liable.— It may be stated as a general rule, that all intermediate purchasers who have in succession from the original obligor, through mesne conveyances, assumed the payment of a bond and mortgage, are personally liable as sureties for a judgment of deficiency in an action to foreclose the mortgage brought by the mortgagee or his assignee.[2] No reason presents itself why, if the first purchaser from the mortgagor is liable, the succeeding purchasers from the mortgagor's grantee should not also be held personally liable for the mortgage debt, either on the doctrine of subrogation or of liability for a contract made for the benefit of a third person. This proposition has been

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[1] Crowell v. Currier, 27 N. J. Eq. (12 C. E. Gr.) 152 (1876). See Laing v. Byrne, 34 N. J. Eq. (7 Stew.) 52 (1881), where nearly the same facts are stated. See also Crowell v. Hospital, etc., 27 N. J. Eq. (12 C. E. Gr.) 650 (1876), *per* Depue, J., who at page 657 quotes the language of Rapallo, J., as given above, calls it an *obiter dictum*, and rules contrary to it.

[2] Cashman v. Henry, 75 N. Y. 103 (1878); Flagg v. Geltmacher, 98 Ill. 293 (1881); Scarry v. Eldridge, 63 Ind. 44 (1878). In point, Smith v. Ostermeyer, 68 Ind. 432 (1879); Young v. Trustees Pub. Schools, 31 N. J. Eq. (4 Stew.) 290 (1879); Pruden v. Williams, 26 N. J. Eq. (11 C. E. Gr.) 210 (1875); Jarman v. Wiswall, 24 N. J. Eq. (9 C. E. Gr.) 267 (1873), *per* Chancellor Runyon, collating the cases and discussing the legal reasons upon which the practice rests, and stating that the decree should be the same as that directed in Luce v. Hinds, Clarke Ch. (N. Y.) 453 (1841), *per* Vice-Chancellor Whittlesey; Brewer v. Maurer, 38 Ohio St. 543 (1883). See the following section.

squarely before a court in New York only once, when Vice-Chancellor McCoon,[1] in 1841, held the contrary, that intermediate purchasers were not liable; but this case is nowhere referred to or cited, and from the *obiter dicta* in later cases[2] it is believed that it is not good law, and will be overruled. Furthermore, it is not consonant with the general principles of the law of principal and surety. It is well settled that the successive assignors of a mortgage, all of whom have guaranteed its payment, are personally liable for the mortgage debt to the plaintiff foreclosing. By analogy the same cases support the proposition of this section.[3]

Intermediate purchasers, who have not assumed the payment of the mortgage, are, of course, not liable; neither are intermediate purchasers liable, though they may have assumed the payment of the mortgage, if there is, prior to their purchase, a break in the line of the several contracts of assumption in the successive mesne conveyances.[4]

§ 233. **Assignor of a mortgage guaranteeing payment or collection liable.**—An assignor of a mortgage, who, in the assignment or by a separate instrument, guarantees the payment or collection of the mortgage, is personally liable to his assignee, and may be made a defendant to an action for foreclosure, for the purpose of recovering against him a judgment of deficiency.[5] In those states where no provision is made for the recovery of a personal judgment in an action

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[1] Lockwood v. Benedict, 3 Edw. Ch. (N. Y.) 472 (1841).

[2] In Dunning v. Leavitt, 85 N. Y. 30 (1881), intermediate purchasers who had assumed the payment of a mortgage were made parties in an action to foreclose, and a personal judgment for deficiency demanded against them. No objection was raised by them, and Andrews, J., throughout his opinion, speaks of them as though they were personally liable.

[3] See the following section.

[4] Vrooman v. Turner, 69 N. Y. 280 (1877).

Hunt v. Purdy, 82 N. Y. 486 (1880); Craig v. Parkis, 40 N. Y. 181 (1869); Officer v. Burchell, 44 N. Y. Supr. Ct. (12 J. & S.) 575 (1879); Jones v. Steinbergh, 1 Barb. Ch. (N. Y.) 250 (1845); Luce v. Hinds, Clarke Ch. (N. Y.) 453 (1841); Bristol v. Morgan, 3 Edw. Ch. (N. Y.) 142 (1837); Curtis v. Tyler, 9 Paige Ch. (N. Y.) 432 (1842); Leonard v. Morris, 9 Paige Ch. (N. Y.) 90 (1841); North American Fire Ins. Co. v. Handy, 2 Sandf. Ch. (N. Y.) 492 (1845); N. Y. Code Civ. Proc. §1627. In Harlem Sav. Bk. v. Mickelsburgh, 57 How. (N. Y.) Pr. 106

to foreclose a mortgage, such a guarantor can not, of course, be made a party to the action; the only remedy against him is a separate action at law.

In New York an action at law can also be subsequently maintained, but only by consent of the court in which the mortgage was foreclosed. In actions at law, a distinction is made between a guaranty of *payment* and of *collection*;[1] but in the equitable action of foreclosure, if a party is in any way liable for the debt, he can be made a defendant.[2]

The decree of foreclosure and judgment for deficiency should specify in order the respective liabilities of the parties who have guaranteed the payment or collection of the debt, or who are otherwise obligated for it;[3] the decree must always contain conclusions and directions in harmony with the general law of principal and surety. Thus, Vice-Chancellor Whittlesey in Luce v. Hinds[4] made the judgment of foreclosure "for the sale of the mortgaged premises,

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(1878), the order of liability between guarantors and grantors assuming payment is considered. In point. Claflin v. Reese, 54 Iowa, 544 (1880); also Jarman v. Wiswall, 24 N. J. Eq. (9 C. E. Gr.) 267 (1873). In Robertson v. Cauble, 57 Ind. 420 (1877), the indorser of a note secured by a mortgage was made a defendant. See Stark v. Fuller, 42 Pa. St. 320 (1862). In Fluck v. Hager, 51 Pa. St. 459 (1866), the mortgage came back into the hands of the first guarantor, who foreclosed; he was not allowed to enforce the guaranty against the intermediate guarantors. Under the statute of 1858, in Wisconsin, a guarantor could not be made a defendant for the purpose of recovering a personal judgment against him; Borden v. Gilbert, 13 Wis. 670 (1861). But by chap. 243 of the laws of 1862, the law was changed so that a personal judgment can now be recovered; Burdick v. Burdick, 20 Wis. 348 (1866).

[1] In Johnson v. Shepard, 35 Mich. 115 (1876), it was held that a guarantor of *collection* ought not to be made a party defendant to a foreclosure suit, for the reason that no liability attaches to the guarantor till every remedy against the principal has been exhausted. Such a guarantor may be made a party under the New York rule; the fact of a primary and a secondary liability must, however, be recognized and provided for in the decree; Cady v. Sheldon, 38 Barb. (N. Y.) 103 (1862).

[2] N. Y. Code Civ. Proc. § 1627. See Vanderbilt v. Schreyer, 91 N. Y. 392, 396 (1883), and the able opinion *per* Ruger, Ch. J., reversing 21 Hun (N. Y.) 537 (1880.)

[3] Jones v. Steinbergh, 1 Barb. Ch. (N. Y.) 253 (1845); Luce v. Hinds, Clarke Ch. (N. Y.) 453, 456 (1841); Leonard v. Morris, 9 Paige Ch. (N. Y.) 90 (1841).

[4] Clarke Ch. (N. Y.) 457 (1841).

and a personal decree against the obligor (mortgagor) for the deficiency, and in case an execution against him does not realize the money, an execution must afterwards go against the guarantor (assignor) of the mortgage, for any balance due after sale of the premises, and execution unsatisfied against the obligor."[1] The execution must not issue against the guarantor in any case, until an execution against the person primarily liable has been returned unsatisfied.

§ 234. **Intermediate assignors of a mortgage guaranteeing payment liable.**—It is generally well established that the transfer of a debt or obligation carries with it as an incident all securities for its payment. Thus, the assignment of a bond and mortgage gives to the assignee the benefit of, and the right to sue upon, a guaranty by a previous assignor for their collection; and this proposition is sustained, although such guaranty may not be in terms transferred with the bond and mortgage.[2]

This principle is in harmony with the proposition stated in the second preceding section, that an intermediate purchaser who has assumed the payment of a mortgage is personally liable for the mortgage debt, providing his preceding grantors were liable. It is suggested as a query, whether the same principles of law that are applicable to intermediate purchasers assuming the payment of a mortgage, are not also applicable to intermediate assignors guaranteeing payment; but in the latter case it is not believed that an unbroken line of guaranties is required in order to hold liable those who have guaranteed payment.

§ 235. **Assignors of a mortgage, covenanting as to title and against defences, liable.**—The query is raised here as to whether a person, who guarantees that the title to a mortgage is perfect or that there are no defences against it,

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[1] See also the quotation from the opinion of Chancellor Walworth in Curtis v. Tyler, 9 Paige Ch. (N. Y.) 435 (1842), in the note to § 208 *ante;* Jones v. Steinbergh, 1 Barb. Ch. (N. Y.) 253 (1845), and the note in § 202 *ante.*

[2] Craig v. Parks, 40 N. Y. 181 (1869); Ketchell v. Burns, 24 Wend. (N. Y.) 456 (1840); First Nat. Bk. of Dubuque v. Carpenter, 41 Iowa, 518 (1875). See Fluck v. Hager, 51 Pa. St. 459 (1866), where the mortgage came back into the hands of

can be made a defendant to an action to foreclose the mortgage, for the purpose of recovering a personal judgment against him for a breach of such covenant. He might be made a party, on the theory that he is interested in the action and that a complete adjudication can be made only by bringing him before the court. On the other hand, it can scarcely be claimed that he "is liable to the plaintiff for the payment of the debt secured by the mortgage."[1] In case of such a guaranty it would certainly be safe for the plaintiff to omit the guarantor as a party to the foreclosure, and subsequently, by leave of the court, to commence an action at law against him for a breach of his covenant.[2]

§ 236. **All persons guaranteeing payment or collection of a bond and mortgage by a separate instrument liable.** —In the preceding sections it has been seen that the assignor of a bond and mortgage, who guarantees its payment in the same instrument, is personally liable to the assignee of the mortgage foreclosing, for a judgment of deficiency. The same rule and cases also apply if the guaranty is made by a separate instrument, executed by persons in no way interested in the mortgage.[3] This is based upon the principle that a creditor is entitled to the benefit of all pledges and securities given to, or in the hands of, a surety of the debtor for his indemnity, and the rule is true whether the surety has been injured or not, as it is a trust created for the benefit of the surety of the debt and attaches to it.[4]

§ 237. **Married women obligating themselves in any of the preceding ways generally liable.**—A married woman who purchases the equity of redemption in mortgaged premises, and assumes the payment of the mortgage in the deed of conveyance, is personally liable to the mortgagee for a

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the first guarantor, who foreclosed; he was not allowed to enforce their guaranties against the intermediate guarantors.

[1] N. Y. Code Civ. Proc. § 1627. See Knickbocker Ice Co. v. Nelson, 8 Hun (N. Y.) 21 (1876).

[2] N. Y. Code Civ. Proc. § 1628.

[3] Grant v. Griswold, 82 N. Y. 569 (1880); Hunt v. Purdy, 82 N. Y. 486 (1880).

[4] Crow v. Vance, 4 Clarke (Iowa), 442 (1857), citing Curtis v. Tyler, 9 Paige Ch. (N. Y.) 431 (1842).

judgment of deficiency, if her grantor was also personally liable, although she may not charge her separate estate with the payment of the mortgage debt.[1]

This proposition was squarely before Andrews, J., in Cashman v. Henry,[2] in 1878, and after referring to the Massachusetts and New Jersey statutes, which are similar to those of New York, he based his decision upon the fact that a "married woman as incident to her right to acquire real and personal property by purchase, and hold it to her sole and separate use, may purchase property upon credit, and bind herself by an executory contract to pay the consideration money, and that her bond, note, or other engagement given and entered into to secure the payment of the purchase price of property acquired and held for her separate use, may be enforced against her in the same manner and to the same extent, as if she were a *feme sole*."[3] If her grantor was not liable, she, of course, would not be liable.

When a married woman assigns a mortgage owned by her, guaranteeing its payment or collection, her liability will be governed by the general rules affecting married women's

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[1] Cashman v. Henry, 75 N. Y. 103 (1878); Vrooman v. Turner, 69 N. Y. 280 (1877), reversing 8 Hun (N. Y.) 78 (1876); Ballin v. Dillaye, 37 N. Y. 35 (1867); Flynn v. Powers, 35 How. (N. Y.) Pr. 279 (1868); aff'd 36 How. (N. Y.) Pr. 289 (1868); s. c. 54 Barb. (N. Y) 550 (1868); Bush v. Babbitt, 25 Hun (N. Y.) 213 (1881); Scott v. Otis, 25 Hun (N. Y.) 35 (1881). See Munson v. Dyett, 56 How. (N. Y.) Pr. 333 (1878). In point, Coolidge v. Smith, 129 Mass. 554 (1880); also Brewer v. Maurer, 38 Ohio St. 543 (1883), citing the leading cases in other states and holding with the New York decisons. See Culver v. Badger, 29 N. J. Eq. (2 Stew.) 74 (1878), where a married woman, to whom a deed was executed with an assumption clause, was held not liable on its being shown that she did not intend to assume the mortgage by accepting the deed.

[2] 75 N. Y. 103, 115, (1878); s. c. 55 How. (N. Y.) Pr. 234.

[3] In Huyler v. Atwood, 26 N. J. Eq. (11 C. E. Gr.) 504 (1875), *per* Vice-Chancellor VanFleet, the same question was pointedly before the court and the ruling was the same as in Cashman v. Henry, 75 N. Y. 103 (1878). At page 506 the Vice-Chancellor says: "The law, in giving married women the right to acquire and hold land, did not intend that their capacity to make contracts to secure the purchase money should be so limited and restricted, that they could get the land without paying for it. Whether they secured the payment of the purchase money by bond and mortgage, note,

contracts stated in an early part of this work.[1] Under the act of 1884 in New York, she is now, of course, personally liable upon all of her contracts, whatever their form or nature.[2]

§ 238. **Persons subsequently liable in any of preceding ways, deceased, their estates liable—Personal representatives proper parties; heirs and devisees not proper parties.**—In a preceding section it has been seen that the personal representatives, and not the heirs and devisees of the deceased obligor, are proper parties defendant to an action brought to foreclose a mortgage, for the purpose of obtaining a decree determining the amount of any deficiency, and directing the same to be paid by the personal representatives in the due administration of the decedent's estate.[3] When the liability is incurred subsequently to the inception of the bond and mortgage by a contract of assumption,[4] or by guaranteeing payment or collection, the rule is the same.[5]

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or contract to assume the payment of a mortgage, it is a contract they have a capacity to make, and must be enforced."

[1] See Penn. Coal Co. v. Blake, 85 N. Y. 226 (1881), where a married woman expressly charged her separate estate. See *ante* § 211.

[2] See *ante* §§ 209–211, and notes.

[3] See *ante* §§ 213–216.

[4] Leonard v. Morris, 9 Paige Ch. (N. Y.) 90 (1841). See *ante* §§ 213–216.

[5] Scofield v. Doscher, 72 N. Y. 491 (1878); Bache v. Doscher, 67 N. Y. 429 (1876). See Mutual Benefit Life Ins. Co. v. Howell, 32 N. J. Eq. (5 Stew.) 146 (1880).

CHAPTER XII.

COMMENCEMENT OF ACTION.

§ 239. How brought—Requisites of summons.
240. Notice of object of action.
241. Notice of no personal claim.
242. Where some of the defendants are non-residents or absentees.
243. Requisites of affidavit to secure order for service of summons by publication.
244. Change of place of publication.
245. Notice to defendants—Proof of publication.
246. Where there are unknown owners.
247. Service of summons on married women.
248. Service of summons on infant defendants.
249. Failure to appoint guardian *ad litem*.
250. Service on lunatics and incompetents.
251. Appearance of defendant.
252. Appearance by attorney without authority.
253. Commencement of foreclosure prevents action at law on bond.
254. Action at law on bond by consent of court.
255. Tender after suit brought.
256. What claims may be foreclosed.
§ 257. Removed fixtures.
258. Doctrine of merger.
259. Purchase of equity by mortgagee from mortgagor.
260. Conveyance after assignment of notes.
261. Mortgage on undivided interest in land.
262. Mortgages on separate pieces of property for the same debt.
263. Where mortgagee has lien on personal property sufficient to pay debt.
264. Mortgage with power of sale.
265. Breach of payment of installment—Accelerated maturity of debt.
266. Failure to pay installment of principal.
267. Failure to pay installment of interest.
268. Equitable mortgage to repay purchase money.
269. Equitable mortgage by deposit of title deeds.
270. Agreement to execute mortgage.
271. Junior mortgagee can not compel foreclosure by senior mortgagee.
272. Joinder of actions.
273. Consolidation of actions.

§ 239. **How brought—Requisites of summons.**—An action to foreclose a mortgage is a civil action, and where all the parties are known and reside within the state, it is commenced by the personal service of a summons and complaint, or of a summons alone, as in ordinary civil actions.[1] The summons

[1] N. Y. Code Civ. Proc. § 416. See also Ingersoll v. Mangam, 84 N. Y. 622 (1881); People v. Northern Pac. R. R. Co., 50 N. Y. Supr. Ct.

must contain the title of the action, specifying the court in which the action is brought,[1] the names of the parties to the action,[2] and, if it is brought in the supreme court, the name of the county in which the plaintiff desires the trial.[3] It must be subscribed by the plaintiff's attorney,[4] who is required to add to his signature his office address, specifying a place within the state where there is a post-office, and if in a city, he must add the street, and street number, if any, or other suitable designation of the particular locality of his office.[5]

It should require the defendant to answer the complaint and to serve a copy of his answer on the person whose name is subscribed to the summons at the place within the state thereon specified, within twenty days after the service of the summons, exclusive of the day of service.[6]

(18 J. & S.) 456 (1884); Putnam Co. Chem. Works v. Jochen, 8 N. Y. Civ. Proc. Rep. 424 (1886); Davis v. Jones, 8 N. Y. Civ. Proc. Rep. 43 (1883); Acker v. Hauteman, 63 How. (N. Y.) Pr. 280 (1882); s. c. 27 Hun (N. Y.) 48 (1882); Kelly v. Countryman, 15 Hun (N. Y.) 97 (1878); McCarthy v. McCarthy, 13 Hun (N. Y.) 579 (1878).

[1] Croden v. Drew, 3 Duer (N. Y.) 652 (1854); Webb v. Mott, 6 How. (N. Y.) Pr. 439 (1852); James v. Kirkpatrick, 5 How. (N. Y.) Pr. 241 (1851); Dix v. Palmer, 5 How. (N. Y.) Pr. 233 (1851); Walker v. Hubbard, 4 How. (N. Y.) Pr. 154 (1849).

[2] Bank v. Magee, 20 N. Y. 355 (1859); Traver v. Eigth Ave. R. R. Co., 6 Abb. (N. Y.) Pr. N. S. 46 (1867); Cooper v. Burr, 45 Barb. (N. Y.) 10 (1865); Miller v. Stettiner, 7 Bosw. (N. Y.) 692 (1862); Hill v. Thacter, 3 How. (N. Y.) Pr. 407 (1848); Eagleston v. Son, 5 Robt. (N. Y.) 640 (1866).

[3] Hotchkiss v. Crocker, 15 How. (N. Y.) Pr. 336 (1858); Davison v. Powell, 13 How. (N. Y.) Pr. 288 (1856); Merrill v. Grinnell, 10 How. (N. Y.) Pr. 31 (1854).

[4] Mutual Life Ins. Co. v. Ross, 10 Abb. (N. Y.) Pr. 260 (1860), note. Weir v. Slocum, 3 How. (N. Y.) Pr. 397 (1857); Johnston v. Winter, (N. Y. Com. Pl.) 7 Alb. L. J. 135 (1872). See also N. Y. Code Civ. Proc. §§ 55, 417.

[5] Supreme Court Rules 1, 10; Demelt v. Leonard, 19 How. (N. Y.) Pr. 182 (1860); Yorks v. Peck, 17 How. (N. Y.) Pr. 192 (1859); Hurd v. Davis, 13 How. (N. Y.) Pr. 57 (1856). See also German American Bank v. Champlin, 11 N. Y. Civ. Proc. Rep. 452 (1887); Wadsworth v. Georger, 18 Abb. (N. Y.) N. C. 199 (1887); Mayor of N. Y. v. Eisler, 10 Daly (N. Y.) 396 (1882); Wiggins v. Richmond, 58 How. (N. Y.) Pr. 376 (1879); Osborn v. McCloskey, 55 How. (N. Y.) Pr. 345 (1878); Weil v. Martin, 24 Hun (N. Y.) 645 (1881); Wallace v. Dimmick, 24 Hun (N. Y.) 635 (1881).

[6] N. Y. Code Civ. Proc. §§ 417, 418.

The summons should also contain a notice to the defendant to the effect, that in case he fails to answer the complaint within the time specified for the service of the answer, the plaintiff will apply to the court for judgment on default and for the relief demanded in the complaint. In New York the exact form of the summons is prescribed by the Code.[1]

§ 240. **Notice of object of action.**—When the summons is served without the complaint, it is usually accompanied by a notice of the object of the action. The form and contents of this notice are prescribed by the code, which provides that "where a personal claim is not made against a defendant, a notice, subscribed by the plaintiff's attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that a personal claim is not made against him, may be served with the summons. If the defendant so served, unreasonably defends the action, costs may be awarded against him."[2] Where such a notice is served with the summons, the complaint need not be served upon the defendant, unless he demands a copy of the same in writing within the time for answering.

§ 241. **Notice of no personal claim.**—The notice served upon the defendant should describe correctly the object of the action; if it does not do so, and the defendant is misled, the judgment will be irregular as against such defendant, and may be set aside on motion. The object of the notice in mortgage foreclosures is to relieve the complainant of the expense of unnecessary disclaimers by defendants, who are made parties to the suit solely for the purpose of extinguishing their claims and of perfecting the title, and against whom no personal judgment for deficiency is sought.[3] But it has been said that even where a defendant has not been served with a notice as permitted

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[1] N. Y. Code Civ. Proc. § 418.

[2] N. Y. Code Civ. Proc. § 423. See O'Hara v. Brophy, 24 How. (N. Y.) Pr. 379 (1863); Benedict v. Warriner, 14 How. (N. Y.) Pr. 568 (1857); Gallagher v. Egan, 2 Sandf. (N. Y.) 742 (1850).

[3] Jay v. Ensign, 9 Paige Ch. (N. Y.) 230 (1841).

by the code,[1] and he unreasonably defends, the court may award costs against him for making such defense.[2] The question of costs, as affected by the service of such notice, will be fully considered hereafter in the chapter on costs.

§ 242. Where some of the defendants are non-residents or absentees.—In an action to foreclose a mortgage, "where a defendant to be served is a foreign corporation; or, being a natural person, is not a resident of the state; or where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state;[3] or where the defendant, being a resident of the state, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed therein, with like intent,"[4] such defendant may be brought within the jurisdiction of the court by service of the summons upon him by publication, or personally without the state, in the same manner as in other actions, as directed in the Code.[5]

Service of the summons upon such a defendant may be made in New York by the publication thereof in two newspapers, designated in the order directing such service, for a specified time, not less than once a week for six successive weeks; or, at the option of the plaintiff, by service of the summons, and of a copy of the complaint and order, without the state, upon the defendant personally, if he is of full age, or an infant of the age of fourteen years or upwards; or, if the defendant is a corporation, upon an officer thereof. On or before the day of the first publication, the plaintiff must

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[1] N. Y. Code Civ. Proc. § 423.

[2] O'Hara v. Brophy, 24 How. (N. Y.) Pr. 379 (1863).

[3] Wortman v. Wortman, 17 Abb. (N. Y.) Pr. 66 (1863); Lefferts v. Harris, 10 Abb. (N. Y.) Pr. N. S. 2 (1866), note; Hulbert v. Mutual Ins. Co., 4 How. (N. Y.) Pr. 278 (1850).

[4] N. Y. Code Civ. Proc. § 438.

[5] Easterbrook v. Easterbrook, 64 Barb. (N. Y.) 421 (1872); Collins v. Ryan, 32 Barb. (N. Y.) 647 (1860); Towsley v. McDonald, 32 Barb. (N. Y.) 604 (1860); Bixby v. Smith, 49 How. (N. Y.) Pr. 50 (1875); s. c. 5 T. & C. (N. Y.) 279; 3 Hun (N. Y.) 60; Roche v. Ward, 7 How. (N. Y.) Pr. 416 (1853); VonRhade v. VonRhade, 2 T. & C. (N. Y.) 491 (1874).

deposit in a specified post-office copies of the summons, complaint and order, contained in a securely closed post-paid wrapper, directed to the defendant at a place specified in the order.[1]

§ 243. **Requisites of affidavit to secure order for service of summons by publication.**—In order to obtain an order for the service of the summons on a defendant absent from the state, the plaintiff must show by affidavit the defendant's absence and due diligence in seeking to obtain personal service upon him, on which proof alone can be based an order for the publication of the summons in an action for foreclosure. The affidavit should be based upon the applicant's own knowledge, and not upon his information and belief.[2] Proof may also be made by the affidavits of other parties. A foreclosure will be invalid, where it is based upon an order of publication, which is made upon the complainant's affidavit that the defendant could not be found, where the summons was returned before the return day as not personally served.[3]

The affidavit for service of the summons by publication, should be made by the plaintiff himself; but if made by his attorney, it should state why it is not made by the plaintiff, and the sources from which the attorney derived his information of the facts set forth in the affidavit.[4] After an order of publication, which has an erroneous caption, has been acted on, it may properly be amended by an order of the court, striking out the erroneous caption and inserting the correct one.[5]

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[1] N. Y. Code Civ. Proc. § 440.

[2] Carleton v. Carleton, 85 N. Y. 313 (1881); Belmont v. Cornen, 82 N. Y. 256 (1880); Howe Mach. Co. v. Pettibone, 74 N. Y. 68 (1878); s. c. 12 Hun (N. Y.) 657; Soule v. Hough, 45 Mich. 418 (1881). But see Smith v. Mahon, 27 Hun (N. Y.) 40 (1882).

[3] Soule v. Hough, 45 Mich. 418 (1881). Whether jurisdiction of a foreclosure proceeding is not acquired, where the affidavit for the order of publication is sufficient, though contrary to the facts, *quaere;* Whitford v. Crooks, 50 Mich. 40 (1883).

[4] Piser v. Lockwood, 30 Hun (N. Y.) 6 (1883).

[5] Mojarrieta v. Saenz, 80 N. Y. 553 (1880); Phinney v. Broschell, 80 N. Y. 544 (1880); Coffin v. Lesster, 36 Hun (N. Y.) 347 (1885).

§ 244. **Change of place of publication.**—While the statute, authorizing the service of a summons by publication, does not authorize such publication to be commenced in one newspaper and to be finished in another; yet in a recent case such service was held not to be affected by the fact that during the time which the notice was being published, the name of the paper was changed.[1] The place of publication was not changed from one town to another in the same jurisdiction;[2] though the paper was merged in another and its name and place of publication were changed, the identity of the paper and the territory of its circulation remained the same.[3]

§ 245. **Notice to defendants—Proof of publication.**—It is required in New York that there be subjoined to the summons, which is published, a notice to the defendant, to the effect that the summons is served upon him by publication pursuant to an order of the judge, specifying his name and official title and the date of the order directing the publication. The summons, complaint, order and papers upon which it was granted, must be filed with the clerk of the court on or before the day of the first publication.[4]

Proof of the service of the summons by publication should be made in the form prescribed by the statute authorizing the same; but where the statute does not assume to fix the exclusive mode of proof, proof made in a form other than that prescribed by the statute will be sufficient to pass title to the purchaser at a sale thereunder.[5] In New York proof of the publication of the summons and notice must be made by the affidavit of the printer or publisher, or his foreman or principal clerk. Proof of deposit in the post-office, or of delivery, of a paper required to be deposited or delivered by the provisions of the Code, must be made by the affidavit of the person who deposited or delivered it.[6]

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[1] Perkins v. Keller, 43 Mich. 53 (1880).

[2] Perkins v. Keller, 43 Mich. 53 (1880).

[3] Perkins v. Keller, 43 Mich. 53 (1880); Sage v. Central R. R. Co., 99 U. S. (9 Otto), 334 (1878); bk. 25 L. ed. 394.

[4] N. Y. Code Civ. Proc. § 442.

[5] Brown v. Phillips, 40 Mich. 264 (1879).

[6] N. Y. Code Civ. Proc. § 444.

§ 246. **Where there are unknown owners.** — Where there are defendants unknown to the plaintiff, having a lien upon or an interest in the mortgaged premises, whose residence is unknown and can not with reasonable diligence be ascertained, they may be served by publication of the summons in two newspapers published in the county where the premises are situated.[1] Where in an action of foreclosure unknown owners are made parties defendant, as authorized by the New York Code of Civil Procedure,[2] and are properly described in the summons, the addition of the words "if any" will not invalidate the process.[3]

Where service of the summons has been made upon unknown heirs by publication, as prescribed by the Code, it will bar all the parties in interest, although it may subsequently appear that one of the unknown parties was an infant.[4]

§ 247. **Service of summons on married women.**—The wife of the mortgagor of land, whether she joins in the execution of the mortgage or not, has an inchoate right of dower in the equity of redemption, which will not be affected by a foreclosure to which she is not made a defendant.[5] The service of the summons upon the husband in a foreclosure, was formerly held to be sufficient service upon the wife also, unless the action was against her separate estate, in which case service was required to be made upon her individually.[6] At common-law the husband was authorized and required to enter a joint appearance for himself and his wife upon

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[1] N. Y. Code Civ. Proc. § 438.

[2] See N. Y. Code Civ. Proc. §§ 438, 451.

[3] Abbott v. Curran, 98 N. Y. 665 (1885).

[4] Wheeler v. Scully, 50 N. Y. 667 (1872).

[5] Mills v. VanVoorhis, 10 Abb. (N. Y.) Pr. 152 (1859); affi'd 20 N. Y. 412. See *ante* §§ 135, 136.

[6] See Nagle v. Taggart, 4 Abb. (N. Y.) N. C. 144 (1877); Foote v. Lathrop, 53 Barb. (N. Y.) 183 (1869); Watson v. Church, 3 Hun (N. Y.) 80 (1874); s. c. 5 T. & C. (N. Y.) 243 (1875); Ferguson v. Smith, 2 Johns. Ch. (N. Y.) 139 (1816); Lathrop v. Heacock, 4 Lans. (N. Y.) 1 (1871). An inchoate right of dower is an interest, which results from the marital relation and does not belong to the wife as her separate estate; Eckerson v. Vollmer, 11 How. (N. Y.) Pr. 42 (1855).

service of the summons upon him alone, if the action concerned his property,[1] but the present Code of Civil Procedure[2] provides that in an action or special proceeding, a married woman shall appear, prosecute, or defend, alone, or joined with other parties, as if she were single; and it shall not be necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property.[3] It has been held under this provision of the Code that in an action to foreclose a mortgage upon real property, the wife of the owner of the equity of redemption may appear and defend by her own attorney, although her husband appears and defends by another attorney.[4]

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[1] Watson v. Church, 3 Hun (N. Y.) 80 (1874); Lathrop v. Heacock, 4 Lans. (N. Y.) 1 (1871); Leavitt v. Cruger, 1 Paige Ch. (N. Y.) 421 (1829). See *ante* §§ 137, 138.

[2] N. Y. Code Civ. Proc. § 450.

[3] Reynolds v. Robinson, 64 N. Y. 589 (1876); Scott v. Conway, 58 N. Y. 619 (1874); Wright v. Wright, 54 N. Y. 437 (1873), aff'g 59 Barb. (N. Y.) 505 (1871); Simar v. Canaday, 53 N. Y. 298 (1873); Stoneman v. Erie R. R. Co., 52 N. Y. 429 (1873); Hinckley v. Smith, 51 N. Y. 21 (1872); Filer v. New York Cent. R. R. Co., 49 N. Y. 47 (1872); Moore v. Moore, 47 N. Y. 467 (1872); Rowe v. Smith, 45 N. Y. 230 (1871); Hoffman v. Treadwell, 39 N. Y. Supr. Ct. (7 J. & S.) 183 (1875); Chambovet v. Cagney, 35 N. Y. Supr. Ct. (3 J. &. S.) 474 (1873); Osborn v. Nelson, 59 Barb. (N. Y.) 375 (1871); Kamp v. Kamp, 46 How. (N. Y.) Pr. 143 (1873); Brooome v. Taylor, 9 Hun (N. Y.) 155 (1876); Spencer v. Humiston, 9 Hun (N. Y.) 71 (1876); Adams v. Curtis, 4 Lans. (N. Y.) 164 (1870); Beau v. Kiah, 6 T. & C. (N. Y.) 464 (1875); s. c. 4 Hun (N. Y.) 171; Freeman v. Barber, 3 T. & C. (N. Y.) 574 (1874); s. c. 1 Hun (N. Y.) 433. See also Draper v. Stouvenel, 35 N. Y. 507 (1866); Ackley v. Tarbox, 31 N. Y. 564 (1864); Palmer v. Davis, 28 N. Y. 242 (1863); Darby v. Callaghan, 16 N. Y. 71 (1857); Morrell v. Cawley, 17 Abb. (N. Y.) Pr. 76 (1863); Harley v. Ritter, 9 Abb. (N. Y.) Pr. 400 (1859); Gillies v. Lent, 2 Abb. (N. Y.) Pr. N. S. 455 (1865); Rawson v. Penn. R. R., 2 Abb. (N. Y.) Pr. N. S. 220 (1867); Foster v. Conger, 61 Barb. (N. Y.) 145 (1871); Ball v. Bullard, 52 Barb. (N. Y.) 141 (1868); Badgley v. Decker, 44 Barb. (N. Y.) 577 (1865); Barton v. Beer, 35 Barb. (N. Y.) 81 (1861); Mann v. Marsh, 35 Barb. (N. Y.) 68 (1861); Merchants' Ins. Co. v. Hinman, 34 Barb. (N. Y.) 410 (1861); Newbery v. Garland, 31 Barb. (N. Y.) 121 (1860); Spies v. Acces. Trans. Co. 5 Duer (N. Y.) 662 (1856); Rowe v. Smith, 38 How. (N. Y.) Pr. 37 (1869); Mann v. Marsh, 21 How. (N. Y.) Pr. 372 (1861); Barton v. Beer, 21 How. (N. Y.) Pr. 309 (1861); Francis v. Ross, 17 How. (N. Y.) Pr. 561 (1859).

[4] Janinski v. Heidelberg, 21 Hun (N. Y.) 439 (1880). See *ante* §§ 137, 138.

§ 248. **Service of summons on infant defendants.**—Where infants are made parties or are necessary defendants in an action to foreclose a mortgage, they must be served with the summons; and until service is made the court will have no jurisdiction of them and the appointment of a guardian *ad litem* will be void.[1] The court will not acquire jurisdiction of such infants where, after the trial, they petition to intervene and have a guardian *ad litem* appointed, and thereafter file an answer by a guardian appointed upon such petition.[2] In a case where substituted service had been defectively made upon infants, but was confirmed by a subsequent order of the court, and later personal service was also made upon them for the purpose of removing any possible grounds of alleged irregularity in the service of the summons, the judgment and the sale under the decree were held to be valid and binding, it appearing that the action was still pending at the time of the personal service.

Under the provisions of the New York Code of Civil Procedure,[3] where the defendant is an infant under the age of fourteen years, service must be made by delivering a copy of the summons within the state to the infant in person, and also to his father, mother or guardian; or, if there is none within the state, to the person having the care and control of such infant, or with whom he resides, or in whose service he is employed. Service on the infant alone or on the father, mother, guardian, or other person mentioned alone, does not constitute a personal service within the meaning of the statute. Service must be made upon both to meet its requirements.[4]

An infant defendant is required to appear and defend by a guardian,[5] but a guardian *ad litem* can be regularly appointed only after such a defendant has been served with the summons

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[1] Johnston v. San Francisco Savings Union, 63 Cal. 554 (1883).

[2] Johnson v. San Francisco Savings Union, 63 Cal. 554 (1883).

[3] N. Y. Code Civ. Proc. § 426.

[4] Ingersoll v. Mangam, 84 N. Y. 622 (1881), aff'g 24 Hun (N. Y.) 202.

[5] N. Y. Code Civ. Proc. §§ 471, 473. See also Buermann v. Buermann, 9 N. Y. Civ. Proc. Rep. 146 (1886); s. c. 17 Abb. (N. Y.) N. C. 391; Mace v. Scott, 17 Abb. (N. Y.) N. C. 100 (1885); Freund v. Washburn, 17 Hun (N. Y.) 543 (1879).

personally or by the substituted mode prescribed by the Code.[1] Such guardian must be appointed upon the application of the infant, if he is of the age of fourteen years or upwards and applies within twenty days after service of the summons; if he is under that age or neglects so to apply, upon the application of any other party to the action, or upon the application of his general or testamentary guardian, if he has one, or of a relative or friend, with notice thereof to his general or testamentary guardian, if he has one within the state, or if he has none, to the person with whom the infant resides.[2] Where an infant defendant resides within the state, and is temporarily absent therefrom, the court may in its discretion make an order designating a person to act as guardian *ad litem*, unless he or some one in his behalf, procures such a guardian to be appointed, as prescribed in the Code,[3] within a specified time after service of a copy of the order.[4] In case an appearance is made by a person appointed guardian *ad litem* for an infant under fourteen years of age who has not been served with the summons, the judgment rendered in the action will not be binding upon such infant.[5]

Where suit is brought to foreclose a mortgage against an infant who resides in another state with his mother, a widow, it will not be presumed that such infant has a guardian residing in the state where suit is brought, and service by publication may be had on filing an affidavit stating that he and his mother are non-residents and that personal service of the summons can not be made upon him in the state where the action is brought.[6]

§ 249. **Failure to appoint guardian ad litem.**—Where an infant defendant has been properly served with process, the omission of the court to appoint a guardian *ad litem* for

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[1] Ingersoll v. Mangam, 84 N. Y. 622 (1881), aff'g 24 Hun (N. Y.) 202.

[2] N. Y. Code Civ. Proc. § 471. See also the cases cited *supra*.

[3] N. Y. Code Civ. Proc. §§ 471, 473.

[4] Mace v. Scott, 17 Abb. (N. Y.) N. C. 100 (1885); N. Y. Code Civ. Proc. § 473.

[5] Ingersoll v. Mangam, 84 N. Y. 622 (1881), aff'g 24 Hun (N. Y.) 202.

[6] Davis v. Huston, 15 Neb. 28 (1883).

him will not render the judgment void, but only voidable; it can be avoided, however, by no one except the infant or his privies in blood.[1] In such a case where judgment is obtained by fraud or collusion, an action may be maintained by the infant to set it aside.[2] The record of the judgment, however, is *prima facie* evidence of the jurisdiction of the court, and will be held conclusive until clearly and explicitly disproved; the recitals in the judgment may be used to establish the jurisdiction of the court.[3]

§ 250. **Service on lunatics and incompetents.**—In those cases where the court has reasonable ground to believe that the defendant, by reason of habitual drunkenness, or for any other cause, is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, it may, in its discretion, with or without an application therefor, make an order requiring a copy of the summons to be delivered also to a person whom it may designate in the order; in which case service of the summons will not be complete until it is so delivered.[4] But where the defendant has been judicially declared to be incompetent to manage his affairs in consequence of lunacy, and it appears satisfactorily to the court by affidavit, that the delivery of a copy of the summons to him in person, will tend to aggravate his disorder, or to lessen the probability of his recovery, the court may make an order, dispensing with such delivery, in which case the delivery of a copy of the summons to a committee duly appointed for him will be sufficient personal service upon the defendant.[5]

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[1] McMurray v. McMurray, 66 N. Y. 175 (1876); Croghan v. Livingston, 17 N. Y. 218 (1858); Bloom v. Burdick, 1 Hill (N. Y.) 130, 143 (1841); Austin v. Trustees of Charleston Female Seminary, 49 Mass. (8 Metc.) 196 (1844); s. c. 41 Am. Dec. 497; Barber v. Graves, 18 Vt. 290 (1846).

[2] McMurray v. McMurray, 66 N. Y. 175 (1876).

[3] Ingersoll v. Mangam, 84 N. Y. 622 (1881), aff'g 24 Hun. (N. Y.) 202; Bosworth v. Vandewalker, 53 N. Y. 597 (1873).

[4] N. Y. Code Civ. Proc. § 427. See Moulton v. Moulton, 47 Hun (N. Y.) 606 (1888); s. c. 17 N. Y. St. Rep. 427.

[5] N. Y. Code Civ. Proc. § 429.

§ 251. Appearance of defendant.—The voluntary appearance of a defendant is equivalent to a personal service of the summons upon him,[1] because a voluntary appearance waives all objections to the regularity or the sufficiency of the service of the summons.[2] If a defendant in a mortgage foreclosure enters an appearance by an attorney after judgment has been entered, he will be entitled to notice of all subsequent proceedings; the sufficiency of the notice of appearance is to be determined by the trial court.[3]

§ 252. Appearance by attorney without authority.—A judgment recovered against a defendant, who has not been served with process and who has no knowledge of the suit, but for whom an attorney appeared without authority, will be good, and can not be attacked collaterally for want of jurisdiction;[4] but if there has been fraud or collusion between the plaintiff's attorney and the attorney for the defendant, or if the attorney for the defendant is not responsible and perfectly competent to answer to his assumed client for damages,[5] or if the signature of the attorney supposed to have appeared was forged, the judgment will not be binding on the defendant.[6]

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[1] N. Y. Code Civ. Proc. § 424. See Ferguson v. Crawford, 70 N. Y. 253 (1877), reversing 7 Hun (N. Y.) 25 (1876); Mors v. Stanton, 51 N. Y. 649 (1873); Wheelock v. Lee, 15 Abb. (N. Y.) Pr. N. S. 24 (1873); Brett v. Brown, 13 Abb. (N. Y.) Pr. N.S. 295 (1872); Allen v. Malcolm, 12 Abb. (N. Y.) Pr. N. S. 335 (1872); Tracy v. Reynolds, 7 How. (N. Y.) Pr. 327 (1852).

[2] Ogdensburg & L. C. R. R. Co. v. Vermont & C. R. R. Co., 63 N. Y. 176 (1875).

[3] Tuller v. Beck, 108 N. Y. 355 (1888); s. c. 15 N. Y. St. Rep. 686; Catlin v. Ricketts, 91 N. Y. 668 (1883); Ingersoll v. Mangam, 84 N. Y. 622 (1881); Wheelock v. Lee, 74 N. Y. 495 (1878); Olcott v. Maclean, 73 N. Y. 223 (1878); Martine v. Lowenstein, 68 N. Y. 456 (1877); Phelps v. Phelps, 6 N. Y. Civ. Proc. Rep. 117 (1883); Diossy v. West, 8 N. Y. Week. Dig. 411 (1879); Dake v. Miller, 7 N. Y. Week. Dig. 353 (1878); Markee v. City of Rochester, 6 N. Y. Week. Dig. 102 (1878); Wheelock v. Lee, 54 How. (N. Y.) Pr. 402 (1877). See Supreme Court Rule 9.

[4] Brown v. Nichols, 42 N. Y. 26 (1870). See Ferguson v. Crawford, 70 N. Y. 253 (1877), reversing 7 Hun (N. Y.) 25; Denton v. Noyes, 6 Johns. (N. Y.) 296 (1810); s. c. 5 Am. Dec. 237.

[5] Denton v. Noyes, 6 Johns. (N. Y.) 296 (1810); s. c. 5 Am. Dec. 237.

[6] Ferguson v. Crawford, 70 N. Y. 253 (1877). See Supreme Court Rule 10.

§ 253. **Commencement of foreclosure prevents action at law on bond.**—The effect of commencing an action to foreclose a mortgage is to bar an action at law on the note or bond for the recovery of the mortgage debt, or any part thereof, during the pendency of the action for the foreclosure of the mortgage;[1] neither can an action at law be maintained later for any deficiency arising on a foreclosure sale, without leave of the court in which the foreclosure was brought.[2]

And the owner of a debt secured by mortgage, who holds an independent obligation or covenant for its payment given by a person other than the mortgagor, can not enforce his claim against such obligor by an action at law during the pendency of a foreclosure;[3] but it seems that where proceedings for foreclosure and for a judgment of deficiency have been ineffectual, an action at law can be instituted for the debt without leave of the court in which the foreclosure was brought.[4] This provision of the Code, however, does not exclude such relief at law against the representatives of a deceased mortgagor;[5] but an action upon a guaranty is within

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[1] This rule does not apply to an action begun without leave of the probate court upon the bond of a mortgagor's residuary legatee; and the omission to obtain leave from the court in chancery is a mere irregularity that may be waived by the defendants; Culver v. Judge of Superior Court, 57 Mich. 25 (1885). See N. Y. Code Civ. Proc. § 1628.

[2] N. Y. Code Civ. Proc. § 1628. See also Scofield v. Doscher, 72 N. Y. 49 (1878); Williamson v. Champlin, 8 Paige Ch. (N. Y.) 70 (1839); s. c. Clarke Ch. (N. Y.) 9. The Supreme Court in Nebraska held in Clapp v. Maxwell, 13 Neb. 542 (1882), that a leading principle of the statute, relative to the foreclosure of mortgages upon real property, is that a mortgagor shall not be answerable for the debt secured, upon the mortgage and personally at the same time, without leave of the court.

[3] Scofield v. Doscher, 72 N. Y. 491 (1878); Belmont v. Cornen, 48 Conn. 343 (1880).

[4] Culver v. Judge of Superior Court, 57 Mich. 25 (1885).

[5] Glacius v. Fogel, 88 N. Y. 434 (1882). In *re* Collins, 17 Hun (N. Y.) 289 (1879), after an action for foreclosure had been prosecuted to judgment and sale, upon which a deficiency had arisen, an application was made for leave to sue the representatives and next of kin of the deceased grantor, they not having been made parties to the foreclosure and no claim having been presented against the estate. It was held that such application was addressed to the sound discretion of the court, and it would not be granted when the circumstances of the case would render

the prohibition of this provision, unless authorized by the court.[1]

§ 254. **Action at law on bond by consent of court.**—Where an action at law has been commenced without leave of the court in which the foreclosure was brought, and the facts in the case are such that leave would have been granted had a proper application been made to the court, the court may grant leave *nunc pro tunc* upon such terms as may be just,[2] and thus remove the impediment to maintaining the action.[3] Where such leave is granted after suit has been brought, the complaint should be so amended as to show that proper leave has been granted.[4] It has been said that such an order may be granted *ex parte*, even after the neglect to obtain such leave has been set up as a defense.[5] If an action at law is commenced on the bond, before an action in equity to foreclose the mortgage is filed, it can not be prosecuted further during the pendency of the foreclosure.[6]

The provision of the statute prohibiting an action at law to recover the debt or any part of it during the pendency of an action to foreclose, unless leave of the court has been first duly obtained, has no application to an action by an assignee against the mortgagee upon his guaranty of the payment of the debt,[7] and does not prohibit a junior mortgagee, who has filed a notice of claim to surplus moneys arising upon the foreclosure of a prior mortgage, from bringing, without leave of the court, an action to recover the debts secured by his mortgage.[8] The pendency of an action on a promissory

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it inequitable to permit such an action.

[1] McKernan v. Robinson, 84 N. Y. 105 (1881).

[2] Earl v. David, 86 N. Y. 634 (1881), aff'g 20 Hun (N. Y.) 527 (1880); N. Y. Code Civ. Proc. § 1628.

[3] Earl v. David, 86 N. Y. 634 (1881); McKernan v. Robinson, 84 N. Y. 105 (1881); Scofield v. Doscher, 72 N. Y. 491 (1878); Equitable Life Ins. Co. v. Stevens, 63 N. Y. 341 (1875).

[4] Earl v. David, 86 N. Y. 634 (1881).

[5] McKernan v. Robinson, 84 N. Y. 105 (1881).

[6] Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294 (1841); Williamson v. Champlin, 8 Paige Ch. (N. Y.) 70 (1839); s. c. Clarke Ch. (N. Y.) 9.

[7] Schaaf v. O'Brien, 8 Daly (N. Y.) 181 (1878). See Baxter v. Smack, 17 How. (N. Y.) Pr. 183 (1859).

[8] Wyckoff v. Devlin, 12 Daly (N. Y.) 144 (1883).

note, secured by mortgage, to have the amount due on the note ascertained and for a decree for the sale of the property described in the mortgage, but in which no personal judgment is sought, is not a bar to another action upon the note against the maker for a personal judgment.[1] A judgment in an action to foreclose a mortgage executed by a husband and wife to secure the payment of the wife's promissory note, constitutes no bar to a subsequent action to subject the separate estate of the wife to the payment of a deficiency arising upon the sale of the property mortgaged.[2]

§ 255. Tender after suit brought. — The New York Code of Civil Procedure authorizes a tender after suit is brought "where the complaint demands judgment for a sum of money only; and the action is brought to recover a sum certain, or which may be reduced to certainty by calculation."[3] But an action to foreclose a mortgage, being a proceeding purely *in rem*, can not properly be said to be brought for the recovery of money only; and consequently, in such an action, the defendant has no right to make and plead a tender.[4] But where an action is brought to foreclose a mortgage against real property, upon which a portion only of the principal and interest is due and another portion of either is to become due, the defendant can have the cause dismissed, without costs as against the complainant, by payment into court, at any time before a final judgment directing a sale is rendered, the sum due together with the plaintiff's costs in the action;[5] and he may, after a final judgment directing a sale has been rendered, but before the sale is made, pay into court the amount due for the principal and interest and

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[1] Spence v. Union Cent. Ins. Co., 40 Ohio St. 517 (1884).

[2] Avery v. Vansickle, 35 Ohio St. 270 (1879).

[3] N. Y. Code Civ. Proc. § 731.

[4] Astor v. Palache, 49 How. (N. Y.) Pr. 231 (1875); Bartow v. Cleveland, 16 How. (N. Y.) Pr. 364 (1858); s. c. 7 Abb. (N. Y.) Pr. 339; Thurston v. Marsh, 14 How. (N. Y.) Pr. 572 (1857); s. c. 5 Abb. (N. Y.) Pr. 389.

[5] N. Y. Code Civ. Proc. § 1634; Malcolm v. Allen, 49 N. Y. 448 (1872); s. c. 5 Alb. L. J. 334; Long v. Lyons, 54 How. (N. Y.) Pr. 129 (1875).

the costs of the action, together with the expenses of the proceedings to sell, if any, and have all proceedings upon the judgment stayed.[1]

Should the plaintiff in a mortgage foreclosure accept from the defendant the principal due, and the interest thereon, together with the costs, he will thereby waive the making of the payment into court, and the decree in the usual form of foreclosure and sale, where subsequent installments are to fall due, can not be entered.[2] The plaintiff is not required to accept payment from the hands of the defendant, after the decree has been entered. If the defendant wishes a stay in the execution of the decree of foreclosure and sale, he should apply to the court for leave to make the payment into court, and procure an order for a stay of proceedings; even then the plaintiff will be entitled to have a provision inserted in the decree for its enforcement in case of future defaults. An observance of the provisions of the Code, regulating proceedings for the foreclosure of mortgages, where the whole sum is not due, should be strictly pursued, in order that both parties may be made acquainted with the terms of the decree, and have an opportunity to know and to protect their rights.[3]

§ 256. **What claims may be foreclosed.** — All valid mortgages may be foreclosed, where the whole or a part of the debt secured is due and default has been made in the payment of the principal or of the interest. And where a mortgage has been adjudged to be void for usury, the mortgagee may enforce a parol mortgage, which was taken up with the proceeds of such usurious loan.[4]

After the death of a mortgagor the mortgagee may institute an action to foreclose the mortgage against the heirs of the mortgagor, and can not be compelled to relinquish his lien on the real estate and to share in the general assets of the estate;[5] and the mortgagee is not bound to proceed

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[1] N. Y. Code Civ. Proc. § 1635.

[2] Long v. Lyons, 54 How. (N. Y.) Pr. 129 (1875).

[3] Long v Lyons, 54 How. (N. Y.) Pr. 129 (1875). See *post* chapter on Tender and Payment into Court.

[4] Allison v. Schmitz, 98 N. Y. 657 (1885). See *ante* chap. iii.

[5] Jones v. Null, 9 Neb. 57 (1879).

against the estate of the deceased mortgagor before bringing his action to foreclose the mortgage.[1]

§ 257. Removed fixtures.—A mortgagee can not enforce his lien against buildings or other fixtures which were upon the land at the time the mortgage was executed, and which have been removed and become a part of another freehold.[2] Thus, the severance and removal of a house from mortgaged premises takes it out from under the operation of the mortgage and frees it from the mortgage lien,[3] because such severance and removal change the character of the house from real to personal property, whether the act of severance and removal is accidental or intentional.[4] Where a piece of land and a dwelling house thereon were mortgaged, and the mortgagor subsequently removed the house and used a portion of the materials together with new materials in erecting a house on another lot belonging to him, which lot, together with the house thus erected, he afterwards, for a valuable consideration, conveyed to a third person, the court held in an action brought by the mortgagee for their recovery, that the old materials used in the construction of the new house became a part of the freehold, and that the right of property therein vested in the purchaser and was free from the lien of the mortgage.[5] And where a mortgage was executed upon certain real estate upon which there was a grist-mill, and the mortgagor sold the millstones in the mill, which were removed by the purchaser, it was held, in an action brought by the mortgagee to recover the property, that the title to the millstones passed to the purchaser.[6]

This is in accordance with the general rule in equity, that a mortgagor in possession has the right to cut timber on the

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[1] Bell v. Hobaugh, 65 Ind. 598 (1879).

[2] Harris v. Bannon, 78 Ky. 568 (1880).

[3] Buckout v. Swift, 27 Cal. 433 (1865); Peirce v. Goddard, 39 Mass. (22 Pick.) 559 (1839); s. c. 33 Am. Dec. 764.

[4] Buckout v. Swift, 27 Cal. 433 (1865). See Citizens' Bank v. Knapp, 22 La. An. 117 (1870); Codrington v. Johnstone, 1 Beav. 520 (1838).

[5] Peirce v. Goddard, 39 Mass. (22 Pick.) 559 (1839); s. c. 32 Am. Dec. 764. See Fryatt v. Sullivan Co., 5 Hill (N. Y.) 116 (1843).

[6] Cooper v. Davis, 15 Conn. 556 (1843).

mortgaged lands, and to do other similar acts, and that a court of equity will not interfere to restrain him in the exercise of such right, until it is made to appear that the cutting of the timber and other like acts are being carried to an extent which will render the land insufficient security for the amount due upon the mortgage.[1] This right continues even after the decree of foreclosure and sale, and until the expiration of the period allowed for redemption.[2]

§ 258. **Doctrine of merger.**—A merger takes place only where the titles to the land and to the mortgage, equitable as well as legal, unite in the same person.[3] Thus it has been held, that if a mortgagor conveys the mortgaged premises to his mortgagee and another, and the mortgagee afterwards conveys his interest to the other person, this will extinguish the mortgage and unite the whole title in such purchaser.[4] And where land subject to a mortgage was conveyed by the mortgagor, the grantee assuming and agreeing to pay the mortgage, and such grantee afterwards conveyed the land to the mortgagee by a deed reciting that the conveyance was subject to the mortgage assumed by him, the mortgage was thereby merged and the mortgagee was not allowed to maintain an action against the mortgagor on the mortgage note, although the value of the land at the time of the last conveyance was less than the amount of the mortgage.[5]

And where a grantee of mortgaged premises assumes the payment of the mortgage and afterwards takes an assignment of the mortgage, he thereby extinguishes the lien and can not afterwards revive the right to foreclose the mortgage by assigning it.[6] But it has been held that a conveyance to the mortgagee by an assignee in bankrutcy of the mortgagor

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[1] Buckout v. Swift, 27 Cal. 433 (1865). See VanWyck v. Alliger, 6 Barb. (N. Y.) 511 (1849); Brady v. Waldron, 2 Johns. Ch. (N. Y.) 147 (1816); King v. Smith, 2 Hare, 239 (1843); Hampton v. Hodges, 8 Ves. 105 (1803); Wright v. Atkyns, 1 Ves. & B. 313, 314 (1813).

[2] Cooper v. Davis, 15 Conn. 556 (1843).

[3] Jordan v. Cheney, 74 Me. 359 (1883).

[4] Lyman v. Gedney, 114 Ill. 388 (1885).

[5] Freer v. Lake, 115 Ill. 662 (1886); Dickason v. Williams, 129 Mass. 182 (1880).

[6] Winans v. Wilkie, 41 Mich. 264 (1879).

does not, in equity, operate to satisfy the mortgage and will not constitute a merger.[1]

§ 259. **Purchase of equity by mortgagee from mortgagor.**—There is no legal restraint on a mortgagor's selling the mortgaged property to the mortgagee in satisfaction of his debt;[2] but where the validity of such a sale is in issue, the burden of proof is upon the mortgagee to show that the sale of the mortgagor's equity was voluntarily made, that his conduct in making the purchase was in all things fair, and that he paid for the property what it was reasonably worth.[3] But the purchase by a mortgagee of the legal title to the property covered by the mortgage will not operate as a merger and extinguish the lien of his mortgage, unless such was the intention of the parties, and this intention will not be presumed where the interests of the mortgagee require that the mortgage should remain in force.[4] In such a case the law will regard the mortgage as a continuing lien, which may be enforced against the land,[5] in the hands of the mortgagee or his assignees, when it can be done without prejudice to the rights of the mortgagor or third parties.[6]

Where the assignee of a bankrupt, with the approval of the court, conveyed mortgaged property to the mortgagees in satisfaction of their claims, and the mortgage was thereupon discharged of record, it was held that the conveyance would not divest the property of other liens junior to the mortgage, but that such liens would remain subject to that

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[1] Haggerty v. Byrne, 75 Ind. 499 (1881).

[2] A mortgagee has a perfect right to purchase the mortgaged premises, and the mere fact that the deed to him is made in satisfaction and payment of the mortgage will not make such deed a mortgage; the surrender of the evidences of the mortgage debt, and the failure to execute a new obligation to pay, are circumstances affording evidence that the conveyance was not intended as a mortgage. Rue v. Dole, 107 Ill. 275 (1883).

[3] Jones v. Franks, 33 Kan. 497 (1885).

[4] Pike v. Gleason, 60 Iowa, 150 (1882); First Nat. Bank of Waterloo v. Elmore, 52 Iowa, 541 (1879).

[5] Pike v. Gleason, 60 Iowa, 150 (1882).

[6] Hoffman v. Wilhelm, 68 Iowa, 510 (1886); Vannice v. Bergen, 16 Iowa, 555 (1864).

of the mortgage, which, as against them, would be presumed not to have been discharged.[1]

A mortgage does not necessarily merge or become extinct by being transferred to the person holding the fee title; and where a person becomes entitled to an estate, subject to a charge for his own benefit, he may take the estate and keep up the charge. The question in such cases rests upon the intention, actual or presumed, of the person in whom the estates are united. Thus a mortgagee, after the conveyance to him of the mortgagor's equity of redemption, may keep a mortgage alive in favor of one to whom he had assigned the mortgage as collateral security prior to the conveyance to him of the equity of redemption. He may also obtain further advances on such an assignment, which fact will be evidence of an intention to keep the mortgage alive for the protection of his assignee; and in such a case a merger will certainly not take place.[2] But where mortgaged premises are conveyed by the mortgagor to the mortgagee in satisfaction of the mortgage debt, so that a recovery could not be had upon the original debt in an action at law, the transaction must be regarded as an absolute sale and constitutes a merger, although the grantee may execute a contract for reconveyance upon the payment of the amount of the mortgage within a limited time.[3]

§ 260. Conveyance after assignment of notes.—A conveyance of real estate by a mortgagor to his mortgagee, after a transfer of the notes secured together with the mortgage to an assignee, who takes the same *bona fide*, will not operate as a merger of the mortgage, nor affect the assignee's rights. After the recording of the assignment of the mortgage, a purchaser from the mortgagee as grantee of the mortgagor, will take subject to the equitable rights of the assignee.[4]

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[1] Stimpson v. Pease, 53 Iowa, 572 (1880).

[2] International Bank of Chicago v. Wilshire, 108 Ill. 143 (1883); Rue v. Dole, 107 Ill. 275 (1883).

[3] Rue v. Dole, 107 Ill. 275 (1883).

[4] International Bank of Chicago v. Wilshire, 108 Ill. 143 (1883).

§ 261. **Mortgage on undivided interest in land.**—A mortgage on an undivided interest in land may be foreclosed and the interest sold.[1] Thus, where one member of a partnership mortgages property belonging to the firm, using the partnership name and reciting that he is a member of such firm, the mortgage may be foreclosed as against him, and his interest in the property sold; but it can not be foreclosed against the members who did not execute it, as the mortgage does not bind their interests.[2] And where one of two co-mortgagees has become the owner of the equity of redemption in the mortgaged property, the other can maintain a bill for foreclosure to recover his proportionate share of the mortgage fund.[3]

Where two tenants in common unite in executing a joint mortgage for a joint and several debt, one of them can not compel the mortgagee to accept his half of the debt, and to proceed against his co-tenant's moiety for the collection of the other half, although such tenant may tender a sufficient bond of indemnity against final loss. In a foreclosure against both mortgagors the court will not decree a sale of the undivided moieties separately.[4]

§ 262. **Mortgages on separate pieces of property for the same debt.**—It has been said that a mortgagee may legally hold two mortgages on different pieces of land, as security for the same debt, and that he may foreclose the mortgage on one piece without foreclosing that on the other; and that whether a foreclosure on one will bar a foreclosure on the other depends upon the value of the premises foreclosed.[5] It seems that if the land sold under the foreclosure of one of the mortgages, is equal in value to the debt, the debt will be thereby paid and the remaining premises will be relieved from the lien of the mortgage.[6]

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[1] Sutlive v. Jones, 61 Ga. 676 (1878); Baker v. Shepard, 30 Ga. 706 (1860).

[2] Sutlive v. Jones, 61 Ga. 676 (1878).

[3] Sandford v. Bulkley, 30 Conn. 344 (1862).

[4] Frost v. Frost, 3 Sandf. Ch. (N. Y.) 188 (1846).

[5] Burpee v. Parker, 24 Vt. 567 (1852).

[6] Burpee v. Parker, 24 Vt. 567 (1852). See Case v. Boughton, 11 Wend. (N. Y.) 106 (1833); West v.

A mortgagee can not foreclose as to part of the mortgaged premises, where they form a single tract, and not as to the balance; because, if the mortgagor has a right to redeem any part, he has a right to redeem the whole premises.[1] The foreclosure of a mortgage will not be barred by the existence of another mortgage which is a prior security for the same debt.[2] The giving of a bond and mortgage as collateral security to an existing bond and mortgage does not, *per se*, operate as a suspension of the right to foreclose such first bond and mortgage.[3]

§ 263. **Where mortgagee has lien on personal property sufficient to pay debt.**—An action to foreclose a mortgage on real estate can not be maintained, where it appears that the mortgage also covers personal property sufficient to satisfy the mortgage debt, until the remedy against the personal property has been exhausted.[4] And where a mortgagee, who holds two mortgages, one on real and the other on personal property, to secure the payment of the same debt, forecloses the mortgage on the personal property and converts it to his own use, it will operate as a payment and satisfaction of the entire mortgage debt, if its value is equal to or exceeds the amount of the debt secured.[5]

§ 264. **Mortgage with power of sale.**—A power given in the mortgage "to proceed to sell in the manner prescribed by law," is in substance the same as any power to proceed to sell by means of an action to foreclose.[6] The fact that a mortgage or deed of trust contains a power of sale, and contemplates a foreclosure without the aid of the court, will not deprive the

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Chamberlain, 25 Mass. (8 Pick.) 336 (1829); Amory v. Fairbanks, 3 Mass. 562 (1793); Omaly v. Swan, 3 Mason C. C. 474 (1824).

[1] Spring v. Haines, 21 Me. 126 (1842).

[2] Connerton v. Millar, 41 Mich. 608 (1879).

[3] Fireman's Ins. Co. v. Wilkinson, 35 N. J. Eq. (8 Stew.) 160 (1882).

[4] Koger v. Weakly, 2 Port. (Ala.) 516 (1835).

[5] Koger v. Weakly, 2 Port. (Ala.) 516 (1835); Androscoggin Sav. Bank v. McKenny, 78 Me. 442 (1886).

[6] Brickell v. Batchelder, 62 Cal. 623 (1882). See the chapter *post* on Foreclosure by Advertisement and Sale.

court of jurisdiction and preclude a foreclosure by action.[1] The mortgage power of sale is simply a cumulative remedy given to the mortgagee, and does not affect the jurisdiction of the court;[2] neither will it change or affect the mortgagor's right to redeem so long as that power remains unexecuted.[3]

But after a sale made under such a power, the mortgagor's interest will be entirely divested and he will have no right to redeem.[4] And the fact that a judgment has been recovered upon the debt secured by the mortgage, will not impair the power of sale in the mortgage;[5] but in New York, while a foreclosure suit is pending, no judgment will be rendered nor execution issued in a suit at law upon the note or bond without leave of the court in which the foreclosure is pending.[6] The acceptance of security in the form of a mortgage will not prevent a creditor from pursuing any other remedy on his debt;[7] in some states he may proceed

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[1] Carradine v. O'Connor, 21 Ala. 573 (1852); Marriott v. Givens, 8 Ala. 694 (1845); McGowan v. Branch Bank of Mobile, 7 Ala. 823 (1845); Butler v. Ladue, 12 Mich. 173 (1863); Heyward v. Judd, 4 Minn. 483 (1860); Green v. Gaston, 56 Miss. 748 (1879); Morrison v. Bean, 15 Tex. 267 (1855). In Massachusetts there are special statutory provisions regulating the foreclosing of mortgages containing a power of sale; Childs v. Dolan, 87 Mass. (5 Allen), 319 (1862). See Massachusetts Gen. Stat., ch. 140, §§ 38–44.

[2] Cormerais v. Genella, 22 Cal. 116, 124, 125 (1863); Walton v. Cody, 1 Wis. 420 (1853). Where the holder of such a mortgage applies to a court of equity for a foreclosure thereof, he abandons the power of sale contained in the mortgage, and submits his cause to the court for such relief as to the court may seem just; Heyward v. Judd, 4 Minn. 483, 495 (1860).

[3] Benham v. Rowe, 2 Cal. 387 (1852); s. c. 56 Am. Dec. 342; Turner v. Bouchell, 3 Har & J. (Md.) 99 (1806).

[4] Kinsley v. Ames, 43 Mass. (2 Metc.) 29 (1840); Brisbane v. Stoughton, 17 Ohio, 482 (1848); Turner v. Johnson, 10 Ohio, 204 (1840).

[5] Hewitt v. Templeton, 48 Ill. 367, 370 (1868); Thornton v. Pigg, 24 Mo. 249 (1857); Tappan v. Evans, 11 N. H. 311 (1840); His Majesty's Attorney-Gen. v. Winstanley, 5 Bligh. 130 (1831); Burnell v. Martin, Doug. 417 (1780).

[6] Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294 (1841); Williamson v. Champlin, 8 Paige Ch. (N. Y.) 70 (1839). See N. Y. Code Civ. Proc. § 1628. See *ante* §§ 253, 254.

[7] Downing v. Palmateer, 1 T. B. Mon. (Ky.) 64 (1824); Ely v. Ely, 72 Mass. (6 Gray), 439 (1856); Longworth v. Flagg, 10 Ohio, 300 (1840); Morrison v. Buckner, Hempst. C. C. 442 (1843).

at law and in equity for its recovery at one and the same time, or successively.[1]

§ 265. **Breach of payment of installment—Accelerated maturity of debt.**—The parties to a mortgage may by their contract make the time fixed for the payment of the principal debt, depend upon the prompt payment of the several installments of principal and interest, as they fall due; and may provide either in the note or mortgage that a failure to pay an installment of principal or interest, when it becomes due and payable, shall work a forfeiture of the credit and make the entire debt due at once.[2] Such a stipulation inserted in the mortgage is for the benefit and advantage of the mortgagee or his assignee, and is of full force as to the remedy on the mortgage;[3] but it does not operate to vary or extinguish the agreement expressed on the face of the notes themselves for general purposes.[4]

Where the parties to a mortgage covenant that in case of default in the payment of either principal or interest, the whole of the principal and interest shall become due at the option of the mortgagee, such stipulation should be inserted in both the notes and the mortgage, in order that where there are several notes falling due at different times, the holder of any of them may bring suit to foreclose in case of default.[5]

§ 266. **Failure to pay installment of principal.**—Where money secured by a mortgage is payable in installments, the

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[1] Very v. Watkins, 18 Ark. 546 (1857); Delahay v. Clement, 4 Ill. (3 Scam.) 201 (1840); Slaughter v. Foust, 4 Blackf. (Ind.) 379 (1837); Andrews v. Scotton, 2 Bland Ch. (Md.) 665 (1830); Ely v. Ely, 72 Mass. (6 Gray), 439 (1856); McCall v. Lenox, 9 Serg. & R. (Pa.) 302 (1823); Hughes v. Edwards, 22 U. S. (9 Wheat.) 48 (1824); bk. 6 L. ed. 143. See the cases cited *supra* and in §§ 253, 254 *ante*.

[2] Hoodless v. Reid, 112 Ill. 105 (1885); McClelland v. Bishop, 42 Ohio St. 113, 122 (1884). See also *ante* chap. iii.

[3] Redman v. Purrington, 65 Cal. 271 (1884); McCleliand v. Bishop, 42 Ohio St. 113, 122 (1884).

[4] Morgan v. Martien, 32 Mo. 438 (1862); McClelland v. Bishop, 42 Ohio St. 113, 122 (1884).

[5] McClelland v. Bishop, 42 Ohio St. 113, 123 (1884). See Mallory v. West Shore, H. R. R. R. Co., 35 N. Y. Sup. Ct. (3 J. & S.) 174 (1873), and also Noell v. Gaines, 68 Mo. 649 (1878).

mortgage may be foreclosed for an over-due installment of principal or interest,[1] by entry or by a provisional decree of judgment and sale.[2] And such an action or proceeding will not bar another foreclosure for a subsequent installment;[3] and the mortgage will thus continue in force as to all subsequently maturing contracts.[4]

Where there is a series of negotiable notes in the usual form, for separate sums of money payable at specified times, with a mortgage securing each according to its terms containing a stipulation, that if default be made in the payment of any one of the notes or interest thereon, each and all of them shall become due and payable, and the mortgage shall become absolute as to "said notes remaining unpaid at the happening of such default," such stipulation relates to the remedy of foreclosure by an action or other proceeding under the mortgage, and upon default the mortgage may be foreclosed for the whole debt.[5] Such a covenant in the mortgage also inures to the benefit of the assignee of the mortgage, who may foreclose for the whole debt upon default in the payment of an installment thereof.[6]

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[1] Mussina v. Bartlett, 8 Port. (Ala.) 277 (1838); Gibbons v. Hoag, 95 Ill. 45 (1880); Adams v. Essex, 1 Bibb (Ky.) 149 (1808); s. c. 4 Am. Dec. 623; Pepper v. Dunlap, 16 La. 163 (1840); Salmon v. Clagett, 3 Bland Ch. (Md.) 125 (1833); Watkins v. Hackett, 20 Minn. 106 (1873); Kennedy v. Hammond, 16 Mo. 341 (1852); Noyes v. Barnet, 57 N. H. 605 (1876); Johnson v. Brown, 31 N. H. 405 (1855); American Life Ins. Co. v. Ryerson, 6 N. J. Eq. (2 Halst.) 9 (1846).

[2] Lansing v. Capron, 1 Johns. Ch. (N. Y.) 617 (1815); Robinson v. Wilcox, 2 N.Y. Leg. Obs. 160 (1843); Jones v. Lawrence, 18 Ga. 277 (1855); Hunt v. Harding, 11 Ind. 245 (1858); Eastabrook v. Moulton, 9 Mass. 258 (1812).

[3] Cox v. Wheeler, 7 Paige Ch. (N. Y.) 248 (1838); McDougal v. Downey, 45 Cal. 165 (1872); Wilson v. Hayward, 2 Fla. 27 (1848); Robbins v. Swain, 68 Ill. 197 (1873); Skelton v. Ward, 51 Ind. 46 (1875); Kemerer v. Bournes, 53 Iowa, 172 (1880); Poweshiek County v. Dennison, 36 Iowa, 244 (1873); s. c. 16 Am. Rep. 521; Darrow v. Scullin, 19 Kan. 57 (1877); Hubbard v. Jarrell, 23 Md. 66 (1865); Smith v. Osborn, 33 Mich. 410 (1876); Kimmel v. Willard, 1 Doug. (Mich.) 217 (1843); Fowler v. Johnson, 26 Minn. 338 (1880); Magruder v. Eggleston, 41 Miss. 284 (1866); Buford v. Smith, 7 Mo. 489 (1842); Allen v. Wood, 31 N. J. Eq. (4 Stew.) 103 (1879); West's Appeal, 88 Pa. St. 341 (1879).

[4] Bridgeman v. Johnson, 44 Mich. 491 (1880).

[5] McClelland v. Bishop, 42 Ohio St. 113, 122 (1884).

[6] Redman v. Purrington, 65 Cal. 271 (1884).

In the foreclosure of a mortgage, given to secure the payment of a sum of money in installments, the court may stay proceedings in the action, if the defendant pays the installments due and consents to a decree of foreclosure subject to the future order of the court in case of a subsequent default.[1]

§ 267. Failure to pay installment of interest.—It has been said that a mortgage given as security for the payment of a promissory note with interest, but containing no provision for foreclosure upon the non-payment of interest, can not be foreclosed until the principal sum becomes due;[2] but the better and prevailing opinion is that a mortgage may be foreclosed for interest due on the mortgage note, although the principal of the note may not yet be due.[3] The practice of foreclosing for small installments of interest, however, is condemned as oppressive.[4] While in an action to foreclose, brought for the non-payment of a small balance of interest, the court may dismiss the complaint, it is not, in the absence of any waiver of the default, bound to do so, and its refusal will not be such an error as to authorize a reversal on appeal.[5] Thus, where a debt is made payable at the end of a term of years, with the interest payable annually, a bill to foreclose the mortgage which secures it may be properly filed at the expiration of the first year if the interest is not paid.[6]

Where a mortgage is conditioned for the payment of a certain sum with interest according to the terms of a note,

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[1] Campbell v. Macomb, 4 Johns. Ch. (N. Y.) 534 (1820); Lansing v. Capron, 1 Johns. Ch. (N. Y.) 617 (1815); Robinson v. Wilcox, 2 N. Y. Leg. Obs. 160 (1843); Jones v. Lawrence, 18 Ga. 277 (1855); Stanhope v. Manners, 2 Eden, 197 (1763). See *ante* chap. iii.

[2] Brodribb v. Tibbets, 58 Cal. 6 (1881).

[3] Valentine v. VanWagner, 37 Barb. (N. Y.) 60 (1862); Bank of San Luis Obispo v. Johnson, 53 Cal. 99 (1878); Hunt v. Dohrs, 39 Cal. 304 (1870); Butler v. Blackman, 45 Conn. 159 (1877); Booknau v. Burnet, 49 Iowa, 303 (1878); Stafford v. Maus, 38 Iowa, 133 (1874); Van Doren v. Dickerson, 33 N. J. Eq. (6 Stew.) 388 (1881); Mahn v. Hussey, 28 N. J. Eq. (1 Stew.) 546 (1877); Glass v. Warwick, 40 Pa. St. 140 (1861); s. c. 80 Am. Dec. 566.

[4] Mabie v. Hatinger, 48 Mich. 341 (1882).

[5] House v. Eisenlord, 102 N. Y. 713 (1886).

[6] Dederick v. Barber, 44 Mich. 19 (1880); Scheibe v. Kennedy, 64 Wis. 564 (1885).

to secure which the mortgage was given, the terms of such note will be imported into the mortgage, and a failure to pay the interest, as provided in the note, will constitute a breach of the contract for which the mortgage may be foreclosed.[1] Some of the cases, however, hold that a failure to pay interest as it becomes due, under such a clause in the note or mortgage, authorizes a foreclosure for such interest only, and not for the principal, which is not yet due.[2]

Where a note or bond secured by a mortgage, provides that on default in the payment of the interest thereon for a specified number of days after the same becomes due and payable, the principal shall, at the option of the obligee, become payable after default, and the obligee ratifies several parol extensions of the time for paying the interest made by an agent, a subsequent similar extension will be deemed a waiver of the forfeiture, and an action to foreclose for such interest will not be permitted.[3]

Where a note contains a clause providing that "any interest remaining due and unpaid shall be added monthly to the principal and bear interest at the same rate," and the mortgage securing such note provides that in case default shall be made in the payment of the principal sum or of the interest thereon, or any part thereof, according to the terms of the note, the mortgagee shall be empowered to proceed to sell the mortgaged premises in the manner prescribed by law; the mortgagee will have the right, on default in the monthly payment of interest, to commence an action to foreclose.[4] But such a clause in the mortgage, giving the mortgagee the right to sell in case of default, refers to a default in the payment of interest, not to a default in adding it unpaid to the principal; the right to dispose of the interest due and unpaid in the mode prescribed in the note, is given to the mortgagee and not to the mortgagor; and the mortgagee may delay exercising it, or waive it, but a delay in exercising such right can not be so construed as to deprive him of it.[5]

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[1] Scheibe v. Kennedy, 64 Wis. 564 (1885).

[2] Bank of San Luis Obispo v. Johnson, 53 Cal. 99 (1878).

[3] Bell v. Bomaine, 30 N. J. Eq. (3 Stew.) 24 (1878).

[4] Bricknell v. Batchelder, 62 Cal. 623 (1882).

Where a mortgage provides that upon failure to pay an installment of interest or principal when due, the whole sum shall become due and payable if the mortgagee so elects,[1] a formal notice of election to foreclose the whole debt on failure to pay an installment is unnecessary; a declaration of such election in the complaint will be sufficient.[2]

§ 268. **Equitable mortgage to repay purchase money.** —An instrument designated as a "memoranda of contract," signed by the parties to be charged, recited that the party for whose benefit the instrument was given had advanced the money with which to purchase a certain piece of land, which was described in the instrument, the use and control of which was to be turned over to such party until sold, and when sold the purchase price was to be returned to him with one half of the profit. On the death of the parties purchasing, an action was brought on the contract with a demand in the complaint that the land be ordered sold and that the claim for the purchase money advanced be paid out of the proceeds. The court held that the instrument was an equitable mortgage, and that the plaintiff was entitled to have the land sold to pay the debt evidenced by it. No time having been fixed in which the purchase money was to be repaid, the law required that it should be paid within a reasonable time.[3]

§ 269. **Equitable mortgage by deposit of title deeds.**— In England it has long been held that a deposit of title deeds with a creditor by his debtor is evidence of a valid agreement to give a mortgage, which agreement may be enforced by treating the transaction as an equitable mortgage.[4] Some of the American courts, however, have repudiated this doctrine and refused to recognize this species of mortgage;[5] but in

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[1] Lowenstein v. Phelan, 17 Neb. 429 (1885).

[2] Johnson v. VanVelsor, 43 Mich. 208 (1880). See *ante* chap. iii.

[3] Brown v. Brown, 103 Ind. 23 (1885).

[4] See Stoddard v. Hart, 23 N. Y. 556, 560 (1861).

[5] See Stoddard v. Hart, 23 N. Y. 556, 561 (1861); Berry v. Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603 (1817); Vanmeter v. McFadden, 8 B. Mon. (Ky.) 435 (1848); Shitz v. Dieffenbach, 3 Pa. St. 233 (1846);

[6] Bricknell v. Batchelder, 62 Cal. 623 (1882).

many states such mortgages are valid, although not a common form of security.[1] In those states where equitable mortgages by deposit of title deeds are valid, they may be foreclosed by an equitable action. In New York a mere parol agreement to make a mortgage, or a deposit of a deed, does not create an equitable lien; the doctrine is said to be almost unknown, because there is no practice of creating liens in that manner.[2] It is very questionable whether the doctrine of an equitable mortgage by a deposit of title deeds could be maintained under the New York statutes. It has been held in Tennessee that a mortgage by parol and a deposit of title deeds, is not valid under the statute;[3] and the same doctrine, it seems, prevails in Massachusetts.[4]

§ 270. **Agreement to execute mortgage.**—An agreement to execute a mortgage on land is in equity a specific lien upon such land;[5] and a mortgage thus created, is entitled to preference over subsequent judgments.[6] But the agreement to execute a mortgage must be in writing, the mere advancement of money not being such a part performance as will take the contract out of the statute of frauds.[7]

Bicknell v. Bicknell, 31 Vt. 498 (1859).

[1] See Mounce v. Byars, 16 Ga. 469 (1854); Gothard v. Flynn, 25 Miss. 58 (1852); Gale v. Morris, 29 N. J. Eq. (2 Stew.) 222 (1878); Hackett v. Reynolds, 4 R. I. 512 (1857); Jarvis v. Dutcher, 16 Wis. 307 (1862). See also Chase v. Peck, 21 N. Y. 581, 584 (1860).

[2] Stoddard v. Hart, 23 N. Y. 556, 561 (1861). See Berry v. Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603 (1817).

[3] Meador v. Meador, 3 Heisk. (Tenn.) 562 (1871).

[4] Ahrend v. Odiorne, 118 Mass. 261 (1875).

[5] See Payne v. Wilson, 74 N. Y. 348, 351 (1878); Chase v. Peck, 21 N. Y. 581 (1860); Seymour v. Canandaigua & N. F. R. R. Co., 14 How. (N. Y.) Pr. 531 (1857); White v. Carpenter, 2 Paige Ch. (N. Y.) 217, 264 (1830); *In re* Howe, 1 Paige Ch. (N. Y.) 125, 129, 130 (1828); s. c. 19 Am. Dec. 395; Bloom v. Noggle, 4 Ohio St. 45 (1854).

[6] Payne v. Wilson, 74 N. Y. 348, 352 (1878); Robinson v. Williams, 22 N. Y. 380, 386 (1860); *In re* Howe, 1 Paige Ch. (N. Y.) 125, 129 (1830); s. c. 19 Am. Dec. 395; Rockwell v. Hobby, 2 Sandf. Ch. (N. Y.) 9 (1844).

[7] Marquat v. Marquat, 7 How. (N. Y.) Pr. 417 (1853); Dean v. Anderson, 34 N. J. Eq. (7 Stew.) 496 (1881), and note. There is an exception to this rule where an accident, fraud or mistake is shown, and where, upon the well established principles of equity, such relief would be permissible. See Ray v. Adams, 4 Hun (N. Y.) 332 (1875).

It is a general principle in equity jurisprudence that an agreement in writing to execute a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or an apportionment of specific property to the discharge of a particular debt, will create a mortgage in equity which will have preference over subsequent judgments. This rule is founded on the principle that a court of equity looks upon things agreed to be done as actually performed.[1] An agreement in writing to execute a mortgage will be enforced, where it is plain that the parties intended to impose a charge upon specified lands as a security for the payment of a sum of money; and the agreement will be treated as conferring rights similar to those inherent in mortgages.[2] And this is true also where the parties do not explicitly contract for the giving of a mortgage, but it is manifestly equitable that the land should be charged with the indebtedness.[3]

It has been held that an attempt to execute a mortgage, which fails for want of some of the formalities required by statute, will constitute a valid mortgage in equity,[4] even against judgment creditors.[5] But an instrument in the form of a mortgage, which contains the name of no mortgagee, will not become operative by its delivery to one who advances money upon the agreement that he shall hold the paper as security for his loan.[6] And it is questionable whether such an instrument could be made effectual by parol authority from a mortgagor to insert the lender's name as mortgagee.[7]

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[1] National Bank of Norwalk v. Lanier, 7 Hun (N. Y.) 623 (1876); Burger v. Hughes, 5 Hun (N. Y.) 180 (1875). See Siemon v. Schurck, 29 N. Y. 598 (1864); Wadsworth v. Wendell, 5 Johns. Ch. (N. Y.) 230 (1821); Arnold v. Patrick, 6 Paige Ch. (N. Y.) 310 (1837); White v. Carpenter, 2 Paige Ch. (N. Y.) 217 (1830); Morse v. Faulkner, 1 Anst. 11, 14 (1792); Burn v. Burn, 3 Ves. 582 (1798).

[2] See Chase v. Peck, 21 N. Y. 581 (1860); DePierres v. Thorn, 4 Bosw. (N. Y.) 266 (1859); Stewart v. Hutchins, 6 Hill (N. Y.) 143 (1843); Seymour v. Canandaigua & N. F. R. R. Co., 14 How. (N. Y.) Pr. 531 (1857).

[3] Hoyt v. Doughty, 4 Sandf. (N. Y.) 462 (1851).

[4] Payne v. Wilson, 74 N. Y. 348 (1878).

[5] Delaire v. Keenan, 3 Desaus. (S. C.) Eq. 74 (1809). *Contra*, Price v. Cutts, 29 Ga. 142 (1859).

[6] Chauncey v. Arnold, 24 N. Y. 330 (1862); s. c. 2 Am. L. Reg. 317.

[7] Chauncey v. Arnold, 24 N. Y. 330 (1862); s. c. 2 Am. L. Reg. 317.

§ 271. **Junior mortgagee can not compel foreclosure by senior mortgagee.**—It rests with the holder of a mortgagee to select for himself the time and manner of enforcing his security, so long as he does not prosecute it unlawfully or unjustly as against a subordinate interest.[1] And the principle is well established that a junior mortgagee, in an action to foreclose his mortgage, can not make the prior mortgagee a party to the suit, and compel the foreclosure of such prior mortgage.[2] But the plaintiff may make a prior incumbrancer a party to the suit for the purpose of having the amount of his incumbrance ascertained and paid out of the proceeds.[3] And where a prior mortgagee has been made a party to an action to foreclose by the junior mortgagee, he may in his answer set up the prior mortgage and ask to have it paid in its priority, before any of the proceeds of the sale are applied to the payment of the plaintiff's mortgage; and the court may render judgment to that effect;[4] but it is improper to insert such a clause in the judgment, where it may operate to the prejudice of other defendants who have no opportunity for contesting the priority claimed.[5] The prior mortgagee is not obliged, however, to take this course to protect his rights.[6]

§ 272. **Joinder of actions.**—The Code permits the plaintiff to unite in the same complaint two or more causes of action, whether they are such as have heretofore been denominated legal or equitable, or both, where they arise out of the same transaction, or transactions connected with the same subject matter.[7] Where the plaintiff has other liens upon the property besides his mortgage lien, he may set them out in the complaint and have them established; or

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[1] Adams v. McPartlin, 11 Abb. (N. Y.) N. C. 369 (1882).

[2] Adams v. McPartlin, 11 Abb. (N. Y.) N. C. 369 (1882); McReynolds v. Munns, 2 Keyes (N. Y.) 214 (1865). See Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127 (1878); Frost v. Koon, 30 N. Y. 428 (1864); Corning v. Smith, 6 N. Y. 82 (1851). See *ante* chap. ix.

[3] Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127 (1878).

[4] Doctor v. Smith, 16 Hun (N. Y.) 245 (1878). See *ante* chap. ix.

[5] Payn v. Grant, 23 Hun (N. Y.) 134 (1880).

[6] Payn v. Grant, 23 Hun (N. Y.) 134 (1880).

[7] N. Y. Code Civ. Proc. § 484.

after the sale of the premises he may present and establish a claim to the surplus, the same as any other person holding a lien subsequent to the mortgage.[1]

Where a mortgagee holds two or more mortgages upon the same premises they should both be set out in the complaint and foreclosed in the same action, only one suit to foreclose both being proper; if the mortgagee brings two suits he will be allowed costs in but one of them.[2] And the assignee of two mortgages on the same land executed by the same mortgagor at different times to different mortgagees may unite them in one action to foreclose.[3] So also two mortgages given by different persons to secure the same debt may be foreclosed in one and the same suit.[4] And a single mortgage given to secure two debts may be foreclosed in favor of both creditors in the same action.[5] Only one foreclosure being permissible on a single mortgage to secure different debts due to different creditors, if more than one action is commenced they will be consolidated.[6]

If a person holds two mortgages on the same property to secure different debts, one of which is due, and the other is not due, he may file his complaint for the foreclosure of both mortgages, although the second may not be due, providing it will become due before the decree for the sale of the property is entered; the defendant can not defeat the action as to the second mortgage by tendering the amount due on the first mortgage after the maturity of the second.[7] And where the whole of the junior mortgage has become due and payable, and a part only of the senior mortgage is due, the complainant will be entitled to a decree to sell sufficient of the mortgaged premises to pay the amount of both

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[1] Field v. Hawxhurst, 9 How. (N. Y.) Pr. 75 (1853); Tower v. White, 10 Paige Ch. (N. Y.) 395 (1843).

[2] Roosevelt v. Ellithrop, 10 Paige Ch. (N. Y.) 415 (1843); Demarest v. Berry, 16 N. J. Eq. (1 C. E. Gr.) 481 (1864); Oconto Co. v. Hall, 42 Wis. 59 (1877).

[3] Pierce v. Balkam, 56 Mass. (2 Cush.) 374 (1848).

[4] McGowan v. Branch Bank of Mobile, 7 Ala. 823 (1845).

[5] Chamberlin v. Beck, 68 Ga. 346 (1883).

[6] Benton v. Barnet, 59 N. H. 249 (1879).

[7] Hawkins v. Hill, 15 Cal. 499 (1860); s. c. 76 Am. Dec. 499. See Campbell v. Macomb, 4 Johns. Ch. (N. Y.) 534 (1820).

mortgages, unless the defendant, previous to the sale, pays the junior mortgage and the costs of foreclosure, together with the portion of the senior mortgage which has become due.[1]

Where a mortgagee is the holder of two mortgages upon the same property, but one of them covers only a portion of the premises included in the other, suit should be brought in the first place for the foreclosure of the mortgage covering the entire premises, for an action upon the other mortgage would then be unnecessary.[2] But a person who is the holder of two mortgages upon separate pieces of property securing the same debt, or securing different debts, can not foreclose both of such mortgages in one action.

§ 273. **Consolidation of actions.**—The Code provides, that where two or more actions, in favor of the same plaintiff against the same defendant, for causes of action which may be joined, are pending in the same court, the court may, in its discretion, by order, consolidate any or all of them, into one action.[3] And where one of the actions is pending in the supreme court, and another is pending in another court, the supreme court may, by order, remove to itself the action in the inferior court, and consolidate it with that in the supreme court.[4]

The power of the court to consolidate several actions pending in such court, exists only where it would have been proper to join the several causes of action in the same complaint under the provisions of the Code;[5] even where the power exists the court may, in its discretion, refuse to exercise it. It has been held that the power conferred by these sections of the Code is confined exclusively to the consolidation of actions at law, and is not applicable to cases in equity.[6] It was held, however, under a former statute, that suits in

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[1] Hall v. Bamber, 10 Paige Ch. (N. Y.) 296 (1843).

[2] Demarest v. Berry, 16 N. J. Eq. (1 C. E. Gr.) 481 (1864).

[3] N. Y. Code Civ. Proc. § 817.

[4] N. Y. Code Civ. Proc. § 818.

[5] N. Y. Code Civ. Proc. § 484.

[6] Selkirk v. Wood, 9 N. Y. Civ. Proc. Rep. 141 (1886); Bech v. Ruggles, 6 Abb. (N. Y.) N. C. 69 (1878); Lockwood v. Fox, 8 Daly (N. Y.) 11, 27 (1878); Kipp v. Delamater, 58 How. (N. Y.) Pr. 183 (1879); Grant v. Spencer, Voorhies Code (1864); 336 f.

equity, such as foreclosures of mortgages, may be consolidated as well as actions at law, but that the granting or denying of the application is discretionary.[1]

It has been said, where two actions were brought to foreclose two mortgages on separate adjoining parcels of land, both of which were executed by the defendant to the plaintiff for the same debt, and the parties in both actions were the same and the defences identical, that the actions could not be consolidated;[2] because actions for the foreclosure of mortgages are not actions on contract within the meaning of the Code of Civil Procedure,[3] which provides for the joinder in the same complaint of such actions alone. Foreclosures are actions *in rem* against parcels of land, and such actions can not be consolidated where they do not arise out of the same transaction or subject-matter.[4] But where several notes secured by a single mortgage are held by different parties, if each holder brings a foreclosure suit, the actions may be consolidated.[5]

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[1] Eleventh Ward Savings Bank v. Hay, 55 How. (N. Y.) Pr. 438 (1877).

[2] Selkirk v. Wood, 9 N. Y. Civ. Proc. Rep. 141 (1886).

[3] N. Y. Code Civ. Proc. § 484.

[4] Selkirk v. Wood, 9 N. Y. Civ. Proc. Rep. 141 (1886).

[5] Benton v. Barnet, 59 N. H. 249 (1879).

CHAPTER XIII.

THE COMPLAINT.

§ 274. Form of complaint.
275. Allegation as to claim.
276. Allegation as to title and ownership of mortgage.
277. Allegation of execution and delivery of mortgage.
278. Description of note or bond.
279. Allegation against mortgagor, subsequent purchasers and co-defendants.
280. Complaint under New York practice.
281. Allegation by or against administrator, executor or trustee.
282. Allegation where money due on demand.
283. Allegation as to assignment of mortgage.
284. Allegation on mortgage securing several notes.
285. Allegation as to proceedings at law—Rules in New York and Wisconsin.
286. Allegation where there are infant defendants.
287. Allegation where mortgage collaterally assigned.
§ 288. Allegation as to recording mortgage and subsequent deeds.
289. Allegation to bar dower.
290. Allegation as to defendants' interests.
291. Default in answering by prior incumbrancer.
292. Prayer of complaint.
293. Demand for judgment of deficiency.
294. Allegation for personal judgment against grantee assuming payment.
295. Allegation as to property mortgaged.
296. Referring to mortgage or other instruments for description.
297. Defective description.
298. Allegation as to breach of contract and right of action.
299. Allegation in foreclosure of indemnity mortgage.
300. Allegation as to defendant's interest.
301. Dismissal of complaint on payment before judgment.

§ 274. **Form of complaint.**—The complaint in an action for the foreclosure of a mortgage, in respect to its form and other matters, is regulated by the Code of Civil Procedure.[1] The complaint under the New York Code is the same in substance as the former bill in equity, and must, as in other actions, contain the title of the action, and state in plain and concise language the facts constituting the cause of action, "without unnecessary repetition." It must also contain a demand for the judgment to which the plaintiff believes

[1] N. Y. Code Civ. Proc. § 518, *et seq.*

himself entitled.[1] It is also required that "the complaint, in an action to foreclose a mortgage upon real property, must state, whether any other action has been brought to recover any part of the mortgage debt, and if so, whether any part thereof has been collected."[2]

In an action for foreclosure the mortgage and the bond or note secured thereby must, in some manner, be made a part of the complaint or bill;[3] but if the substance of the mortgage is set out, it will be sufficient.[4] The plaintiff in a suit to foreclose a mortgage can recover upon default only on the cause stated in his complaint or bill;[5] and where a personal judgment is desired for any deficiency that may arise, facts sufficient to support it must be set out in the complaint, and such relief specially demanded.

§ 275. **Allegation as to claim.**—In an action to foreclose a mortgage, the claim which the mortgage was given to secure, and upon which the action is founded, should be fully set out, and it must appear that the debt secured is due and owing to the complainant;[6] if the obligation secured

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[1] N. Y. Code Civ. Proc. § 481. Similar provisions are made by the codes of the various states in which codes of procedure have been adopted. See California Code Civ. Proc. § 426; Dakota Code Civ. Proc. § 111; Florida Code Civ. Proc. § 93; Iowa Code Proc. § 2646; North Carolina Code Civ. Proc. § 93; Ohio Code Civ. Proc. § 85. See also Wa Ching v. Constantine, 1 Idaho (N. S.) 266 (1883).

[2] N. Y. Code Civ. Proc. § 1629; Lovett v. German Reformed Church, 12 Barb. (N. Y.) 67 (1851); North River Bank v. Rogers, 8 Paige Ch. (N. Y.) 649 (1841).

[3] See Whitney v. Buckman, 13 Cal. 536 (1859); Harlan v. Smith, 6 Cal. 173 (1856); Shoaf v. Joray, 86 Ind. 70 (1882); Buck v. Axt, 85 Ind. 512 (1882); Ogborn v. Eliason, 77 Ind. 393 (1881); Hiatt v. Goblt, 18 Ind. 494 (1862); Brown v. Shearon, 17 Ind. 239 (1861); Mickle v. Maxfield, 42 Mich. 304 (1879).

[4] Emeric v. Tams, 6 Cal. 155 (1856); Ætna Life Ins. Co. v. Finch, 84 Ind. 301 (1882); Sturgeon v. Board of Commissioners, 65 Ind. 302 (1879); Cecil v. Dynes, 2 Ind. 266 (1850).

[5] See Simonson v. Blake, 12 Abb. (N. Y.) Pr. 331 (1861); s. c. 20 How. (N. Y.) Pr. 484; Shoaf v. Joray, 86 Ind. 70 (1882); Knowles v. Rablin, 20 Iowa, 101 (1865); Hansford v. Holdam, 14 Bush (Ky.) 210 (1878); Converse v. Blumrich, 14 Mich. 109 (1866).

[6] See Cornelius v. Halsey, 11 N. J. Eq. (3 Stockt.) 27 (1855). But see Chesterman v. Eyland, 81 N. Y. 401 (1880); Brown v. Kahnweiler, 28 N. J. Eq. (12 C. E. Gr.) 311 (1877).

is a bond, default in the performance of its conditions must be shown.[1] Where the complainant is the assignee of the claim, the assignment of the note and mortgage should be averred, but it is not necessary to set out a copy of the assignment,[2] because under such an averment the complainant may prove an indorsement, and the transfer and delivery of the note and mortgage to him in that manner.[3]

Whatever can be claimed by virtue of the mortgage must be set out in the complaint in foreclosure, for a demand can not be split and made the basis of separate suits.[4] In those cases, however, where the indebtedness is not the foundation of the action, it need not be separately described.[5] Where there is a stipulation in a mortgage for the payment of taxes and assessments, the complaint in foreclosure must set forth the amount of taxes and assessments paid by the plaintiff for which judgment will be asked.[6] If any payments have been indorsed upon the mortgage, they should be fully set out in the complaint, because where no reference is made to them the averments can not be aided by proof of such indorsements.[7]

§ 276. **Allegation as to title and ownership of mortgage.**—In a complaint to foreclose a mortgage, the plaintiff should show ownership of it either as mortgagee, assignee or otherwise. It is not necessary to aver in so many words that the defendant has title to the mortgaged premises; it is sufficient to aver the making of the mortgage;[8] neither is it necessary to anticipate any defence.[9] A complaint by A. in

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[1] Coulter v. Bower, 64 How. (N. Y.) Pr. 132 (1882).

[2] See Green v. Marble, 37 Iowa, 95 (1873); Barthol v. Blakin, 34 Iowa, 452 (1872); Nichol v. Henry, 89 Ind. 54 (1883); Kurtz v. Sponable, 6 Kan. 395 (1870); Andrews v. McDaniel, 68 N. C. 385 (1873).

[3] Mundy v. Whittemore, 15 Neb. 647 (1884).

[4] Vincent v. Moore, 51 Mich. 618 (1883).

[5] Risk v. Hoffman, 69 Ind. 138 (1879).

[6] Hibernia Savings and Loan Society v. Conlin, 67 Cal. 178 (1885).

[7] Nichol v. Henry, 89 Ind. 54 (1883).

[8] Bull v. Meloney, 27 Conn. 560 (1858); Frink v. Branch, 16 Conn. 260, 268 (1844).

[9] Frink v. Branch, 16 Conn. 260, 268 (1844); Palmer v. Mead, 7 Conn. 149, 157 (1828); Spear v. Hadden, 31 Mich. 265 (1875); Cornelius v. Halsey, 11 N. J. Eq. (3 Stockt.) 27 (1855).

the usual form, to foreclose a mortgage given to A. and B. to secure a note payable to A., is not bad for want of sufficient allegations, because, if objectionable at all, it is for want ot proper parties plaintiff.[1] In an action to foreclose a mortgage given to secure the performance of the conditions of a bond, one of which conditions was that the obligor should pay the sum for which a note had previously been given to the plaintiff, it is not necessary to allege in the complaint that the plaintiff is still the holder of the note.[2]

The statute of Vermont providing for foreclosure by petition does not require the fullness required in a bill. A general and comprehensive statement of facts, constituting the ground of right and liability, is sufficient. Thus, where a petition for foreclosure by an assignee of a mortgage, after alleging the assignment to the petitioner and delivery to him of the note and mortgage, alleged that the note and mortgage had ever since been and still were his property, and that he was the holder, owner and bearer of the note, it was held that there was a sufficient allegation of title to present it for litigation on answer.[3]

Where by a clerical error the name of the mortgagee is incorrectly given in the mortgage and in the notes secured thereby, it is not necessary to set out such error in the complaint and to ask to have the instrument reformed, because the mistake may be explained by evidence or disregarded as immaterial.[4]

§ 277. **Allegation of execution and delivery of mortgage.**—The complaint should show the execution and delivery of the mortgage,[5] its date and the amount due thereon, the parties to it and the place of record,[6] together with a description of the premises mortgaged. An allegation that

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[1] Chrisman v. Chenoweth, 81 Ind. 401 (1882).

[2] Matteson v. Matteson, 55 Wis. 450 (1882).

[3] Sprague v. Rockwell, 51 Vt. 401 (1879).

[4] Germantown Farmers' Mut. Ins. Co. v. Dhein, 57 Wis. 521 (1883).

[5] See Bull v. Meloney, 27 Conn. 560 (1858); Frink v. Branch, 16 Conn. 260, 268 (1844).

[6] It has been held that the complaint should allege that the mortgage was properly recorded at the proper office; Magee v. Sanderson, 10 Ind. 261 (1858); but that a failure

the defendant executed the instrument sued upon, setting it out in full, is equivalent to an allegation that he made all the covenants and promises therein contained, and assumed all the liabilities thereby created.[1] And it has been held that an allegation in a complaint to foreclose, that the defendant "made, executed, acknowledged and delivered a certain deed of mortgage," is sufficient and can only be construed to mean that the mortgage was properly made and valid in its operation;[2] but that an allegation that "the defendant gave a mortgage" is simply a conclusion of law. If the mortgage is not set out in, or made a part of, the complaint, it will be insufficient to authorize a decree for the sale of the premises upon default in answering.[3]

In an action by a mortgagee, against the mortgagor and a subsequent purchaser, to foreclose a mortgage on real estate, the complaint alleged that the mortgage had been duly executed and recorded, setting out a copy of the mortgage, which did not show a certificate of acknowledgment. On demurrer it was held that the acknowledgment was no part of the cause of action, and a copy thereof was not necessary, and that the reasonable inference from the averments of the complaint was, that the mortgage had been duly acknowledged. If such was not the case, the want of an acknowledgment should have been set up affirmatively as a defence.[4]

§ 278. **Description of note or bond.**—If a bond has been given with the mortgage, it should be briefly set out in the complaint, together with the terms and conditions of both instruments. If the note set out in the complaint does not correspond with that described in the mortgage, but the complaint shows that this is a mere error in description, and that the mortgage was designed to secure the note described

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to allege such recording of the mortgage will be cured by proof thereof at the trial without objection; Lyon v. Perry, 14 Ind. 515 (1860).

[1] Budd v. Kramer, 14 Kan. 101 (1874).

[2] Moore v. Titman, 33 Ill. 358 (1864); McAllister v. Plant, 54 Miss. 106 (1876).

[3] Hussey v. Hussey, 1 Utah, 241 (1875).

[4] Sturgeon v. Board of Commissioners, 65 Ind. 302 (1879).

in such complaint, it states a good cause of action.[1] And where the note secured by the mortgage is imperfectly described in the complaint, if such note be filed with the complaint, and alleged to be the note which the mortgage was given to secure, and this allegation is proved on the trial, the defective description will thereby be cured.[2] Where the variance between the note described in the mortgage and the note introduced in the suit is not due to a misdescription, but only to an imperfect description, the note will be sufficiently identified,[3] and such variance will be no objection to the introduction of the note in evidence.[4]

The note or bond and the mortgage securing the same, are usually made parts of the complaint in some manner. Copies of them may be set out in the complaint or annexed thereto. It is not sufficient merely to file the originals or copies thereof with the complaint without referring to them and making them a part of it;[5] it will be sufficient, however, if the bill sets out the substance of the mortgage debt;[6] it should show that the mortgage was executed for a valuable consideration,[7] although it is not necessary that there be literal exactness in describing the debt secured. A statement that the mortgage was given to secure notes amounting to a specified sum, drawing a certain named interest, and held by designated individuals, upon which notes persons named are sureties, has been said to be a sufficient description.[8] And where the plaintiffs have a joint or a several interest in the money advanced upon the mortgage, that fact should be alleged in the complaint and the decree should be made to

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[1] Dorsch v. Rosenthall, 39 Ind. 209 (1872); Merchants' Nat. Bank v. Raymond, 27 Wis. 567 (1871).

[2] Cleavenger v. Beath, 53 Ind. 172 (1876). See Hadley v. Chapin, 11 Paige Ch. (N. Y.) 245 (1844).

[3] Boyd v. Parker, 43 Md. 182 (1875).

[4] Hough v. Bailey, 32 Conn. 288 (1864).

[5] Brown v. Shearon, 17 Ind. 239 (1861). See Dumell v. Terstegge, 23 Ind. 397 (1864); Hiatt v. Goblt, 18 Ind. 494 (1862); Triplett v. Sayre, 3 Dana (Ky.) 590 (1835); Harlan v. Murrell, 3 Dana (Ky.) 180 (1835).

[6] Cecil v. Dynes, 2 Ind. 266 (1850).

[7] Withers v. Little, 56 Cal. 370 (1880).

[8] Ætna Life Ins. Co. v. Finch, 84 Ind. 301 (1882). See Ogborn v. Eliason, 77 Ind. 393 (1881).

conform therewith.[1] So, where a mortgage describes the note it secures by giving the date, the amount, the time of payment, and the rate of interest thereof, it seems that such description in the complaint will be sufficient without giving the name of the maker.[2] But a failure to set out the note or bond and the mortgage properly in the complaint, is a defect which will be cured by the verdict of a jury or the findings of a court.[3]

§ 279. **Allegation against mortgagor, subsequent purchasers and co-defendants.**—In a suit against the mortgagor alone, the complaint need not allege that such mortgagor has not conveyed the land, or that the mortgage has been duly acknowledged and recorded;[4] neither is it necessary to allege title to the mortgage, for the mortgagor is estopped as to title, as the only purpose of the action is to foreclose.[5] But where an action in foreclosure is brought against a subsequent purchaser of the fee, if the complaint fails to allege either that the mortgage was on record at the time of the defendant's purchase, or that he had actual notice of such mortgage, it will be defective,[6] unless it is averred that such subsequent purchaser assumed and agreed to pay the mortgage debt as a part of the purchase money.[7] In a foreclosure against a subsequent purchaser, a failure to allege the recording of the mortgage will be cured by proof thereof at the hearing without objection.[8]

Where in an action to foreclose a mortgage parties other than the mortgagor or his grantee are made co-defendants, if the complaint contains an allegation that such co-defendants

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[1] Higgs v. Hanson, 13 Nev. 356 (1878).

[2] Ogborn v. Eliason, 77 Ind. 393 (1881).

[3] Martin v. Holland, 87 Ind. 105 (1882); Galvin v. Woollen, 66 Ind. 464 (1879).

[4] St. Marks Ins. Co. v. Harris, 13 How. (N. Y.) Pr. 95 (1856): Martens v. Rawdon, 78 Ind. 85 (1881); Snyder v. Bunnell, 64 Ind. 403 (1878); Perdue v. Aldridge, 19 Ind. 290 (1862); Culph v. Phillips, 17 Ind. 209 (1861).

[5] Shed v. Garfield, 5 Vt. 39 (1838).

[6] Peru Bridge Co. v. Hendricks, 18 Ind. 11 (1862).

[7] Scarry v. Eldridge, 63 Ind. 44 (1878).

[8] Lyon v. Perry, 14 Ind. 515 (1860). See Martens v. Rawdon, 78 Ind. 85 (1881); Faulkner v. Overturf, 49 Ind. 265 (1874)

have or claim to have some interest in or lien upon the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage, a cause of action will be sufficiently stated without averring the character of the interests claimed.[1] But a mere averment in a complaint to foreclose against a person other than the mortgagor, that "he is now the owner of the land," has been held not to be sufficient to show that the mortgage constitutes a lien upon the land as against him, because he may have acquired title to the land by purchase before the mortgage was executed.[2] Where any of the defendants are infants, the complaint should allege the requisite facts to show the interests of such defendants.[3]

An allegation in a complaint that a mortgagor was seized or pretended to be seized in fee simple of the land when he executed the mortgage, is held a sufficient allegation that he was in possession.[4] And where the complaint to foreclose does not state the real consideration for, or the exact amount due upon, the mortgage, a decree of foreclosure will be authorized, although the proofs may show a less sum to be due than that which was claimed, or a state of facts not averred in the complaint, if the facts shown are not incompatible with the allegations in the complaint.[5]

§ 280. **Complaint under New York practice.**—Under the rules prescribed by the New York Code of Civil Procedure the facts constituting the cause of action, and not the evidence of the facts, should be stated in the complaint.[6] Under this rule it is improper to set out the mortgage and

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[1] Frost v. Koon, 30 N. Y. 428, 448 (1864); Drury v. Clark, 16 How. (N. Y.) Pr. 424 (1857); Anthony v. Nye, 30 Cal. 401 (1866); Poett v. Stearns, 28 Cal. 226 (1865); Woodworth v. Zimmerman, 92 Ind. 349 (1883); Marot v. Germania Assoc., 54 Ind. 37 (1876); Bowen v. Wood, 35 Ind. 268 (1871); Case v. Bartholow, 21 Kan. 300 (1878); Nooner v. Short, 20 Kan. 624 (1878); Seager v. Burns, 4 Minn. 141 (1860); Rice v. Hall, 41 Wis. 453 (1877).

[2] Nichol v. Henry, 89 Ind. 54 (1883).

[3] Aldrich v. Lapham, 6 How. (N. Y.) Pr. 129 (1850); s. c. 1 Code Rep. (N. S.) 408. See *post* § 286.

[4] Holman v. Bank of Norfolk, 12 Ala. 369 (1847).

[5] Collins v. Carlile, 13 Ill. 254 (1851).

[6] Floyd v. Dearborn, 2 N. Y. Code Rep. 17 (1849). See N. Y. Code Civ. Proc. § 481.

the bond or note it secures at length; and while the bond and mortgage should be correctly described in the complaint, a merely technical variance will be disregarded.[1] The breach of condition, which gives the right to foreclose the mortgage, as well as the amount of the plaintiff's debt due, must be fully alleged.[2] The assignment of a mortgage, which was executed without a bond or note, passes the title to the debt; and the complaint in an action to foreclose such a mortgage will be sufficient, if it alleges that the mortgage was given to secure the mortgage debt and sets out the conditions of the mortgage and its assignment to the plaintiff.[3]

§ 281. **Allegation by or against administrator, executor or trustee.**—The complaint in an action against an executor to enforce the lien of a mortgage executed by his decedent, need not aver that notice has been given to the creditors of the deceased, but it must aver that the mortgage claim has been duly presented to the administrator for allowance.[4] Where the mortgage sought to be foreclosed purports to be executed by an executor and trustee in his representative capacity,[5] the complaint need not allege that the defendant was in fact such executor and trustee, nor the facts relating to his appointment and authority to execute the mortgage,[6] because such executor and his grantees are estopped from denying his appointment and authority.[7]

But the rule is different where one sues as executor or administrator, in which case he must set forth in full his appointment and authority to bring the foreclosure.[8]

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[1] See Hadley v. Champin, 11 Paige Ch. (N. Y.) 245 (1844).

[2] Second American Building Association v. Platt, 5 Duer (N. Y.) 675 (1856); Cornelius v. Halsey, 11 N. J. Eq. (3 Stockt.) 27 (1855).

[3] Severance v. Griffith, 2 Lans. (N. Y.) 38 (1870). See Coleman v. Van Rensselaer, 44 How. (N. Y.) Pr. 368 (1873); Caryl v. Williams, 7 Lans. (N. Y.) 416 (1873).

[4] Harp v. Calahan, 46 Cal. 222 (1873).

[5] Kingsland v. Stokes, 25 Hun (N. Y.) 107 (1881).

[6] White v. Joy, 13 N. Y. 87 (1855); Skelton v. Scott, 18 Hun (N. Y.) 375 (1879).

[7] Tefft v. Munson, 57 N. Y. 97 (1874); Kingsland v. Stokes, 25 Hun (N. Y.) 107 (1881); Skelton v. Scott, 18 Hun (N. Y.) 375 (1879); Jackson v. Parkhurst, 9 Wend. (N. Y.) 209 (1832).

[8] Kingsland v. Stokes, 58 How. (N. Y.) Pr. 1 (1879); s. c. aff'd 25 Hun

§ 282. **Allegation where money due on demand.**—In a complaint to foreclose a mortgage securing a note payable on demand generally, and not at a particular place, the mortgagee, having a right to foreclose the mortgage at any time,[1] need not allege a previous demand before commencement of the suit; the filing of the complaint is a sufficient demand.[2]

It is well settled where a demand note is made payable at a particular place and secured by mortgage, that in an action to foreclose such mortgage, it is not necessary to make or allege a demand of payment at the place designated for payment.[3] This rule is based upon the principle that where

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(N. Y.) 107 (1881); 61 How. (N. Y.) Pr. 494. See also White v. Joy, 13 N. Y. 83 (1855); Peck v. Mallams, 10 N. Y. 509 (1853); Forrest v. Mayor of N. Y., 13 Abb. (N. Y.) Pr. 350 (1861); Wheeler v. Dakin, 12 How. (N. Y.) Pr. 537 (1856); Sheldon v. Hoy, 11 How. (N. Y.) Pr. 11 (1855); Beach v. King, 17 Wend. (N. Y.) 197 (1837). As to forms in pleading by an executor, see Moir v. Dodson, 14 Wis. 279 (1861).

[1] Wright v. Shumway, 1 Biss. C. C. 23 (1853); s. c. 2 Am. L. Reg. (O. S.) 20.

[2] Haxtun v. Bishop, 3 Wend. (N. Y.) 13 (1829). See Locklin v. Moore, 57 N. Y. 360 (1874); Gillett v. Balcolm, 6 Barb. (N. Y.) 370 (1849); Harris v. Mulock, 9 How. (N. Y.) Pr. 402 (1853); Bank of Niagara v. McCracken, 18 Johns. (N. Y.) 493 (1821); Gammon v. Everett, 25 Me. 66 (1845); s. c. 43 Am. Dec. 255; McKenney v. Whipple, 21 Me. 98 (1842); Bryant v. Damariscotta Bank, 18 Me. 241 (1841); State Bank v. VanHorn, 4 N. J. L. (1 South.) 382 (1817); Union Cent. Life Ins. Co. v. Curtis, 35 Ohio St. 343, 357 (1880); Smith v. Bythewood, Rice (S. C.) L. 245 (1839); s. c. 33 Am. Dec. 111; Rumball v. Ball, 10 Mod. 38 (1712). See also Henley v. Bush, 33 Ala. 636 (1859); Niemeyer v. Brooks, 44 Ill. 77 (1867); Pennington v. Clifton, 10 Ind. 172 (1858); Ross v. Lafayette & I. R. Co., 6 Ind. 297 (1855); Wood v. Barstow, 27 Mass. (10 Pick.) 368 (1830); Holden v. Eaton, 24 Mass. (7 Pick.) 15 (1828); Lent v. Padelford, 10 Mass. 230 (1813); s. c. 6 Am. Dec. 119; Watson v. Walker, 23 N. H. (3 Fost.) 471 (1851); Thurston v. Wolfborough Bank, 18 N.H. 391 (1846); s.c. 45 Am. Dec. 382; Darling v. Wooster, 9 Ohio St. 517 (1859); Hill v. Henry, 17 Ohio, 9 (1848); White v. Swift, 1 Cr. C. C. 442 (1807); Wyman v. Fowler, 3 McL. C. C. 467 (1844).

[3] See Wolcott v. VanSantvoord, 17 Johns. (N. Y.) 248 (1819); s. c. 8 Am. Dec. 396; Foden v. Sharp, 4 Johns. (N. Y.) 183 (1809); Haxtun v. Bishop, 3 Wend. (N. Y.) 13 (1829); Butterfield v. Kinzie, 2 Ill. (1 Scam.) 445 (1837); Gammon v. Everett, 25 Me. 66 (1845); s. c. 43 Am. Dec. 255; Bacon v. Dyer, 12 Me. (3 Fairf.) 19 (1835); Carley v. Vance, 17 Mass. 389 (1821); Washington v. Planters' Bank, 2 Miss. (1 How.) 230 (1835); s. c. 28 Am. Dec. 333; Eastman v. Fifield, 3 N. H. 333 (1826); s. c. 14 Am. Dec. 371; Adams v. Hackensack Improvement Co., 44 N. J. L. (15 Vr.) 638 (1882); s. c. 43

money is made payable by the agreement of the parties, upon demand, or at a specified time at a particular place, a demand at the time or place, prior to the commencement of the suit, is not necessary. The commencement of the suit is itself a sufficient demand.[1] But where the defendant was at the place designated, and was ready and offered to pay the money, he may plead such fact in exoneration of interest and the costs of the suit, provided he makes his tender good by payment of the amount of the debt into court.[2]

§ 283. **Allegation as to assignment of mortgage.**— Where the assignee of a mortgage brings an action for foreclosure he should set out in the complaint all the assignments thereof. A mere allegation, "that the plaintiff, by several mesne assignments, is the owner and holder of the note and mortgage," without other allegations showing title in the plaintiff, is defective, because it does not sufficiently show the assignments of the mortgage.[3] Where a complaint

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Am. Rep. 406; Wallace v. McConnel, 38 U. S. (13 Pet.) 136 (1839); bk. 10 L. ed. 95; Bank of United States v. Smith, 24 U. S. (11 Wheat.) 171 (1836); bk. 6 L. ed. 443; Nicholls v. Bowes, 2 Campb. 498 (1810); Lyons v. Sundius, 1 Campb. 423 (1808).

[1] Locklin v. Moore, 57 N. Y. 360 (1874); Hills v. Place, 48 N. Y. 520 (1872); Caldwell v. Cassidy, 8 Cow. (N. Y.) 271 (1828); Nelson v. Bostwick, 5 Hill (N. Y.) 37 (1843); Wolcott v. VanSantvoord, 17 Johns. (N. Y.) 248 (1819); s. c. 8 Am. Dec. 396; Haxtun v. Bishop, 3 Wend. (N. Y.) 13, 15 (1829); Watkins v. Crouch, 5 Leigh (Va.) 522 (1834).

[2] Adams v. Hackensack Improvement Co., 44 N. J. L. (15 Vr.) 638 (1882); s. c. 43 Am. Rep. 406. See also Caldwell v. Cassidy, 8 Cow. (N. Y.) 271 (1828); Haxtun v. Bishop, 3 Wend. (N. Y.) 13 (1829); Wood v. Merchants' Saving, Loan and Trust Co., 41 Ill. 267 (1866); s. c. 1 Am. Lead. Cas. 478; Carley v. Vance, 17 Mass. 389 (1821); Ward v. Smith, 74 U. S. (7 Wall.) 447 (1868); bk. 19 L. ed. 207. See *ante* § 39.

[3] See Rose v. Meyer, 7 N. Y. Civ. Proc. Rep. 219 (1885); s. c. 1 How. (N. Y.) Pr. N. S. 274; Thomas v. Desmond, 12 How. (N. Y.) Pr. 321 (1855); Pattie v. Wilson, 25 Kan. 326 (1881); Lashbrooks v. Hatheway, 52 Mich. 124 (1883); Denton v. Cole, 30 N. J. Eq. (3 Stew.) 244 (1878). It is held in some cases that in an action by the assignee to foreclose a mortgage, it is not necessary to set out the assignments whereby he acquired the title to the instrument, and that it is sufficient to allege in the complaint that the plaintiff is the assignee; Ercanbrack v. Rich, 2 Chand. (Wis.) 100 (1850); s. c. 2 Pin. (Wis.) 441. Yet it has been said that a complaint by an assignee to foreclose a mortgage, which merely avers that the mortgage was endorsed to him, without stating by whom, is not

sets forth the indebtedness of the defendants to the complainant's assignor for the purchase money of lands, and the execution by them of a mortgage to secure the payment thereof in installments, and its assignment to the plaintiff, it sufficiently shows the plaintiff to be the owner of the mortgage debt and entitled to maintain an action to foreclose.[1] It has also been held, where the assignee of a mortgage files a complaint for foreclosure, alleging that the debt is due and owing to him and that he is ready to produce the note or obligation, which is the evidence of the debt the mortgage was given to secure, that this is sufficient without stating that the note or obligation has been assigned to the plaintiff.[2]

As a mortgage given to secure a note, is regarded as an incident thereto, and passes with every transfer of such note without a specific assignment of the mortgage, it is not necessary to aver an assignment of such mortgage in a foreclosure thereof.[3] The complaint need not aver the record of the assignment,[4] because the record of such assignment is not necessary to the validity of the plaintiff's claim.[5] The fact that the assignee holds the mortgage merely as a collateral security, does not affect his right to recover; it simply limits his interest in the proceeds of the sale.[6] A mortgage given to indemnify the mortgagee against a contingent liability is assignable, and an action thereon may be maintained by

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good as against a demurrer for defect of parties, because the mortgagee is not made a defendant; Nichol v. Henry, 89 Ind. 54 (1883).

[1] Severance v. Griffith, 2 Lans. (N. Y.) 38 (1870). See also Ercanbrack v. Rich, 2 Chand. (Wis.) 100 (1850); s. c. 2 Pin. (Wis.) 441.

[2] Cornelius v. Halsey, 11 N. J. Eq. (3 Stockt.) 27 (1855). See Buckner v. Sessions, 27 Ark. 219 (1871); Babbitt v. Bowen, 32 Vt. 437 (1859).

[3] Johnson v. Johnson, 81 Mo. 331 (1884); Ord v. McKee, 5 Cal. 515 (1855). See Koch v. Briggs, 14 Cal. 256 (1859); s. c. 73 Am. Dec. 651; Haffley v. Maier, 13 Cal. 13 (1859); McMillan v. Richards, 9 Cal. 365 (1858); s. c. 70 Am. Dec. 655; Bennett v. Solomon, 6 Cal. 134 (1856). See Hagerman v. Sutton, 91 Mo. 519 (1887); Bell v. Simpson, 75 Mo. 485 (1882); Child v. Singleton, 15 Nev. 461 (1880). The indorsement without recourse of a note secured by a deed of trust, carries with it the trust deed as a security; Bell v. Simpson, 75 Mo. 485 (1882).

[4] King v. Harrington, 2 Aik. (Vt.) 33 (1826).

[5] Fryer v. Rockefeller, 63 N. Y. 268 (1875).

[6] McKinney v. Miller, 19 Mich 142 (1869).

the assignee, in his own name, upon the accruing of such liability.[1]

Where upon the settlement of an estate the residue consists in part of a note and mortgage, it may be assigned in that form to the persons entitled thereto.[2] The assignment will have the effect of an order of distribution, and transfer the title to the persons named, and they may foreclose the mortgage.[3]

§ 284. Allegation on mortgage securing several notes. —A mortgage constitutes a single cause of action, however many notes or installments it may secure.[4] It is said that in an action to foreclose such a mortgage, it is proper to embrace in a single paragraph of the complaint the mortgage and all the notes secured by it; and if a copy of one note only is given, the complaint will nevertheless be good upon demurrer.[5] The joinder, in one paragraph of the complaint, of several matured and unmatured promissory notes, secured by a mortgage on real estate, in an action on the notes and to foreclose the mortgage, is not an error that can be taken advantage of after judgment.[6]

Where the holder of one of several notes secured by a mortgage, brings an action to foreclose for the payment of his note alone, he should state in his complaint whether the other notes have been paid, and if they have not been paid, he should give the names of the persons by whom they are held and the time when they mature, in order that the rights of such holders of other notes may be determined and protected by the court.[7] The foreclosure of such a mortgage by the holder of one note will not be a bar to a separate action and decree by the holder of other notes.[8] And it has been said, where a person holds all of the notes secured by a

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[1] Carper v. Munger, 62 Ind. 481 (1878).

[2] See Ind. Rev. Stat. §§ 3940, 3942.

[3] Ford v. Smith, 60 Wis. 222 (1884).

[4] Hannon v. Hilliard, 101 Ind. 310 (1884).

[5] Buck v. Axt, 85 Ind. 512 (1882).

[6] Firestone v. Klick, 67 Ind. 309 (1879).

[7] Hartwell v. Blocker, 6 Ala. 581 (1844); Levert v. Redwood, 9 Port. (Ala.) 79 (1839).

[8] Moffitt v. Roche, 76 Ind. 75 (1881).

mortgage, that he will not be obliged to foreclose for all of them; but that he may enter a decree of foreclosure as to part of them, and recover in a suit at law on the others.[1]

Where a plaintiff holds several notes secured by the same mortgage, only a portion of which are due, he should ask in his complaint that so much of the debt as may become due before the final decree shall be entered in the case, shall be included in such decree.[2] It will be error to adjudge in favor of the plaintiff the foreclosure of a mortgage for the payment of a note which matures after the filing of the complaint, without some foundation being laid in the pleadings therefor.[3]

An action can not be commenced to foreclose a mortgage securing several notes where none of them are yet due;[4] but where one or more are due and an action has been properly commenced, additional relief may be had under the decree for rights that may accrue after the commencement of the action.[5]

§ 285. Allegation as to proceedings at law—Rules in New York and Wisconsin.—The New York Code of Civil Procedure requires that the complaint in an action to foreclose a mortgage upon real property, must state whether any other action has been brought to recover any part of the mortgage debt, and if such an action has been brought, whether any part thereof has been collected;[6] and that "where final judgment for the plaintiff has been rendered, in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued, upon the judgment, to the sheriff of the county where he resides, if he resides within the state, or, if he resides without the state, to the sheriff of the county where the judgment

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[1] Langdon v. Paul, 20 Vt. 217 (1848).

[2] Malcolm v. Allen, 49 N. Y. 448 (1872); Williams v. Creswell, 51 Miss. 817 (1876).

[3] Williams v. Creswell, 51 Miss. 817 (1876).

[4] McCollough v. Colby, 4 Bosw. (N. Y.) 603 (1859).

[5] Bostwick v. Menck, 8 Abb. (N. Y.) Pr. N. S. 169 (1869); Candler v. Pettit, 1 Paige Ch. (N. Y.) 168 (1828).

[6] N. Y. Code Civ. Proc. § 1629.

roll is filed; and has been returned wholly or partly unsatisfied."[1] An averment in a petition that no other proceedings have been had for the recovery of the debt secured by the mortgage, is a sufficient allegation to show that no action at law has been commenced.[2]

Where proceedings have been instituted for the collection of the debt, independent of the action for foreclosure, the complaint should state what those proceedings were and against whom instituted; and should show further that such proceedings have been discontinued, or that the remedy thereby has been exhausted.[3] But the proceedings to foreclose a mortgage will not be stayed because a suit at law has been commenced upon the bond, even though it appears that such suit has not been discontinued.[4] If it appears from the complaint in a foreclosure suit that judgment has been recovered for the mortgage debt, or that the mortgage was given as collateral security for the payment of a note which was already in judgment, the plaintiff must show that he has exhausted his remedy at law upon the judgment; otherwise the defendant in the foreclosure suit may demur to the complaint, or may raise the objection by his answer.[5]

The Wisconsin doctrine, however, would seem to be that a bill to foreclose a mortgage, which states that no proceedings have been had to collect the debt, will be held good on demurrer for failure to state what part of the debt has been collected, because an allegation in that behalf is necessary only where proceedings have been had at law.[6] In this case the bill stated that the bond and collateral mortgage had been, for a valuable consideration, assigned to the complainant, and were held and owned by him. The court say:

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[1] N. Y. Code Civ. Proc. § 1630.

[2] Mundy v. Whittemore, 15 Neb. 647 (1884).

[3] Lovett v. German Reform Church, 12 Barb. (N. Y.) 67 (1851); Williamson v. Champlin, Clarke Ch. (N. Y.) 9 (1839); Pattison v. Powers, 4 Paige Ch. (N. Y.) 549 (1834).

[4] Williamson v. Champlin, Clarke Ch. (N. Y.) 9 (1839).

[5] Lovett v. German Reform Church, 12 Barb. (N. Y.) 67 (1851); Shufelt v. Shufelt, 9 Paige Ch. (N. Y.) 137 (1841); s. c. 37 Am. Dec. 389; North River Bank v. Rogers, 8 Paige Ch. (N. Y.) 648 (1841).

[6] Ercanbrack v. Rich, 2 Chand. (Wis.) 100 (1850); s. c. 2 Pin. (Wis.) 441.

"This was enough to entitle him to sue. He was not bound to set forth the evidence of his right. The objection that it does not appear, that no part of the debt has been collected, is not applicable, as the bill states that no proceedings had been had at law, and it is only when such proceedings have been had, that it is necessary to show what has been collected."[1]

§ 286. Allegation where there are infant defendants.—In an action to foreclose a mortgage, where some of the defendants are infants, the complaint must allege the requisite facts to show what the interests of such infant defendants in the premises are; and the facts entitling the complainant to a judgment for foreclosure and sale must be set up in the complaint and established by the proof, because they are never deemed admitted where there are infant defendants.[2]

§ 287. Allegation where mortgage collaterally assigned.—In the foreclosure of a mortgage by a plaintiff to whom the mortgage has been assigned as collateral security, the complaint should set forth all the circumstances of such assignment and the respective interests of all parties; and in case of the sale of the mortgagee's interest in such action, the surplus, if any remains after satisfying the interest of the plaintiff, must be refunded to the mortgagee.[3] Any arrangement between the mortgagor and the collateral assignee of the mortgage, to discharge the mortgage of record to the injury of the mortgagee, will be void as to him, and he will be entitled to recover the balance of the mortgage debt due him after deducting the amount for which the mortgage was pledged.[4] The foreclosure of the mortgage by the

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[1] Ercanbrack v. Rich, 2 Chand. (Wis.) 100 (1850); s. c. 2 Pin. (Wis.) 441.

[2] Aldrich v. Lapham, 6 How. (N. Y.) Pr. 129 (1850); s. c. 1 N. Y. Code Rep. N. S. 408. See also Livingston v. Tanner, 12 Barb. (N. Y.) 481 (1852).

[3] See Johnson v. Blydenburgh, 31 N. Y. 427 (1865); Henry v. Davis, 7 Johns. Ch. (N. Y.) 40 (1823); s. c. aff'd in Clark v. Henry, 2 Cow. (N. Y.) 324 (1823); Coffin v. Loring, 91 Mass. (9 Allen), 154 (1864); Graydon v. Church, 7 Mich. 36 (1859). See *ante* §§ 87–89, 181, 182.

[4] Hoyt v. Martense, 16 N. Y. 231 (1857); Slee v. Manhattan Co., 1 Paige Ch. (N. Y.) 48, 78 (1828); Cutts v. New York Manuf. Co., 18

collateral assignee thereof will not affect the relation existing between the mortgagor and the mortgagee, in respect to the debt between them.[1]

Where a mortgage has been assigned as collateral security for the debt of a third person, it may be foreclosed by the pledgee.[2] In a foreclosure by the assignee of the mortgage, the complaint should set out the fact of the assignment of the mortgage to him as collateral security for the debt of a third person, designating the person, and aver that the debt is due and has not been paid. The prayer should be for the sale of the mortgaged premises to pay the debt, which the mortgage was assigned to secure, and the costs of suit; and the decree should direct, after the payment of the debt set out and the costs of the suit, that the balance, if any, be brought into court to be disposed of as the interests and rights of the parties may require. Such foreclosure of a mortgage, by the party holding the same as collateral security for the payment of the debt of a third person, does not, as between the assignee and the party placing the mortgage in his hands, necessarily operate as a payment of the debt for which the mortgage was pledged. The debt, as between the pledgor and the pledgee, will not be considered paid until the property mortgaged has been actually sold and converted into money;[3] because on such foreclosures the land is substituted for the notes and mortgage as collateral security.[4]

In an action brought to foreclose a mortgage, given to secure a bond made by one of the mortgagors to secure the payment of certain notes, which notes were held by the mortgagees as collateral security for an over due indebtedness, it is not necessary for the complaint to allege that the notes held as collateral security have become due, for a failure to

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Me. (6 Shep.) 190, 201 (1841); Solomon v. Wilson, 1 Whart. (Pa.) 241 (1836). See *ante* §§ 87, 181.

[1] Brown v. Tyler, 74 Mass. (8 Gray), 135, 138 (1857); s. c. 69 Am. Dec. 239.

[2] See Stevens v. Dedham Inst. for Savings, 129 Mass. 547 (1880).

[3] Brown v. Tyler, 74 Mass. (8 Gray), 135 (1857); s. c. 69 Am. Dec. 239. See Stevens v. Denham Institution for Savings, 129 Mass. 547, 549 (1880); Montague v. Barton & A. R. R. Co., 124 Mass. 242 (1878); Whipple v. Blackington, 97 Mass. 476, 478 (1867).

[4] Montague v. Barton & A. R. R. Co., 124 Mass. 242, 245 (1878).

comply with the conditions of the bond creates a sufficient cause of action.[1]

§ 288. **Allegation as to recording mortgage and subsequent deeds.**—The complaint in an action to foreclose a mortgage need not aver that the mortgage has been recorded,[2] where the action is between the original parties to the mortgage, or their assignees or legal representatives;[3] but generally, in an action to foreclose a mortgage against a subsequent purchaser from the mortgagor, the complaint must allege that the mortgage was recorded at the time and place prescribed by the statute.[4]

In the foreclosure of a mortgage, where a party is made a defendant, who claims the mortgaged premises as a *bona fide* purchaser under a deed given subsequent to the mortgage, but recorded first, and the plaintiff claims that such deed is fraudulent, he must set forth in the complaint the facts and allegations which show the fraud; and in such a case, where the only allegation was that the defendant claimed an interest in the premises "as subsequent purchaser, incumbrancer or otherwise," it was held that the court could not consider the evidence taken to show the fraudulent character of the deed, as such an allegation did not place the defendant's rights in issue.[5]

§ 289. **Allegation to bar dower.**—In an action to foreclose a mortgage executed by the husband alone, during coverture, the widow's dower will not be barred where she is made a defendant, and the complaint simply alleges that she claims some interest in the premises "as a subsequent purchaser, or incumbrancer or otherwise," for in such a case the record bars only whatever interest, if any, she acquired subsequent to the mortgage;[6] a prior right of dower in such a

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[1] Troy City Bank v. Bowman, 19 Abb. (N. Y.) Pr. 18 (1865).

[2] See *ante* § 279.

[3] Snyder v. Bunnell, 64 Ind. 403 (1878). See South Side Planing Mill Assoc. v. Cutler & Savage Lumber Co., 64 Ind. 560 (1878).

[4] Stockwell v. State, 101 Ind. 1 (1884).

[5] Wurcherer v. Hewitt, 10 Mich. 453 (1862). See also Peck v. Mallams, 10 N. Y. 509 (1853); Thomas v. Stone, Walk. Ch. (Mich.) 117 (1843); Godfroy v. Disbrow, Walk. Ch. (Mich.) 260 (1843).

[6] Lewis v. Smith, 9 N. Y. 502 (1854); s. c. 61 Am. Dec. 706; 11 Barb. (N. Y.) 152; 12 Leg. Obs. 193.

case will not be cut off, if the complaint merely alleges that her interest is subsequent to the mortgage, and an objection is properly taken.[1] The dower provided by law in behalf of the wife who survives her husband is paramount to all conveyances, contracts, incumbrances, debts or liabilities of the husband executed or incurred by him during coverture,[2] unless there has been some forfeiture, release, bar or satisfaction thereof by the wife.[3]

If the plaintiff desires to cut off the widow's dower by foreclosure of the mortgage and sale of the property, the complaint should state the facts upon which the question arises, as he believes they exist, according to the rules of equity pleading.[4]

§ 290. **Allegation as to defendants' interests.**—Where parties other than those directly liable for the mortgage debt are made defendants to a foreclosure, it is necessary for the plaintiff to show that they have some interest in the equity of redemption which makes them proper parties to the action. This may be done by the general allegation that such defendants have or claim some interest in, or lien upon, the mortgaged premises which is subsequent to the plaintiff's mortgage.[5] The fact that the interests of such defendants

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See Lee v. Parker, 43 Barb. (N. Y.) 611, 614 (1865).

[1] Jordan v. VanEpps, 85 N. Y. 427, 436 (1881). See Emigrant Industrial Sav. Bank v. Goldman, 75 N. Y. 127 (1878); Frost v. Koon, 30 N. Y. 428, 448 (1864); Lewis v. Smith, 9 N. Y. 502 (1854); 61 Am. Dec. 706; Keeler v. McNierney, 6 N. Y. Civ. Proc. Rep. 363 (1883); Payn v. Grant, 23 Hun (N. Y.) 134 (1880). See *ante* §§ 135, 136.

[2] Higginbotham v. Cornwell, 8 Gratt. (Va.) 83 (1851); s. c. 56 Am. Dec. 130.

[3] O'Brien v. Elliott, 15 Me. 125 (1838); s. c. 32 Am. Dec. 137. As to when dower is barred, see Church v. Bull, 2 Den. (N. Y.) 430 (1845); s. c. 43 Am. Dec. 754; Hitchcock v. Harrington, 6 Johns. (N. Y.) 290 (1810); s. c. 5 Am. Dec. 229; Catlin v. Ware, 9 Mass. 218 (1812); s. c. 6 Am. Dec. 57; Popkin v. Bumstead, 8 Mass. 491 (1812); s. c. 5 Am. Dec. 491; English v. English, 3 N. J. Eq. (2 H. W. Gr.) 504 (1836); s. c. 29 Am. Dec. 730; Gordon v. Stevens, 2 Hill (S. C.) Eq. 46 (1834); s. c. 27 Am. Dec. 445.

[4] Lewis v. Smith, 9 N. Y. 502, 515 (1854); s. c. 61 Am. Dec. 706.

[5] Drury v. Clark, 16 How. (N. Y.) Pr. 424 (1857); Aldrich v. Lapham, 6 How. (N. Y.) Pr. 129 (1850); s. c. 1 N. Y. Code Rep. N. S. 408; Woodworth v. Zimmerman, 92 Ind.

are in separate portions of the mortgaged premises, or that the relief asked for does not affect all of them alike, is immaterial and will not invalidate the general allegation of a subsequent interest in the mortgaged premises.[1]

Where subsequent incumbrancers are made parties, the general practice is to aver that they have or claim some interest in the premises sought to be foreclosed, by mortgage, judgment or otherwise, as the case may be, which interest, if any, is junior and subordinate to the claim of the plaintiff; but the more correct practice is to allege, on information and belief if preferred, the nature of the interest of each defendant, as, for instance, that he claims to have an incumbrance by mortgage, judgment or otherwise, setting forth all of the particulars of the same. If, however, the plaintiff in his complaint misstates the interests or rights of the different defendants, who are by reason thereof unnecessarily compelled to answer in order to protect their interests, the costs of such defendants will be charged against the plaintiff personally.[2]

§ 291. Default in answering by prior incumbrancer.— Where a prior incumbrancer by judgment or otherwise, on being made a party to a foreclosure suit, under an allegation in the complaint that he has or claims an interest in the premises subsequent to the mortgage, makes no defence to the foreclosure, but allows judgment to be taken against him by default, and permits the surplus moneys to be distributed to other claimants, his neglect will not be deemed equivalent to an admission upon the report, that he has no lien upon the premises older than, or superior to, that of the mortgage, so as to be an estoppel upon him in another action, brought by a different plaintiff, for the foreclosure of a prior mortgage, and will not prevent him from asserting in the latter suit a legal priority to the surplus moneys to which he is apparently

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349 (1883); Ulrich v. Drischell, 88 Ind. 354 (1882); Clay v. Hildebrand, 34 Kan. 694 (1886).

[1] See Middletown Savings Bank v. Bacharach, 46 Conn. 513 (1879); Waters v. Hubbard, 44 Conn. 340 (1877); s. c. 79 Am. Dec. 250; Wells v. Bridgeport Hydraulic Co., 30 Conn. 316 (1862); Mix v. Hotchkiss, 14 Conn. 32 (1840).

[2] Union Ins. Co. v. VanRensselaer, 4 Paige Ch. (N. Y.) 85 (1833).

entitled by virtue of his lien; the parties to the record not being identical nor the subject in controversy the same.[1]

Where the plaintiff in an action to foreclose a mortgage makes a prior judgment creditor, or a prior mortgagee whose mortgage is due, a party to the action, he should set forth in his complaint the date and the amount of the incumbrance and state that it is a prior incumbrance. In a case where the prior incumbrance is a mortgage, the plaintiff should aver that it is due and payable, in order that the judgment may make proper provision for its payment.[2] In a case where a junior mortgagee filed a bill of foreclosure, making the holder of a prior mortgage a party defendant and requiring him to answer as to the amount due upon such prior mortgage, the prior mortgagee was held entitled to the costs of his answer as well as other costs to be first paid out of the proceeds of the sale, or to be charged upon the plaintiff personally in the discretion of the court.[3]

§ 292. **Prayer of complaint.**—The relief to which the plaintiff believes himself entitled must be fully set out in the complaint, for the reason that the judgment, in case of default, can not be more favorable to the plaintiff than the relief demanded in the prayer of the complaint,[4] although in

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[1] Frost v. Koon, 30 N. Y. 428 (1864). See also Lewis v. Smith, 9 N. Y. 502 (1854); s. c. 11 Barb. (N. Y.) 156; Bank of Orleans v. Flagg, 3 Barb. Ch. (N. Y.) 318; Holcomb v. Holcomb, 2 Barb. (N. Y.) 20 (1847); Elliott v. Pell, 1 Paige Ch. (N. Y.) 263 (1828).

[2] Holcomb v. Holcomb, 2 Barb. (N. Y.) 20 (1847).

[3] Boyd v. Dodge, 10 Paige Ch. (N. Y.) 42 (1843). See *ante* § 190.

[4] Bullwinker v. Ryker, 12 Abb. (N. Y.) Pr. 311 (1861); N. Y. Code Civ. Proc. § 1207. But where a mortgage, which had been assigned by an assignment that was not recorded, was subsequently discharged by the mortgagee, and the mortgagor thereupon executed another mortgage on the same property to secure an antecedent debt, which latter mortgage was transferred to a *bona fide* purchaser for value, who in time procured a decree of foreclosure and sale against the mortgagor and a judgment for deficiency against his assignor, it was held in a foreclosure by the first mortgagee that while the second mortgage was entitled to priority, yet the plaintiff was entitled to be subrogated to the rights of the assignee thereof, and that it was not essential to the granting of such relief that it should be demanded in the complaint; nor

nearly every other kind of an action the court may grant any relief consistent with the cause of action set forth in the complaint and embraced within its issues.[1]

Thus, where the plaintiff is entitled to and intends to move for an injunction, this relief should be asked for in the prayer of the complaint;[2] otherwise the court will not grant the restraint desired, except in those cases where the facts rendering such restraint necessary arise after the suit has been commenced. Where the cause for restraint arises after the commencement of the action, an injunction will be granted on the presentation of affidavits setting forth facts which render the restraint necessary or proper.[3]

And where there are taxes which are unpaid, or where by the terms of the mortgage the mortgagee was to pay the taxes and to be reimbursed by the mortgagor, the complaint must set out the amount of taxes due and unpaid, or paid by the mortgagee, or the plaintiff will not be entitled to a finding of such amount in the decree.[4]

In an action to foreclose a mortgage, the complaint, if sufficient to maintain the action, is not demurrable because the relief demanded is greater than, or different from, that to which, upon the facts stated, the plaintiff is entitled.[5] And where by statutory provisions an heir or devisee taking real estate subject to a mortgage is required to pay the mortgage out of his own property, no additional allegation is required in a complaint, which seeks to charge the

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was it an objection that defendant's assignors were not parties. Clark v. Mackin, 95 N. Y. 346 (1884).

[1] Simonson v. Blake, 12 Abb. (N. Y.) Pr. 331 (1861); s. c. 20 How. (N. Y.) Pr. 484. See also Bullwinker v. Ryker, 12 Abb. (N. Y.) Pr. 311 (1861); Edson v. Girvan, 29 Hun (N. Y.) 425 (1883). A prayer for foreclosure and sale, as an independent remedy, however, is inconsistent with a bill framed to aid proceedings in ejectment, and makes the bill multifarious and demurrable; and if it contains no other requisites of a complaint in foreclosure, it will not be sufficient to support a foreclosure decree. Livingston v. Hayes, 43 Mich. 129 (1880).

[2] N. Y. Code Civ. Proc. § 603. See Sebring v. Lant, 9 How. (N. Y.) Pr. 346 (1854); Hovey v. McCrea, 4 How. (N. Y.) Pr. 31 (1848).

[3] N. Y. Code Civ. Proc. § 604.

[4] Harris v. McCrossen, 31 Kan. 402 (1884).

[5] Basse v. Gallegger, 7 Wis. 442 (1859); distinguished in Scheibe v. Kennedy, 64 Wis. 564 (1885).

personal representatives of a deceased mortgagor with any deficiency.[1]

§ 293. **Demand for judgment of deficiency.**—A personal judgment for deficiency can be rendered only when it is demanded in the complaint.[2] But where the complaint asks for a judgment on the note, that the mortgage be foreclosed, that the mortgaged property be sold to pay the debts and costs of the action, and that execution issue for the balance, it will be sufficient to sustain a personal judgment for deficiency,[3] and is sufficient to authorize any relief to which the facts pleaded may entitle the plaintiff.[4] If the complaint to foreclose a mortgage does not contain a prayer for the sale of the premises, it will be held insufficient, upon the coming in and confirmation of the report of the amount due, to authorize a sale, and is clearly demurrable.[5]

Under a statute which provides for the entry of a judgment for deficiency, only where the complaint contains a demand therefor, a prayer in the complaint "that the plaintiff may have execution for any balance remaining unpaid," should, under a liberal construction, be held sufficient to authorize the entry of a judgment for any deficiency.[6] Ordinarily the relief demanded by the plaintiff is, that the mortgaged premises be sold for the payment of the debt; that the defendants and all persons claiming under them subsequent to the commencement of the suit, be barred and foreclosed of all right, claim, lien and equity of redemption in the mortgaged premises; that on sale of the premises the moneys arising therefrom be brought into

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[1] Glacius v. Fogel, 88 N. Y. 434 (1885).

[2] Eichbredt v. Angerman, 80 Ind. 208 (1881).

[3] Foote v. Sprague, 13 Kan. 155 (1874). See Shotts v. Boyd, 77 Ind. 223 (1881). Where the complaint contains no graver defect than the one set forth in the text, it may be amended at any time without costs, so as to make it formally perfect; and upon petition in error, it will be considered as amended; Foote v. Sprague, 13 Kan. 155 (1874). See also Armstrong v. Ross, 20 N. J. Eq. (5 C. E. Gr.) 109 (1869); Iowa Co. v. Mineral Point R. R. Co., 24 Wis. 93 (1869).

[4] Shotts v. Boyd, 77 Ind. 223 (1881).

[5] Santacruz v. Santacruz, 44 Miss. 714 (1870).

[6] Olinger v. Liddle, 55 Wis. 621 (1882).

court; that the plaintiff be paid his debt, interest and costs out of such moneys, and that the mortgagor and all other parties personally liable for its payment, specifying their names, be adjudged to pay the deficiency, if any. In a recent case, where judgment for deficiency was entered upon the default of the defendants, although the complaint did not ask for such relief, it was held that the judgment was unauthorized and void.[1]

In an action to foreclose a mortgage, where one of the defendants is not personally liable for the debt, the complaint should demand a decree of foreclosure and sale of the land against both mortgagors, and a judgment for deficiency against that debtor only who is personally liable for the debt.[2] Thus, where a wife joins her husband in the execution of a mortgage to secure the husband's debt, on complaint in foreclosure the court may properly render a personal judgment against the husband alone on the note, and a decree of foreclosure and sale against both.[3] The entry of a personal judgment against the wife would be a great error and absolutely void.[4] The only reason for making a wife, who joined her husband in the execution of a mortgage, a party to proceedings for foreclosure, is to bar her right of dower in the equity of redemption, or to give her an opportunity, before foreclosure, to redeem and prevent a sale of the property.[5]

§ 294. Allegation for personal judgment against grantee assuming payment.—Where the purchaser of land subject to a mortgage covenants with the vendor to pay the mortgage debt, the mortgagee is, in equity, entitled to a personal decree against such purchaser for any deficiency upon foreclosure and sale of the mortgaged premises.[6] An

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[1] Peck v. New York & N. J. R. R. Co., 85 N. Y. 246 (1881). See Simonson v. Blake, 12 Abb. (N. Y.) Pr. 331 (1861); s. c. 20 How. (N. Y.) Pr. 484; Swart v. Boughton, 35 Hun (N. Y.) 281 (1885); Hansford v. Holdam, 14 Bush (Ky.) 210 (1878).

[2] Rollins v. Forbes, 10 Cal. 299 (1858).

[3] Rollins v. Forbes, 10 Cal. 299 (1858); Wright v. Langly, 36 Ill. 381 (1865).

[4] See Brown v. Orr, 29 Cal. 120 (1865).

[5] Wright v. Langly, 36 Ill. 381 (1865).

[6] Halsey v. Reed, 9 Paige Ch. (N. Y.) 446 (1842). See *ante* § 222.

allegation in the complaint that the grantee of the mortgaged premises, at the time of his purchase, covenanted and agreed to pay the mortgage debt, and to discharge the mortgage lien, is sufficient to sustain a personal judgment against such grantee for the deficiency.[1] While it is true in some states, that the privies to a contract of assumption may rescind it at any time before notice of its acceptance by the holder of the mortgage debt, yet after notice or knowledge of such acceptance there can be no rescission.[2] Although such acceptance must, in equity as in law, precede the bringing of an action upon the promise by the holder of the debt, yet the complaint need not contain an averment either of the acceptance or notice thereof to the defendant; neither is it necessary to aver against such a grantee, that he still holds the mortgaged land or any part thereof. The mortgagor, his grantee and successive grantees, who have agreed to pay the debt, may be sued upon their respective promises in the same action; in such a case, they will be held severally liable in the inverse order of their respective promises.[3]

§ 295. **Allegation as to property mortgaged.**—The complaint and decree in a mortgage foreclosure should accurately describe the mortgaged property which it is sought to sell. This may be done by setting out the description in full in the complaint, or by referring to the mortgage or other paper annexed and filed therewith, which contains a full description; but it would seem that any other description will not be sufficient. Thus, in a case where the mortgage, instead of describing the lands covered, referred for a description to a deed, and the complaint and decree in foreclosure followed the description in the mortgage, referring also to the deed for a fuller description, the court held that the description was insufficient, and that no title was acquired at a sale made in the foreclosure proceedings.[4] The

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[1] Pellier v. Gillespie, 67 Cal. 582 (1885).

[2] See *ante* §§ 230, 231.

[3] Carnahan v. Tousey, 93 Ind. 561 (1883). But see *ante* §§ 230, 231, and the cases cited.

[4] Crosby v. Dowd, 61 Cal. 557, 603 (1882). See Emeric v. Tams, 6 Cal. 155 (1856); Buck v. Axt, 85 Ind. 512 (1882); Hosford v. Johnson, 74 Ind. 479 (1881); White v. Hyatt, 40 Ind. 385 (1872); Whittelsey v. Beall,

purpose of a description in a complaint in a mortgage foreclosure is to furnish the means of identifying the property, and a complaint which does this will be sufficient.[1] There is as much necessity for a correct description of mortgaged property in a complaint for foreclosure, as there is in the complaint in an action, the object of which is to recover possession of property.[2] In an action to foreclose a mortgage on a homestead, it seems that the complaint need not describe the property as a homestead.[3]

Where the description of the mortgaged premises is correct in the complaint, a decree entered by default can not be avoided by the defendant's showing that the mortgage, as recorded, described the premises incorrectly.[4] And where the complaint in an action to foreclose a mortgage, covering several distinct parcels of land, describes some of such tracts insufficiently, if the remaining tracts are sufficiently described, such insufficient description of some of the tracts will not render the complaint defective.[5]

§ 296. Referring to mortgage or other instruments for description.—The complaint should so describe the property mortgaged, that in case a sale is ordered the officer may know upon what lands to execute the order of the court.[6] If the complaint does not contain a sufficient description of the property, but refers to an annexed copy of the mortgage for such description, and such mortgage in turn refers therefor to another instrument, the complaint

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5 Blackf. (Ind.) 143 (1839); Triplett v. Sayre, 3 Dana (Ky.) 590 (1835). *Compare* Deitrich v. Lang, 11 Kan. 636 (1873); Howe v. Towner, 55 Vt. 315 (1883). A mistake in the complaint in describing the mortgaged property may be corrected, and a decree of foreclosure may be entered in the same action after the correction; Davis v. Cox, 6 Ind. 481 (1855); Palmer v. Windrom, 12 Neb. 494 (1882).

[1] Thompson v. Madison Build. and Aid Asso., 103 Ind. 279 (1885). See Crosby v. Dowd, 61 Cal. 603 (1882).

[2] Crosby v. Dowd, 61 Cal. 603 (1882).

[3] VanSickles v. Town, 53 Iowa, 259 (1880).

[4] Deitrich v. Lang, 11 Kan. 636 (1873).

[5] Rapp v. Thie, 61 Ind. 373 (1878). See Buck v. Axt, 85 Ind. 512 (1882).

[6] Struble v. Neighbert, 41 Ind. 344 (1872); White v. Hyatt, 40 Ind. 385 (1872); Nolte v. Libbert, 34 Ind. 163 (1870); Davis v. Cox, 6 Ind. 481 (1855); Whittelsey v. Beall, 5 Blackf. (Ind.) 143 (1839); Triplett v. Sayre, 3 Dana (Ky.) 590 (1835).

will be fatally defective. It has been held, however, that it is generally sufficient to describe the premises as they are described in the mortgage itself; and that the inaccuracy of such a description is no ground for refusing a decree of sale, although it may affect the title to the premises when sold;[2] but it is believed that this is bad practice and not to be encouraged. It is certain that if a purchaser should object to the title offered, because of a defective and insufficient description in the complaint and decree, he would not be compelled to complete the purchase.

While it is generally sufficient to describe the premises as they are described in the mortgage itself, this proposition is true only when the mortgage contains a description, and not a mere reference therefor to other instruments from which a description may or may not be obtained.[3]

A reference in a complaint to maps on file or to public records for a full description of the mortgaged premises has been held to be sufficient. Thus, where a complaint alleged that the mortgage was duly recorded in the office of the recorder of the county, and described the mortgaged premises as lot G, in block number 93, in Horton's addition to San Diego, as per maps on file in the county recorder's office, made by James Pascoe, the court held that this sufficiently described the property as situated in San Diego county; and that, judicial notice being taken of the fact that there is but one county of San Diego in the state, the superior court of that county had jurisdiction of the subject of the action.[4]

§ 297. **Defective description.**—The description of real estate in a mortgage may be sufficiently correct to make a valid conveyance as against the mortgagor, but, unaided by proper averments in a complaint for foreclosure, be insufficient to authorize a decree and order of sale.[5] Where such

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[1] Struble v. Neighbert, 41 Ind. 344 (1872). But see Emeric v. Tams, 6 Cal. 155 (1856). See also *ante* § 295.

[2] See Schmidt v. Mackey, 31 Tex. 659 (1869).

[3] Crosby v. Dowd, 61 Cal. 603 (1882).

[4] Graham v. Stewart, 68 Cal. 374 (1886).

[5] Halstead v. Board of Commissioners of Lake Co., 56 Ind. 363 (1877).

a description is so defective as to render the mortgage void, no averments in the complaint can make valid a decree rendered thereon.[1]

Where it appeared from the allegations in a complaint for the foreclosure of a mortgage, that certain pieces of real estate, together with two mills and "all and singular the hereditaments and appurtenances thereunto belonging," were mortgaged, and it also appeared from the pleadings and the admission of the defendants and mortgagors, that a certain mill-dam and water-power were appurtenant to said mills and real estate, but it did not appear whether such dam and water-power were situated on said real estate or not, such allegations were held to support a judgment that the mortgage was a lien upon such dam and water-power, as well as upon the real estate more particularly described in the mortgage.[2] A description of the land in a school-fund mortgage, as "the north-east part" of a specified tract "containing ninety acres," has been held to be insufficient, and to render invalid an auditor's sale made thereunder.[3] But a description as "lots 9 and 10 in block 51, in Rice and Irvine's addition," has been held to describe the whole of the lots sufficiently, though lying partly in "Dayton and Irvine's addition."[4] And in describing a parcel of land as being north of the "ground of the C., C., C. & I. R. R.," the use of the word "ground" instead of the words "right of way," does not render such description void.[5]

Where lands are described by section, township and range, not giving the county or state where situated, it will be presumed that the lands are in the state where the court is located, and from the description the court will judicially know the county.[6] The fact that a complaint in foreclosure describes the premises mortgaged in different terms from

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[1] Halstead v. Board of Commissioners of Lake Co., 56 Ind. 363 (1877); Slater v. Breese, 36 Mich. 77 (1877).

[2] Lanoue v. McKinnon, 19 Kan. 408 (1877).

[3] Buck v. Axt, 85 Ind. 512 (1882).

[4] Rochat v. Emmett, 35 Minn. 420 (1886).

[5] Pence v. Armstrong, 95 Ind. 191 (1883).

[6] Brown v. Ogg, 85 Ind. 234 (1882). See Parker v. Teas, 79 Ind. 235 (1881).

those used in the mortgage itself, is of no consequence where the mortgage is sufficiently well identified, and the premises described in the complaint are the same as those described in the mortgage.[1]

§ 298. **Allegation as to breach of contract and right of action.**—The allegations in a complaint must set out a breach of the conditions of the mortgage, in order to give the court jurisdiction to foreclose the mortgage and to sell the property.[2] Thus, where it appears from the complaint that the personal estate of a deceased mortgagor is liable for the payment of the mortgage debt, and that the suit was brought before the expiration of the time allowed for the payment of the debt after the issuing of letters of administration, and the giving of notice thereof, the complaint is defective and must be dismissed on demurrer for want of sufficient facts.[3] And where the complaint alleges the giving of a bond, conditioned for the payment of a sum of money, and that the mortgage was given as collateral security therefor and contained the same condition, it must also allege a default in the performance of the condition of the bond.[4] Thus, in an action to foreclose a mortgage given to secure the performance of a bond, conditioned for the payment of certain

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[1] Shepard v. Shepard, 36 Mich. 173 (1877).

[2] Davies v. New York Concert Co., 41 Hun (N. Y.) 492 (1886). In this case the allegations of the complaint, as to the default of the defendant, stated that among the interest coupons which were held and owned by the plaintiff's assignor, were twelve coupons for fifteen dollars each, payable on January 1, 1884, and twelve coupons for fifteen dollars each, payable on April 1, 1884, and that said coupons were not paid at maturity, nor were any of them paid, or any part thereof. It was not alleged that the company had neglected or refused to pay them, at the place or in the manner provided in the mortgage, nor that it had been in any form requested to pay them, nor that it had neglected to comply with any such request, nor that it was in any manner in default. The court held that it was apparent from the provisions contained in the mortgage, that more than the mere fact of the non-payment of the coupons was required to be shown to authorize an action to be brought for its foreclosure, and that a demurrer interposed to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, should be sustained.

[3] Lovering v. King, 97 Ind. 130 (1884).

[4] Coulter v. Bower, 11 Daly (N. Y.) 203 (1882).

indebtedness of a suspended bank out of its assets, the complaint which failed to show the character of such indebtedness, the several amounts constituting it, the persons to whom it was due, the nominal value of the assets of the bank, the amount realized out of them and applicable to such payment, or in what respect or particulars, or in what specific sum the obligors were in default, was held bad on demurrer.[1]

The right to foreclose accrues upon any breach of the conditions of a mortgage;[2] and if there are several breaches, it is necessary to prove only one of them to be entitled to a decree.[3] Where suit is brought to foreclose a mortgage given to secure a bond for the support of a husband and wife during their natural lives, a breach of such bond must be shown, but such breach need not be shown to have occurred during the life-time of the husband, who died first. If there has been a breach of the bond since the death of the husband, and before the commencement of the suit, it will be sufficient to maintain the action;[4] because in such a case the mortgage was given as a security for the support not only of the deceased mortgagor, but of his wife also, and constitutes an obligation continuing as long as either lives,[5] for a bond and mortgage given to a husband and wife belongs to the survivor.[6]

Where the mortgagee's right to foreclose is dependent upon a condition precedent, the complaint should distinctly aver the performance of such condition.[7] But where the action is founded upon a note payable on demand, a demand need not be alleged in the complaint.[8] If no particular time for payment is mentioned in a mortgage, it is to be paid

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[1] Seely v. Hills, 49 Wis. 473 (1880).

[2] See Davies v. New York Concert Co., 41 Hun (N. Y.) 492 (1886).

[3] Beckwith v. Windsor Manuf. Co., 14 Conn. 594 (1842).

[4] Plummer v. Doughty, 78 Me. 341 (1886).

[5] See Plummer v. Doughty, 78 Me. 341, 344 (1886); Merrill v. Bickford, 65 Me. 119 (1876); Pike v. Collins, 33 Me. 38, 43 (1851).

[6] Pike v. Collins, 33 Me. 38, 43 (1851); Draper v. Jackson, 16 Mass. 480 (1820). See *ante* § 81.

[7] Curtis v. Goodenow, 24 Mich. 18 (1871).

[8] See *ante* §§ 39, 40, 282. See also Gillett v. Balcom, 6 Barb. (N. Y.) 370 (1849); Haxtun v. Bishop, 3 Wend. (N. Y.) 13 (1829); Austin v. Burbank, 2 Day (Conn.) 474 (1807); s. c. 2 Am. Dec. 119; Rumball v. Ball, 10 Mod. 38 (1712).

within a reasonable time, and if not so paid the mortgagee will be entitled to foreclose,[1] although the interest may have been paid regularly.[2] The same is true where the debt secured is past due.[3]

§ 299. **Allegation in foreclosure of indemnity mortgage.**—Although a mortgage may purport to have been given to secure the payment of a note, it may be shown to have been given for indemnity only.[4] In an action to foreclose a mortgage given as an indemnity merely, the complaint must allege a payment on account of the liability for which the mortgage was given as security; because a surety who has taken a mortgage to indemnify him is not entitled to a foreclosure thereof, until he has paid the debt of the principal or otherwise suffered an injury.[5] The complaint must set out the exact amount paid on account of the liability;[6] and where an indemnity mortgage is given to secure more than one note, it must specifically state on which note the payment was made.[7] But where the aggregate sum paid is stated in the complaint, it is not necessary to set up in detail the several distinct sums constituting such amount.[8]

Where a mortgage is given to secure the sureties on an official bond, it is immaterial that a bill to foreclose it does not correctly state the date of the appointment of the officer, if it correctly recites the mortgage and the breach, and the evidence makes out a full cause of action.[9]

§ 300. **Allegation as to defendant's interest.**—A complaint in foreclosure necessarily puts the defendant's title in controversy; he can be impleaded only on the ground that

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[1] Triebert v. Burgess, 11 Md. 452 (1857); Farrell v. Bean, 10 Md. 233 (1856).

[2] Austin v. Burbank, 2 Day (Conn.) 474 (1807); s. c. 2 Am. Dec. 119.

[3] Wright v. Shumway, 1 Biss. C. C. 23 (1853); s. c. 2 Am. L. Reg. (O. S.) 20.

[4] Morrill v. Morrill, 53 Vt. 74 (1880).

[5] Shepard v. Shepard, 6 Conn. 37 (1825); Francis v. Porter, 7 Ind. 213 (1855); Lewis v. Richey, 5 Ind. 152 (1854). See Collier v. Ervin, 2 Mont. T. 335 (1875). See *ante* § 50.

[6] Seely v. Hills, 44 Wis. 484, 488 (1878); s. c. 49 Wis. 473, 482 (1880).

[7] Shepard v. Shepard, 6 Conn. 37 (1825).

[8] Shepard v. Shepard, 6 Conn. 37 (1825); Dye v. Mann, 10 Mich. 291 (1862).

[9] Shelden v. Warner, 45 Mich. 638 (1881).

he has or claims title. The foreclosure would fail of its purpose, if one who claims title should be omitted as a defendant.[1] And where the complaint to foreclose a mortgage joins a third party as a co-defendant, it should state the interest of such third party, and show that his interest is inferior to the mortgage lien of the plaintiff.[2]

An allegation in a complaint for the foreclosure of a mortgage, that a defendant has or claims to have some interest in the premises, by mortgage, judgment, tax lien or otherwise, but that such interest or lien, if any, has accrued subsequent to the lien of the mortgage, is not an admission of any claim or lien paramount to the mortgage.[3] A general allegation that such third party has or claims an interest in the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage, sufficiently shows that he is a proper defendant,[4] although his interest is not set out specifically,[5] and is sufficient on demurrer;[6] it is not necessary, in a complaint for the foreclosure of a mortgage, to describe specifically the interest which each defendant has, or may claim to have, in the real estate covered by the mortgage.[7] The mere averment, however, in a complaint to foreclose a mortgage against a person other than the mortgagor, that "he is now the owner of the land," is not sufficient to show that the mortgage constitutes a lien upon the land as against him, as he may have acquired the land before the mortgage was executed.[8]

Where a third party is joined as a defendant upon the allegation that he has or claims some interest adverse to the plaintiff, of the nature and amount of which the plaintiff

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[1] McDonald v. McDonald, 45 Mich. 44 (1880). See *ante* §§ 70, 116.

[2] Frost v. Koon, 30 N. Y. 428, 448 (1864); Drury v. Clark, 16 How. (N. Y.) Pr. 424 (1857); Neitzel v. Hunter, 19 Kan. 221 (1877); Short v. Nooner, 16 Kan. 220 (1876); s. c. 20 Kan. 624 (1878).

[3] Newton v. Marshall, 62 Wis. 8 (1884).

[4] Bowen v. Wood, 35 Ind. 268 (1871). See Aldrich v. Lapham, 6 How. (N. Y.) Pr. 129 (1850).

[5] Woodworth v. Zimmerman, 92 Ind. 349 (1883).

[6] Bradford v. Russell, 79 Ind. 64 (1881).

[7] Hoes v. Boyer, 108 Ind. 494 (1886).

[8] Nichol v. Henry, 89 Ind. 54 (1883).

is ignorant, and he demands in his complaint that the defendant may be compelled to disclose such interest to the court, a judgment barring and foreclosing all the right, title and interest of such defendant in and to the mortgaged premises, adverse to the plaintiff, will be binding upon him if he files only a general answer.[1]

§ 301. **Dismissal of complaint on payment before judgment.**—The Code provides that where an action is brought to foreclose a mortgage upon real property upon which a portion of the principal or interest is due, and another portion of either is to become due, the complaint must be dismissed without costs against the plaintiff, upon the defendants paying into court, at any time before the final judgment directing a sale is rendered, the sum due, together with the plaintiff's costs.[2] Where money is paid into court, unless the court otherwise directs, it must be paid either directly, or by the officer who is required by law first to receive it, to the county treasurer of the county where the action is triable; and if the case is pending in New York city, it must be paid to the chamberlain.[3]

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[1] Blandin v. Wade, 20 Kan. 251 (1878).

[2] N. Y. Code Civ. Proc. § 1634. See Long v. Lyons, 54 How. (N. Y.) Pr. 129 (1875); Malcolm v. Allen, (N. Y. Supr. Ct.) 5 Alb. L. J. 334 (1872). Payment to the referee upon trial before him is not payment into court; the referee is not a court for that purpose. Becker v. Boon, 16 N. Y. 317 (1874).

[3] N. Y. Code Civ. Proc. § 745.

CHAPTER XIV.

LIS PENDENS—NOTICE OF PENDENCY OF ACTION.

§ 302. Definition and Bacon's ordinances.
303. Nature and functions of a *lis pendens*.
304. When *lis pendens* becomes operative.
305. Duration and extent of a *lis pendens*.
306. History of the doctrine in New York.
307. Contents of notice of *lis pendens*.
308. Description of premises.
309. When notice of *lis pendens* to be filed.
310. Who may file notice of *lis pendens*.
311. Recording and indexing *lis pendens*.
312. Effect of notice of *lis pendens*.
313. Who regarded as subsequent incumbrancers.
314. Effect of *lis pendens* on holders of unrecorded conveyances.
315. Effect of omission to file notice of *lis pendens*.
316. Proof of filing notice of *lis pendens*.
317. Defective and amended notice of *lis pendens*.
318. Dormant *lis pendens*.
319. Cancelling notice of *lis pendens*.

§ 302. Definition and Bacon's ordinances.—The phrase *lis pendens* means literally "suit pending;"[1] the phrase, as well as its legal doctrine, comes to us from the civil law,[2] where a suit was not considered as pending until it had reached the stage called *litis contestatio*.[3] By some, however, it has been supposed that the rule of *lis pendens* was adopted by analogy from a proceeding at common-law; thus, in an early realty case,[4] the court said: "This is in imitation of the proceedings in a real action at common-law, where, if the defendant aliens after the pendency of the writ, the judgment in the action will over-reach such alienation."

Lord Chancellor Bacon, while a member of the early English court of chancery, promulgated a number of ordinances or rules[5] "for the better and more regular administration of justice in the chancery, to be daily observed,

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[1] 2 Kent, 122; 2 Bouv. L. Dict. (15th ed.) 120.

[2] See Bennett on *Lis Pendens*, § 9.

[3] 1 Mack. C. L. 205, § 203.

[4] Sorrell v. Carpenter, 2 P. Wms. 482 (1728).

[5] Adopted 1618.

saving the prerogative of the court." In these ordinances we have many rules which originated with Bacon, but the main body of them, it is thought, previously existed in some form, written or unwritten; but it is beyond the scope and ambition of this work to settle the much discussed questions of the extent to which Bacon altered the existing practice, or for the first time established it, and how far he merely collated and published rules previously in force.

The twelfth of Bacon's ordinances or rules was as follows: "No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor the order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice."[1]

The correct doctrine of *lis pendens* has been said to be, that the law will not allow a defendant to transfer to others pending a litigation rights to the property in dispute, so as to prejudice a recovery by the plaintiff.[2] Another form of statement is, that where a litigation is pending between a plaintiff and a defendant, as to the ownership of a particular estate, the necessities of mankind require that the decision of the court shall be binding, not only on the litigating parties, but also on those who derive title under them by transfers made pending the suit. If this were not true, there could be no certainty that a litigation would ever come to an end. The rule had its roots largely in public policy, and does not rest, as is sometimes supposed, on the equitable doctrine of notice binding on the conscience. The doctrine is not peculiar to courts of equity. In actions *in rem* the judgment bound the lands, notwithstanding an alienation by the defendant *pendente lite*. Were it not for

[1] See vii. Bacon's Works, 761 (1859), (ed. of Spedding, Ellis & Heath, London.) See also Bennett on *Lis Pendens*, appx. 446.

[2] Bellamy v. Sabine, 1 DeG. & J. 566 (1857).

the doctrine in question, the plaintiff in every action would be liable to be defeated in his recovery by the defendant's alienating the property in litigation before judgment or decree, so that he would be compelled to commence proceedings *de novo*, subject to be defeated again by similar conduct of the defendant.[1]

§ 303. **Nature and functions of a lis pendens.** — Under the methods of legal procedure and practice of the present day, a *lis pendens* is a notice of the actual pendency of a suit or other judicial proceeding.[2] It has been said that the sole object of a *lis pendens* is, to keep the subject in controversy within the jurisdiction of the court until the judgment has been entered, so that it will be effective and binding on the parties to the action and on all parties dealing with them, and on the subject-matter of the controversy.[3] The principal doctrine of a notice of pendency of action is, that a purchaser or assignee of the subject-matter of a litigation will be as fully bound by the final judgment in the action or proceeding, though not made a party thereto, as would the original owner and party to the action, if he had continued to own the subject-matter in dispute.

The modern doctrine of *lis pendens* is based, not upon the theory that a pending suit is constructive notice to all the world, like a recorded deed, but upon the ground that the law will not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the rights of contesting parties and to defeat the execution of the decree to be entered in the cause.[4]

The function of a *lis pendens* has been said to be the enforcement of the well known legal maxim *pendente lite nihil innovetur*. The rule rested in its origin upon the presumption that every man was attentive to what was passing

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[1] See Lamont v. Cheshire, 65 N. Y. 30, 36 (1875); Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441 (1817); Hayden v. Bucklin, 9 Paige Ch. (N. Y.) 513 (1842); Gaskell v. Durdin, 2 Ball & B. 167 (1812).

[2] City Bank of New Orleans v. Walden, 1 La. An. 46 (1846); Bennett v. Chase, 21 N. H. (1 Fost.) 582 (1850).

[3] See Co. Litt. 344 b.

[4] Dovey's Appeal, 97 Pa. St. 158 (1881).

in the courts of his country, and is founded upon the broad principle of public policy. It was necessary in order to prevent the fraudulent alienation and transfer of property, pending the adjudication of rights which might be affected thereby.[1] In the growth of the procedure and practice of the courts it was early found necessary, to the effectual administration of justice, that the decisions of courts of equity should in some way be made binding, not only on the litigant parties, but also on all parties who might derive title from them *pendente lite*, whether with or without actual notice of the suit.[2] The notice of pendency of action or *lis pendens* thus came into use as a matter of necessity. It is purely a rule of practice and is designed to make the decrees of a court binding upon all parties who may acquire rights from or under the parties to the suit pending the action.[3]

§ 304. **When lis pendens becomes operative.**—A notice of pendency of action does not become operative until the summons has been served in some manner;[4] neither will the notice become effective until the filing of the complaint.[5] A subsequent order directing the filing of a *lis pendens nunc pro tunc* will not affect the rights of an intervening creditor.[6] A *lis pendens* becomes effective as to third persons from the earliest service of the process on any defendant;[7] and service

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[1] See Leitch v. Wells, 48 N. Y. 608 (1872); Hopkins v. M'Laren, 4 Cow. (N. Y.) 667 (1825); Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566 (1815); White v. Carpenter, 2 Paige Ch. (N. Y.) 217 (1830); Jackson v. Losee, 4 Sandf. Ch. (N. Y.) 381 (1846); Jackson v. Andrews, 7 Wend. (N. Y.) 152 (1831); Murray v. Blatchford, 1 Wend. (N. Y.) 583 (1828); Swett v. Poor, 11 Mass. 549 (1814).

[2] Lamont v. Cheshire, 65 N. Y. 30, 36 (1875).

[3] Bishop of Winchester v. Paine, 11 Ves. 194 (1805).

[4] Grant v. Bennett, 96 Ill. 513 (1880); Games v. Stiles, 39 U. S. (14 Pet.) 322 (1840); bk. 10 L. ed. 476.

[5] Sherman v. Bemis, 58 Wis. 343 (1883). See Grant v. Bennett, 96 Ill. 513 (1880).

[6] Weeks v. Tomes, 16 Hun (N. Y.) 349 (1878).

[7] Hayden v. Bucklin, 9 Paige Ch. (N. Y.) 512 (1842). In this case the court held, that personal service of the subpœna is not necessary to create a *lis pendens*, which is constructive notice to third persons of the commencement of a suit in chancery; and where the subpœna can not be served personally, a service upon the defendant's wife or other member of his family, of

on one of two defendants is sufficient to create a *lis pendens*.[1] But the notice provided for by statute will be of no effect until filed.[2] Yet where a party appears and is heard, notice will be presumed.[3]

Notice in a foreclosure suit will be good from the service of the summons in the action on any of the defendants, although the owner of the equity of redemption may not yet have been served.[4] A *lis pendens* filed in an original suit to foreclose a mortgage affords, as to all defendants, constructive notice of all cross-suits.[5] A writ of error is a new suit, and a *lis pendens* therein will not become effective until the service of the summons.[6]

§ 305. Duration and extent of a lis pendens. — The operation of a *lis pendens* as a notice continues, if the suit is not abandoned, until it is closed by a final decree, provided it is prosecuted with reasonable diligence and in good faith; otherwise, a purchaser who has no actual notice, will not be bound by it.[7] A notice of *lis pendens* has in no case an extra territorial application, and is not effective beyond the jurisdiction of the court in which the venue of the action is laid.[8]

A notice of *lis pendens* relates only to the voluntary alienation and incumbrance of the property by a defendant pending a suit in respect to it, and does not affect other parties asserting rights adverse to the defendant;[9] nor is it

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suitable age and discretion, at the defendant's place of residence, will be sufficient. See Williamson v. Williams, 11 Lea (Tenn.) 355 (1883).

[1] Myrick v. Selden, 36 Barb. (N. Y.) 15, 22 (1861).

[2] Leitch v. Wells, 48 N. Y. 585 (1872).

[3] See Odell v. DeWitt, 53 N. Y. 643 (1873).

[4] Fuller v. Scribner, 76 N. Y. 190 (1879), affirming 16 Hun (N. Y.) 130.

[5] Hall Lumber Co. v. Gustin, 54 Mich. 624 (1884).

[6] Wooldridge v. Boyd, 13 Lea (Tenn.) 151 (1884).

[7] Hammond v. Paxton, 58 Mich. 393 (1885). See Durand v. Lord, 115 Ill. 610 (1886).

[8] Holbrook v. New Jersey Zinc Co., 57 N. Y. 616 (1874). See Jeffres v. Cochrane, 48 N. Y. 671 (1872); Shelton v. Johnson, 4 Sneed (Tenn.) 672 (1857).

[9] Becker v. Howard, 4 Hun (N. Y.) 359 (1875); s. c. 6 T. & C. (N. Y.) 603; aff'd 66 N. Y. 5; Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847); Harrington v. Slade, 22 Barb. (N. Y.) 161 (1856). See Sears v. Hyer, 1 Paige Ch. (N. Y.) 483 (1829).

notice to one who rents the premises from a person not a party to the suit.[1] The notice of *lis pendens*, after the complaint has been filed and the summons has been issued in an action, is notice only of what those papers contain. It can not extend beyond, nor in any way affect property not the subject of the action, which must be specifically described.[2]

It is now generally conceded that, independent of statutory regulations, the mere commencement of an action in a court of law, or the filing of a bill in equity affecting the title to real estate, is notice to all the world[3] and creates a *lis pendens;*[4] any one purchasing property, pending a litigation, takes the title charged with notice of the suit,[5] and subject to the determination thereof.[6] Such an action is usually deemed commenced

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[1] Thompson v. Clark, 4 Hun (N. Y.) 164 (1875); s. c. 6 T. & C. (N. Y.) 510.

[2] Griffith v. Griffith, Hoff. Ch. (N. Y.) 155 (1839), affirming 9 Paige Ch. (N. Y.) 315. See Fitzgerald v. Blake, 42 Barb. (N. Y.) 513 (1864); s. c. 28 How. (N. Y.) Pr. 110.

[3] One is not charged with notice of a suit concerning a collateral matter not necessarily appearing to affect his rights, especially where the complaint has not been filed. Zoeller v. Riley, 100 N. Y. 102 (1885).

[4] See Stern v. O'Connell, 35 N. Y. 104, 106, (1866); Jackson v. Dickenson, 15 Johns. (N. Y.) 309, 315 (1818); s. c. 8 Am. Dec. 236; Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566, 576 (1815); Hayden v. Bucklin, 9 Paige Ch. (N. Y.) 512 (1842); Center v. Planters' and Merchants' Bank, 22 Ala. 743 (1853); Green v. White, 7 Blackf. (Ind.) 242 (1844); Allen v. Mandaville, 26 Miss. 399 (1853); Herrington v. Herrington, 27 Mo. 560 (1858); Shelton v. Johnson, 4 Sneed (Tenn.) 672 (1857); s. c. 70 Am. Dec. 265.

[5] Although a purchaser *pendente lite* is chargeable with notice of the rights of a party claiming adversely to his vendor, yet the purchaser is not bound by a judgment rendered in a subsequent suit, based on the same cause of action, to which he was not made a party. Randall v. Snyder, 64 Tex. 350 (1885).

[6] Cleveland v. Boerum, 23 Barb. (N. Y.) 201 (1856); s. c. 27 Barb. (N. Y.) 252; 3 Abb. (N. Y.) Pr. 294; Harrington v. Slade, 22 Barb. (N. Y.) 161, 166 (1856); Griswold v. Miller. 15 Barb. (N. Y.) 520 (1851); Zeiter v. Bowman, 6 Barb. (N. Y.) 133 (1849); Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441 (1817); Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566 (1815); Hayden v. Bucklin, 9 Paige Ch. (N. Y.) 512 (1842); Jackson v. Losee, 4 Sandf. Ch. (N. Y.) 381 (1846); Fash v. Ravesies, 32 Ala. 451 (1858); Gilman v. Hamilton, 16 Ill. 225 (1854); Kern v. Hazlerigg, 11 Ind. 443 (1858); s. c. 71 Am. Dec. 360; Watson v. Wilson, 2 Dana (Ky.) 406 (1834); s. c. 26 Am. Dec. 459; Debell v. Foxworthy's Heirs, 9 B. Mon. (Ky.) 228

from the service of the summons,[1] but a *lis pendens* does not operate so as to affect the conscience or legal rights of a purchaser, until the court has acquired jurisdiction of the subject-matter of the action.[2] A pending suit is not notice of anything beyond the matters that can be tried therein.[3]

§ 306. History of the doctrine in New York.—The history and principles of the general doctrine of *lis pendens* are fully set forth by Chancellor Kent in Murray v. Ballou,[4] and in Murray v. Lylburn.[5] The whole law on the subject, it has been said, may be found in these two cases, subsequent cases having merely exemplified and applied the law as there expounded by the learned chancellor.[6]

Prior to the enactment of any statute in New York, the pendency of an action in equity was, of itself, notice to all

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(1848); Talbott's Exrs. v. Bell's Heirs, 5 B. Mon. (Ky.) 320 (1845); s. c. 43 Am. Dec. 126; Masson v. Saloy, 12 La. An. 776 (1857); Shotwell v. Lawson, 30 Miss. 27 (1855); s. c. 64 Am. Dec. 145; Hersey v. Turbett, 27 Pa. St. 418 (1856).

[1] Harrington v. Slade, 22 Barb. (N. Y.) 161 (1856); Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566, 576 (1815); Griffith v. Griffith, Hoff. Ch. (N. Y.) 153 (1839); Weber v. Fowler, 11 How. (N. Y.) Pr. 458 (1854); Hovey v. Hill, 3 Lans. (N. Y.) 167, 170 (1870); Parks v. Jackson, 11 Wend. (N. Y.) 442 (1833).

In Michigan it is held that a suit and a cross-suit constitute but one action, and that notice of the suit is notice of the cross-suit also. Thus, where in an original action to foreclose, a *lis pendens* was filed, but was not filed with a cross-complaint, it was held that the *lis pendens* in the original action was constructive notice to all of the defendants under the cross-complaint also; The Hall Lumber Co. v. Gustin, 54 Mich. 625 (1884). But it is held in Kentucky that where a mortgagee has sued to foreclose his mortgage, and made another mortgagee a defendant, an action by the latter will not constitute a *lis pendens* until he files his cross-petition and causes a process to be issued. Hart v. Hayden, 79 Ky. 346 (1881).

[2] Carrington v. Brents, 1 McL. C. C. 167 (1832). See Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566 (1815); Worsley v. Scarborough, 3 Atk. 392 (1746); Bishop of Winchester v. Payne, 11 Ves. 194 (1805); Sorrell v. Carpenter, 2 P. Wms. 482 (1728).

[3] Weiler v. Dreufus, 26 Fed. Rep. 824 (1886).

[4] 1 Johns. Ch. (N. Y.) 566 (1815).

[5] 2 Johns. Ch. (N. Y.) 441 (1817).

[6] See Leitch v. Wells, 48 N. Y. 585 (1872); Winston v. Westfeldt, 22 Ala. 760 (1853); s. c. 58 Am. Dec. 278; Mims v. West, 38 Ga. 18 (1868); Stone v. Elliott, 11 Ohio St. 252 (1860); Diamond v. Lawrence Co., 37 Pa. St. 353 (1860); s. c. 78 Am. Dec. 429; Kieffer v. Ehler, 18 Pa. St. 388 (1852); City of Lexington v. Butler, 81 U. S. (14 Wall.) 282 (1871); bk. 20 L. ed. 809; Durrant v. Iowa Co., Woolw. C. C. 69 (1864).

parties who had any interest in it, or in the subject-matter of the controversy. Since the adoption of the Code the time of filing the notice has been frequently changed. Prior to 1851 the notice of *lis pendens* could be filed only at the time of commencing the action; by an amendment of that year the time of filing the notice was made to depend upon the time of filing the complaint, and another amendment in 1862 provided that the action should be deemed commenced, for the purposes of that section only, from the time of filing the notice of the pendency of the action.

The early doctrine and practice of *lis pendens*, though seemingly necessary to give effect to chancery decrees and to obviate the inconvenience of a constant change of parties, at times worked great injustice to innocent persons. To remedy this evil many of the states early passed statutes,[1] which generally provided in substance, that, in order to render the filing of a bill in chancery constructive notice to a purchaser of real estate pending a suit affecting it, the complainant must at the same time file with the clerk of the court in the county in which the land was situated, a notice of the pendency of the suit.[2] The notice is always required to be filed with the officer who is charged by law with the duty of keeping the records of transfers, whether that officer be the "clerk of the court," as in New York; the "register of deeds," as in Wisconsin, or the "county recorder," as in Ohio.

§ 307. **Contents of notice of lis pendens.**—The notice of *lis pendens* in New York must contain (1) the names of the parties to the action; (2) a statement of the object of the action; (3) a description of the property in the county where the notice is filed, affected by the action; (4) the date of the mortgage; (5) the parties to the mortgage; (6) the time of recording the mortgage, and (7) the place where the mortgage is recorded.[3] But it is not absolutely necessary to the validity of the notice that all these particulars, where required,

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[1] See N. Y. Act, 1823 (L. 1823, chap. 182, § 11).

[2] See N. Y. Code Civ. Proc. §§ 1670, 1673.

[3] N. Y. Code Civ. Proc. §§ 1631, 1670; N. Y. Supreme Court Rule 60.

should be given with minuteness and entire accuracy. For instance, the names of the parties are always required, yet if the name of a defendant should be misspelled, or if a middle letter should be erroneously inserted in his name,[1] the notice would not be affected thereby, because of the well settled and well known rule of law that middle letters, although descriptive, are not essential parts of a name;[2] even the addition or omission of the whole middle name would not vary the rule.[3]

One of the requisites of a *lis pendens* is that it shall state where the mortgage is recorded; but if the notice describes the premises, giving the ward and county in which they are situated, and states that the mortgage was recorded, without stating in what county, it would seem to be a sufficient compliance with the statute,[4] because the statutes of the various states, regulating the recording of transfers and incumbrances, designate where all such instruments shall be recorded, which is always in the county where the premises are situated; and since every person is bound to take notice of public statutes, the notice being filed in the office where the mortgage is recorded, no one reading the notice and having a knowledge of the statute can be misled. The New York Court of Appeals say,[5] that the object of the

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[1] In the case of Weber v. Fowler, 11 How. (N. Y.) Pr. 458 (1854), the name of a defendant was indexed "John F. Fowler" in the notice of *lis pendens*, instead of "John Fowler," his true name; the court held that the notice was sufficient to put the purchaser *pendente lite* on inquiry, and to charge him with all knowledge to which the inquiry, if made, would have led, and therefore to be a substantial compliance with the requirements of the statute. See also Reed v. Gannon, 50 N. Y. 345 (1872); Williamson v. Brown, 15 N. Y. 362 (1857); Brumfield v. Boutall, 24 Hun (N. Y.) 451 (1881); Jones v. Smith, 1 Hare, 43, 55 (1841); Taylor v. Baker, 5 Price, 306 (1818); Benson v. Heathorn, 1 Younge & Col. Ch. 328 (1842).

[2] Roosevelt v. Gardinier, 2 Cow. (N. Y.) 463 (1824); Milk v. Christie, 1 Hill (N. Y.) 102 (1841); Weber v. Fowler, 11 How. (N. Y.) Pr. 458 (1854); People v. Collins, 7 Johns. (N. Y.) 549 (1811); Franklin v. Talmadge, 5 Johns. (N. Y.) 84 (1809).

[3] Roosevelt v. Gardinier, 2 Cow. (N. Y.) 463 (1824); Milk v. Christie, 1 Hill (N. Y.) 102 (1841); Franklin v. Talmadge, 5 Johns. (N. Y.) 84 (1809).

[4] Potter v. Rowland, 8 N. Y. 448 (1853).

[5] See Potter v. Rowland, 8 N. Y. 448, 450 (1853).

statute was to require such a description of the mortgage as to apprise individuals, having liens by judgment on the mortgaged premises, where they could find the record of the mortgage, and that, this being effectually done, the notice was sufficient, although it did not follow the prescribed form, which is said to be merely directory.

§ 308. **Description of premises.**—The mortgaged premises should be fully and properly described in a *lis pendens;* there will not even be a constructive notice, where the property is not specified in the proceedings.[1] A notice which describes the premises simply as "all the real property of the defendant Brown, or in which she may have an interest, situated in Chenango county, New York," has been held void for indefiniteness.[2] If the notice of *lis pendens*, filed in a mortgage foreclosure suit, describes the premises incorrectly, the mortgagor, it has been said, will be entitled to have a judgment rendered against him on default set aside.[3] The notice of *lis pendens* should describe only the property actually to be affected by the judgment.[4]

§ 309. **When notice of lis pendens to be filed.**—The New York Code provides that a notice of *lis pendens* may be filed by the plaintiff when he files his complaint or at any time afterwards, but at least twenty days before final judgment.[5] Where the notice is required to be filed at, or subsequently to, the time of filing the complaint and issuing the summons thereon, as in New York, a notice filed before the issuance or service of the summons has been said to be a nullity;[6] the better opinion, however, seems to be that a notice so filed is not a nullity, but that it will simply be

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[1] Gardner v. Peckham, 13 R. I. 102 (1880); Russell v. Kirkbride, 62 Tex. 455 (1884).

[2] Jaffray v. Brown, 17 Hun (N. Y.) 575 (1879).

[3] Spraggon v. McGreer, 14 Wis. 439 (1861); Manning v. McClurg, 14 Wis. 350 (1861).

[4] Fitzgerald v. Blake, 42 Barb. (N. Y.) 513 (1864); s. c. 28 How. (N. Y.) Pr. 110 (1864); Griffith v. Griffith, Hoff. Ch. (N. Y.) 153; s. c. aff'd 9 Paige Ch. (N. Y.) 315 (1841).

[5] N. Y. Code Civ. Proc. §§ 1631, 1670.

[6] Benson v. Sayre, 7 Abb. (N. Y.) Pr. 472 (1858), note; Burroughs v. Reiger, 12 How. (N. Y.) Pr. 171 (1856).

inoperative until the summons is actually served, at which time it will become operative.[1]

The court say, in Tate v. Jordan,[2] that "to hold the notice invalid forever, because there may have been some interval of time, however short, when it was not true in point of fact, and was therefore null, is to make a rule of law superior to and independent of the reason on which it is founded. The maxim, *cessante ratione, cessat quoque lex*, applies." And where a notice is filed without the complaint, even though the action has been previously commenced by service of the summons, it is not valid,[3] but will become operative when the complaint is filed.[4]

Where a notice of *lis pendens* is not filed within the time required, it may be filed *nunc pro tunc*; but inasmuch as the notice is effective only from the date when it is actually filed, such *nunc pro tunc* filing will not affect the rights of third parties acquired prior to the date of actual filing.[5]

§ 310. **Who may file notice of lis pendens.**—The right to file a *lis pendens*, being statutory, is an absolute right and not in any way dependent on judicial discretion,[6] and can not be impaired by the order of any court.[7] A notice of *lis pendens* in a foreclosure suit is required, under the statute, to be filed by the plaintiff, and may be filed by a defendant,

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[1] Farmers' Loan & Trust Co. v. Dickson, 9 Abb. (N. Y.) Pr. 61 (1859); Waring v. Waring, 7 Abb. (N. Y.) Pr. 472 (1858); Tate v. Jordan, 3 Abb. (N. Y.) Pr. 392 (1856).

[2] 3 Abb. (N. Y.) Pr. 392 (1856).

[3] Weeks v. Tomes, 76 N. Y. 601 (1879), aff'g 16 Hun (N. Y.) 349; Leitch v. Wells, 48 N. Y. 585 (1872); Stern v. O'Connell, 35 N. Y. 104 (1866); Burroughs v. Reiger, 12 How. (N. Y.) Pr. 171 (1856).

[4] Benson v. Sayre, 7 Abb. (N. Y.) Pr. 472 (1858), note. See Farmers' Loan & Trust Co. v. Dickson, 9 Abb. (N. Y.) Pr. 61 (1859); s. c. 17 How. (N. Y.) Pr. 477; Tate v. Jordan, 3 Abb. (N. Y.) Pr. 392 (1856); Butler v. Tomlinson, 38 Barb. (N. Y.) 641 (1862); Burroughs v. Reiger, 12 How. (N. Y.) Pr. 171 (1856).

[5] Weeks v. Tomes, 76 N. Y. 601 (1879), aff'g 16 Hun (N. Y.) 349.

[6] Mills v. Bliss, 55 N. Y. 139 (1873); Niebur v. Schreyer, 10 N. Y. Civ. Proc. Rep. 72 (1886).

[7] Platt v. Mathews, 13 Rep. (U. S. C. C. 2d Ct. N. Y.) 581 (1882). The right to file and to cancel a notice of *lis pendens* being statutory, the court can not direct it to be canceled unless some one of the events specified in the statute has taken place. Willis v. Bellamy, 53 N. Y. Supr. Ct. (21 J. & S.) 94 (1886).

where he sets up in his answer a counter-claim, alleging a joint interest of parties in certain real property, and demands a judgment affecting the title thereto.[1] In such a case the defendant filing the notice is regarded as a plaintiff, and the plaintiff as a defendant.[2] And where the defendant sets out and claims the protection of certain rights in the land involved in the suit, it becomes necessary for him to file a *lis pendens*, in order to protect or to preserve such rights as he may be adjudged to have; because a purchaser is not chargeable with constructive notice of infirmities in his vendor's title, by reason of an equitable owner's assertion of his rights in his answer in a foreclosure suit, if by the judgment therein it appeared that a sale of the premises had been regularly authorized, and title in that manner acquired by his vendor, who was the purchaser of the premises on the foreclosure sale. The purchaser is not bound to look so far into the pleadings as to inform himself of the contents of such answer, but is only required to consult the judgment itself.[3]

§ 311. **Recording and indexing lis pendens.**—The New York Code of Civil Procedure,[4] requires each county clerk, with whom a notice of *lis pendens* is filed, on the payment of his fee, to record and index such notice immediately, in a book kept in his office for that purpose. The party filing a notice of pendency of action is required to indicate at the foot thereof, the names of the defendants against whom he wishes to have the notice indexed.[5] Some attorneys require the notice to be indexed only against the names of the owners of the fee title; but the safer practice is thought to be to require it to be indexed against the names of all the defendants.

Where a defendant sets up in his answer a counter-claim, upon which he demands an affirmative judgment affecting the title to, or the possession, use or enjoyment of, real

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[1] N. Y. Code Civ. Proc. § 1631, 1673. See Niebur v. Schreyer, 10 N. Y. Civ. Proc. Rep. 72 (1886); s. c. 1 N. Y. St. Rep. 626.

[2] New York Code Civ. Proc. § 1673.

[3] Miller v. McGuckin, 15 Abb. (N. Y.) N. C. 204 (1884).

[4] N. Y. Code Civ. Proc. § 1672. See Isaacs v. Isaacs, 61 How. (N. Y.) Pr. 369 (1881).

[5] See N. Y. Code Civ. Proc. § 1672.

property, he may, at the time of filing his answer, or at any time afterwards before final judgment, file a notice of the pendency of the suit similar to that filed by the plaintiff in such action. The rules governing the filing of a *lis pendens* by a defendant, are the same as those applicable to a like notice filed by a plaintiff. For the purpose of such an application, the defendant filing a notice is regarded as a plaintiff, and the plaintiff is regarded as a defendant.[1]

§ 312. Effect of notice of lis pendens.—The proper filing of a notice of *lis pendens* is constructive notice of the pendency of the action to all subsequent purchasers or incumbrancers of the land affected thereby, and is a substitute for actual notice;[2] it is as effective against a valid transfer or incumbrance[3] of the property described in it as an injunction would be.[4] Any subsequent sale or incumbrance of the property pending the suit, will be invalid as against the party filing the notice,[5] because any one purchasing after the notice becomes operative, takes the property subject to the claims of the plaintiff.[6] The effect of filing a notice of *lis pendens* will not be defeated by its having been lost from the files, or not having been properly entered, through no fault of the plaintiff.[7] The notice of *lis pendens* binds all parties to the action, together with all purchasers from them, and all parties claiming under them, subsequently

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[1] See Niebuhr v. Schreyer, 10 N. Y. Civ. Proc. Rep. 72 (1886); s. c. 1 N. Y. St. Rep. 626; N. Y. Code Civ. Proc. § 1673.

[2] Chapman v. West, 17 N. Y. 125 (1858); s. c. 10 How. (N. Y.) Pr. 367; Hall v. Nelson, 14 How. (N. Y.) Pr. 32 (1856); s. c. 23 Barb. (N. Y.) 88.

[3] Pending a bill of foreclosure filed by the mortgagee, the mortgagor can not, by a contract with a mechanic, not sanctioned by the mortgagee, create a lien which shall be detrimental to the interests of the mortgagee; Hards v. Connecticut Mut. L. Ins. Co., 8 Biss. C. C. 234 (1878); s. c. 6 Rep. 420.

[4] Stevenson v. Fayerweather, 21 How. (N. Y.) Pr. 449 (1860).

[5] Grider v. Payne, 9 Dana (Ky.) 190 (1839).

[6] Chapman v. West, 17 N. Y. 125 (1858); Zeiter v. Bowman, 6 Barb. (N. Y.) 133 (1849); Edmonds v. Crenshaw, 1 McC. (S. C.) Eq. 264 (1826).

[7] Heim v. Ellis, 49 Mich. 241 (1882).

to the filing of the same.[1] All who are in privity with the parties to the action will also be bound.[2]

A *lis pendens* binds a purchaser with constructive notice of all the facts which are apparent on the face of the pleadings at the time he takes his deed, and of such other facts as those facts necessarily put him upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to his knowledge.[3]

§ 313. **Who regarded as subsequent incumbrancers.**— An assignee in bankruptcy of a mortgagor pending a foreclosure is an incumbrancer within the meaning of the statute, and will be bound by a notice of *lis pendens*;[4] so also is an assignee in bankruptcy in a suit commenced subsequently to filing the notice, and he will be bound thereby.[5] Likewise, a judgment creditor will be bound by the notice, where his judgment was entered after filing the *lis pendens*, although the summons was served before the *lis pendens* was filed;[6] and in a suit to reform and to foreclose an unsealed mortgage, a notice of *lis pendens*, filed prior to the recording of a deed by the mortgagor to a grantee, against whom a judgment had been docketed, will save the plaintiff his prior lien as against such judgment.[7] It will be

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[1] Cleveland v. Boerum, 23 Barb. (N. Y.) 201 (1856); s. c. 3 Abb. (N. Y.) Pr. 294; aff'd 27 Barb. (N. Y.) 252; 24 N. Y. 613; Harrington v. Slade, 22 Barb. (N. Y.) 162 (1856). See Patterson v. Brown, 32 N. Y. 81 (1865); Chapman v. West, 17 N. Y. 125 (1858), aff'g 10 How. (N. Y.) Pr. 367; People *ex rel.* v. Connolly, 8 Abb. (N. Y.) Pr. 128 (1858); Griswold v. Miller, 15 Barb. (N. Y.) 520 (1851); Zeiter v. Bowman, 6 Barb. (N. Y.) 133 (1849); Thompson v. Clark, 4 Hun (N. Y.) 164 (1875); s. c. 6 T. & C. (N. Y.) 510.

[2] Craig v. Ward, 1 Abb. Ct. App. Dec. (N. Y.) 454 (1867), aff'g 36 Barb. (N. Y.) 377 (1862); s. c. 3 Abb. (N. Y.) Pr. N. S. 235; 3 Keyes (N. Y.) 387.

[3] Jones v. McNarrin, 68 Me. 334 (1878).

[4] Hovey v. Hill, 3 Lans. (N. Y.) 167 (1870). See Lamont v. Cheshire, 65 N. Y. 30 (1875), aff'g 6 Lans. (N. Y.) 234 (1872).

[5] Cleveland v. Boerum, 23 Barb. (N. Y.) 201 (1856); aff'd 24 N. Y. 613 (1862). See Griswold v. Fowler, 6 Abb. (N. Y.) Pr. 113 (1857).

[6] See Fuller v. Scribner, 76 N. Y. 190 (1879).

[7] Lebanon Savings Bank v. Hollenbeck, 29 Minn. 322 (1882). The effect of properly filing a *lis pendens* will be avoided by proof of actual notice of the unrecorded deed. See Slattery v. Schwannecke, 44 Hun (N. Y.) 75 (1887).

otherwise, however, where the judgment is docketed after the filing of a *lis pendens*, but before the filing of the complaint in a foreclosure suit, because notice of the pendency of an action to foreclose a mortgage, though duly filed, is inoperative before the filing of the complaint, and judgment can not be entered in the action until twenty days after the complaint has been filed.[1] A notice of *lis pendens*, filed in an equitable action for the dissolution of a partnership, is ineffective as against a mortgagee whose mortgage ante-dated the notice, though it was not recorded until after the notice was filed.[2]

It was held in an early case[3] in New York, that a judgment lien is not a subsequent incumbrance within the meaning of the New York Code ;[4] but in a later case[5] it was said, that a judgment creditor is a subsequent incumbrancer within the meaning of the Code, and that where a judgment is docketed subsequently to the filing of a *lis pendens* in a foreclosure suit, and to the service of the summons on one of the defendants, the judgment creditor will be bound by the decree, although not made a party to the action.

§ 314. Effect of lis pendens on holders of unrecorded conveyances.—Every party whose conveyance is executed or recorded subsequently to the operation of a notice of *lis pendens*, is considered a subsequent purchaser or incumbrancer. Thus, it has been held, that where the purchaser of mortgaged premises omitted to record his deed, although previously executed, until after the filing of the notice of *lis pendens* in a foreclosure suit, he was precluded from all rights under such deed, as against the purchaser under the judgment in the foreclosure suit, to the same extent as

[1] Olson v. Paul, 56 Wis. 30 (1882).

[2] Hammond v. Paxton, 58 Mich. 394 (1885).

[3] Rodgers v. Bonner, 45 N. Y. 379 (1871). In this case the court say that a judgment is not a specific lien upon any specific real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, both legal and equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens.

[4] N. Y. Code Civ. Proc. § 1671.

[5] Fuller v. Scribner, 76 N. Y. 190 (1879), aff'g 16 Hun (N. Y.) 130. See Prescott v. Trueman, 4 Mass. 627, 630 (1808); s. c. 3 Am. Dec. 246.

though he had been a party to the action.[1] And a mortgage given before, but recorded after, a *lis pendens* is filed, will be barred thereby.[2]

In a case where A. commenced an action to foreclose a mortgage on the 23d of July, and at 12:30 o'clock on that day filed his summons and complaint and notice of *lis pendens* in the clerk's office, copies of the summons and complaint were delivered to the sheriff within an hour thereafter, for service upon the defendant, and were actually served upon him on the 25th day of the same month. B. made a loan to the defendant and received a mortgage on the same premises on the same 23d day of July, between the hours of two and four o'clock P. M., which was put on record at five o'clock of that day. The court held that B.'s lien was cut off and barred by the notice of *lis pendens* in A.'s suit.[3]

The filing of a notice of *lis pendens* can have no greater effect against the holder of an unrecorded conveyance or incumbrance than making him a party to the suit would have had, and where no relief could be obtained against him in the action, had he been made a party, no rights will be acquired against him by filing such a notice.[4] The notice of a suit affects only proper parties to the suit and those claiming under them, and no act of the plaintiff in improperly inserting other names and in filing the notice so framed can affect the rights of prior purchasers or incumbrancers not properly parties to the action.[5] Thus, where a purchaser by contract is in possession of the land, he is not chargeable with a notice of *lis pendens*, and payments made by him to the vendor will be held valid.[6] Neither will a person who claims title under a sale for taxes be bound by the notice.[7]

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[1] Ostrom v. McCann, 21 How. (N. Y.) Pr. 431 (1860).

[2] Ayrault v. Murphy, 54 N. Y. 203 (1873); Kindberg v. Freeman, 39 Hun (N. Y.) 466 (1886).

[3] Stern v. O'Connell, 35 N. Y. 104 (1866).

[4] Lamont v. Cheshire, 65 N. Y. 30 (1875), aff'g 6 Lans. (N. Y.) 234 (1872). See Porter v. Pico, 55 Cal. 165, 175 (1880).

[5] People *ex rel.* v. Connolly, 8 Abb. (N. Y.) Pr. 128 (1858), aff'g s. c. *sub nom.* Chapman v. Draper, 10 How. (N. Y.) Pr. 367 (1854); Stuyvesant v. Hone, 1 Sandf. Ch. (N. Y.) 419 (1844); s. c. aff'd *sub nom.* Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847).

[6] Moyer v. Hinman, 13 N. Y. 180 (1855); Dwight v. Phillips, 48 Barb. (N. Y.) 116 (1865); Smith v. Gage,

§ 315. **Effect of omission to file notice of lis pendens.**—Where a notice of *lis pendens* is required by statute, its object is to give constructive notice of the pendency of the suit to all parties dealing with the defendant in regard to the land, the title to, or the possession of, which is to be affected by the suit, and to bind them by the judgment in the same manner as though they had originally been made parties to the action. Failure to file such a notice will simply render the judgment inoperative to bind subsequent purchasers or incumbrancers; and since the rights of such persons only can be affected, they alone may be heard to take advantage of the omission to file a notice of *lis pendens*.[1]

A person who parts with nothing of value on receiving a conveyance of real property, pending an action affecting the title thereto, can not be injured by not receiving notice of the existence of such an action, and he will be bound by the results of the action without notice either actual or constructive of its pendency.[2]

It was held by the supreme court of Wisconsin in 1860,[3] that a failure to file a notice of *lis pendens*, where required by the statute, is not such an irregularity as will vitiate the judgment or cause it to be reversed on appeal. The same court said in another case[4] of that year that "the purpose and object of filing a *lis pendens* manifestly is, to give to all persons not parties to the suit, notice of the pendency of the same, and to make it operate as constructive notice to any one who may become interested in the property during the litigation.

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41 Barb. (N. Y.) 61 (1863); Parks v. Jackson, 11 Wend. (N. Y.) 442 (1833).

[7] Becker v. Howard, 4 Hun (N. Y.) 359 (1875).

[1] Potter v. Rowland, 8 N. Y. 448 (1854); White v. Coulter, 1 Hun (N. Y.) 357 (1874); s. c. 3 T. & C. (N. Y.) 608; Curtis v. Hitchcock, 10 Paige Ch. (N. Y.) 399 (1843).

[2] Leavitt v. Tylee, 1 Sandf. Ch. (N. Y.) 207 (1843); aff'd in Shaw v. Leavitt, 3 Sandf. Ch. (N. Y.) 163 (1845). See Brouwer v. Harbeck, 9 N. Y. 589, 595 (1854); Ogden v. Jackson, 1 Johns. (N. Y.) 370 (1806); Gorham v. Stearns, 42 Mass. (1 Metc.) 366 (1840); Gibson v. Muskett, 3 Man. & G. 158 (1841); Flook v. Jones, 4 Bing. 20 (1826).

[3] Boyd v. Weil, 11 Wis. 58 (1860).

[4] Boyd v. Weil, 11 Wis. 58, 60 (1860). See Potter v. Rowland, 8 N. Y. 448 (1854); Curtis v. Hitchcock, 10 Paige Ch. (N. Y.) 399 (1843); Houghton v. Mariner, 7 Wis. 244 (1859).

But we can see no good reason for holding that the judgment is void as to the mortgagors, because this notice was not filed, or proof thereof duly made to the circuit court." But the following year the same court reached an opposite conclusion,[1] overruling Boyd v. Weil, in so far as that case may be supposed to sanction a contrary doctrine,[2] and holding that when it appears from the record in a foreclosure suit that no notice of *lis pendens* was filed as required by the statute, it will be an irregularity, for which the judgment will be reversed on the application of the mortgagor, or of any one interested in the funds arising from the sale of the premises.

§ 316. **Proof of filing notice of lis pendens.**—Under the New York practice in all foreclosure cases, the plaintiff, when he moves for judgment, must show that a proper notice of the pendency of the action was filed at the time of filing the complaint, or afterwards, and at least twenty days before the motion for judgment is made, as required by the Code.[3] The Wisconsin statute and practice are substantially the same.[4] The proof of filing the notice may be made by the affidavit of the plaintiff's attorney, or by the certificate of the clerk of the court in the county in which the mortgaged premises are situated.[5]

The language of the New York Code is imperative, and the filing of the proper notice in foreclosure proceedings is an indispensable prerequisite to obtaining judgment.[6] And the supreme court requires the plaintiff, when he moves for judgment, to show by affidavit or the certificate of the clerk of the county in which the mortgaged premises are situated, that a proper notice of the pendency of the action has been duly filed as directed by its rules.[7] But this requirement is

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[1] See Manning v. McClurg, 14 Wis. 350 (1861); Spraggon v. McGreer, 14 Wis. 439 (1861). See also Catlin v. Pedrick, 17 Wis. 88 (1863).

[2] See Catlin v. Pedrick, 17 Wis. 88 (1863).

[3] N. Y. Code Civ. Proc. § 1631. N. Y. Supreme Court Rule 60.

[4] See Catlin v. Pedrick, 17 Wis. 88 (1863); Spraggon v. McGreer, 14 Wis. 439 (1861); Manning v. McClurg, 14 Wis. 350 (1861).

[5] In Wisconsin proof may be made by the certificate of the register of deeds; Manning v. McClurg, 14 Wis. 350 (1861); Boyd v. Weil, 11 Wis. 58 (1860).

[6] N. Y. Code Civ. Proc. § 1631.

[7] N. Y. Supreme Court Rule 60.

merely a rule of practice and does not affect the validity of the judgment. If no proof of filing the notice of the pendency of the suit is furnished, the judgment will be irregular, but not void;[1] yet the irregularity is such as will vitiate the judgment or cause it to be reversed on appeal.[2] Where a proper notice of *lis pendens* has been duly filed, and there is no objection to the proof of such filing, the fact that the affidavit of filing is defective, will not render the judgment void ; it is a mere irregularity which may be disregarded or amended,[3] in the absence of any wrong to the defendant.[4] Proof of the filing of a notice of *lis pendens* may be permitted by the court to be made *nunc pro tunc*.[5]

§ 317. Defective and amended notice of lis pendens.— A substantial compliance with the statute will be sufficient in a notice of *lis pendens*.[6] But the property must be sufficiently and correctly described;[7] it has been held that if a notice of *lis pendens* describes the premises incorrectly, the mortgagor will be entitled to have a judgment rendered against him on default set aside.[8] But where all the parties having an interest in the property are before the court, and have been properly made parties to the action, it is said that there can be no objection to a defective *lis pendens*, because no one can be prejudiced thereby.[9] Where the original notice of *lis pendens* is defective and ineffectual, and an amended *lis pendens* is filed with or after the filing of an authorized amended summons and complaint, it will be good.[10]

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[1] Potter v. Rowland, 8 N. Y. 448 (1853); White v. Coulter, 1 Hun (N. Y.) 357 (1874); s. c. 3 T. & C. (N. Y.) 608; Curtis v. Hitchcock, 10 Paige Ch. (N.Y.) 399 (1843); Catlin v. Pedrick, 17 Wis. 88 (1863).

[2] Spraggon v. McGreer, 14 Wis. 439 (1861), overruling Boyd v. Weil, 11 Wis. 58 (1860); Manning v. McClurg, 14 Wis. 350 (1861).

[3] N. Y. Code Civ. Proc. § 723.

[4] White v. Coulter, 1 Hun (N. Y.) 357 (1874); s. c. 3 T. & C. (N. Y.) 608.

[5] White v. Coulter, 1 Hun (N. Y.) 357, 365 (1874); s. c. 3 T. & C. (N.Y.) 608.

[6] Potter v. Rowland, 8 N. Y. 448 (1854); Weber v. Fowler, 11 How. (N. Y.) Pr. 458 (1854).

[7] Jaffrey v. Brown, 17 Hun (N. Y.) 575 (1879).

[8] Spraggon v. McGreer, 14 Wis. 439 (1861).

[9] Totten v. Stuyvesant, 3 Edw. Ch. (N. Y.) 500, 505 (1841).

[10] Daly v. Burchell, 13 Abb. (N. Y.) Pr. N. S. 264 (1872).

The court has power to amend a notice of *lis pendens* by inserting therein a specific description of a portion of the premises which was omitted by mistake,[1] or by striking out portions thereof descriptive of property not properly included in such notice.[2]

Where, after filing a notice of *lis pendens*, the complaint is amended by striking out or adding parties, altering the description of the premises, or extending the claim, a new notice of *lis pendens* will be absolutely necessary to conform the notice to the complaint in order to enable proof of its proper filing to be made, and to cut off the rights of judgment creditors of such new parties, as well as to make the amended bill constructive notice to subsequent purchasers and incumbrancers dealing with such new parties in relation to the mortgaged premises.[3] But where the amendment consists simply in adding new parties to the action, without extending the claim or varying the description, a new or amended notice will be necessary only to charge such new parties and those claiming under them with notice; the grantees of the original parties will be bound by the first notice.[4]

Should the complaint be amended by making new parties or by striking out those already parties, or by adding a new description of the premises, the attorney for the plaintiff will not be able to make the necessary proof of the proper filing of a notice of *lis pendens*, as required by the Code and practice, unless a new or an amended notice is filed.[5]

§ 318. **Dormant lis pendens.**—Where a party is to be affected by a pending suit, there should be a "close and continued prosecution" of the same to a final determination;[6]

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[1] Vanderheyden v. Gary, 38 How. (N. Y.) Pr. 367 (1869).

[2] Fitzgerald v. Blake, 42 Barb. (N. Y.) 513 (1864); s. c. 28 How. (N. Y.) Pr. 110.

[3] Clark v. Havens, Clarke Ch. (N. Y.) 560, 563 (1841); Curtis v. Hitchcock, 10 Paige Ch. (N. Y.) 399 (1843); s. c. 2 N. Y. Leg. Obs. 363.

[4] Waring v. Waring, 7 Abb. (N. Y.) Pr. 475 (1858); Curtis v. Hitchcock, 10 Paige Ch. (N. Y.) 399 (1843).

[5] N. Y. Code Civ. Proc. §§ 1631, 1670; N.Y. Supreme Court Rule 60.

[6] Preston v. Tubbin, 1 Vern. 286 (1684). In order to constitute a *litis pendentia*, it is said, there must be a continuance of *litis contestatio*, and something must be done to keep it alive and in force. Kinsman v. Kinsman, 1 Russ. & Myl. 617 (1830).

the *lis pendens* becomes void or dormant, if the action is not diligently pursued.[1] But only unreasonable or unusual negligence in the prosecution of a suit will take away the benefit of a *lis pendens*.[2]

§ 319. **Canceling notice of lis pendens.**—A notice of *lis pendens* properly filed under the provisions of the Code, in an action to foreclose a mortgage on real property, can not be removed or canceled until after the action has been settled, discontinued or abated.[3] After the action has been settled, discontinued or abated, or a final judgment has been rendered therein against the party filing the notice, and the time within which to appeal therefrom has expired, or if the plaintiff unreasonably neglects to proceed, then the cancellation rests in the discretion of the court.[4]

The provisions of the Code of Civil Procedure relating to the cancellation of notices of *lis pendens*, confer that power only upon the court in which the action is pending; the court of common pleas has no power to order the cancellation of a *lis pendens* filed in a district court, where no judgment has been rendered nor transcript filed, so as to make the district court judgment a judgment of the court of common pleas.[5] The question whether an action is sustainable can not be considered on a motion to cancel a *lis pendens*.[6]

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[1] See Sheridan v. Andrews, 49 N. Y. 478 (1872); Myrick v. Selden, 36 Barb. (N. Y.) 15 (1861); Kinsman v. Kinsman, 1 Russ. & Myl. 617 (1830).

[2] Gossom v. Donaldson, 18 B. Mon. (Ky.) 230, 237 (1857); s. c. 68 Am. Dec. 723.

[3] Mills v. Bliss, 55 N. Y. 139 (1873); Parks v. Murray, 2 N. Y. St. Rep. 135 (1886); Willis v. Bellamy, 53 N. Y. Supr. Ct. (21 J. & S.) 94 (1886); Wilmont v. Meserole, 41 N. Y. Supr. Ct. (9 J. & S.) 274 (1876); Niebuhr v. Schreyer, 10 N. Y. Civ. Proc. Rep. 72 (1886); Little v. Rawson, 8 Abb. (N. Y.) N. C. 253, 259 (1880), and note; Pratt v. Hoag, 5 Duer (N. Y.) 631 (1856); s. c. 12 How. (N. Y.) Pr. 215.

[4] N. Y. Code Civ. Proc. § 1674; Willis v. Bellamy, 53 N. Y. Supr. Ct. (21 J. & S.) 94 (1886); Lyle v. Smith, 13 How. (N. Y.) Pr. 104 (1856); N. Y. Code Civ. Proc. § 1674.

[5] Matter of Barnum, (N. Y. City Com. Pl. Sp. T.) N. Y. Daily Reg. May 29, (1884).

[6] Mills v. Bliss, 55 N. Y. 139 (1873). See Pratt v. Hoag, 5 Duer (N. Y.) 631 (1856); s. c. 12 How. (N. Y.) Pr. 215.

CHAPTER XV.

ANSWERS AND DEFENCES.

WHO MAY ANSWER—DEFECT IN PARTIES—ACTION AT LAW ON BOND—DEFECTIVE EXECUTION OF MORTGAGE—INFANCY, INSANITY, IGNORANCE, ALTERATION.

§ 320. Generally.
321. Right of prior incumbrancers to answer.
322. Claimants of interest in equity of redemption may answer.
323. When action ready for trial.
324. Insufficiency of service on another defendant.
325. Objection of defect in parties—How made.
326. Parties personally liable for debt may object to defect in parties.
327. Objection of pendency of action at law on note or bond.
§ 323. Objection of recovery of judgment on note or bond.
329. Objection under the codes.
330. Denial of execution of mortgage.
331. Allegation of infancy.
332. Foreclosure of infants' purchase money mortgage.
333. Allegation of insanity of mortgagor.
334. Defect in execution and record of mortgage.
335. Allegation of alteration of instrument.
336. Illiteracy and negligence.

§ 320. **Generally.**—The answer of a defendant in an action brought to foreclose a mortgage, is regulated in respect to its form by the provisions of the Code of Civil Procedure, the same as an answer in any other civil action.[1] In such an action a defendant may plead the same matters in defence against the mortgage, except only the statute of limitations, that he could against the note or bond which the mortgage was given to secure.[2] A defendant should not serve a general answer, merely admitting that the several rights and interests alleged in the complaint are correctly set forth, without at the same time setting up new matter constituting a defence, counter-claim or set-off. Where the defence

[1] N. Y. Code Civ. Proc. § 500.

[2] Vinton v. King, 86 Mass. (4 Allen), 562 (1862). See Hannan v. Hannan, 123 Mass. 441 (1877); Freeland v. Freeland, 102 Mass. 475 (1869); Holbrook v. Bliss, 91 Mass. (9 Allen), 69 (1864).

consists of new matters, by way of avoidance, the defendant must set forth the facts of his defence in full and prove them as alleged.[1]

Where an answer setting up no new matter constituting a defence, counter-claim or set-off is filed, the plaintiff may move at a special term of the court to strike it out as sham or frivolous, and at the same time apply for judgment; or he may, upon previous notice, apply to the court for judgment upon the pleadings as they stand.[2]

A mortgagor or his grantee may defend a foreclosure, and is entitled, moreover, to reply to the affirmative matter set up in the respective answers of his co-defendants, showing liens in their favor upon the mortgaged property, and to have the validity of the same determined. As to such matter his co-defendants are to be deemed plaintiffs and their answers as complaints.[3]

§ 321. **Right of prior incumbrancers to answer.**—Where the rights of prior incumbrancers are correctly stated in the complaint, it is not necessary for them to appear and answer in order to protect their rights;[4] but where one holds a mortgage upon property which is of insufficient value to satisfy all the liens upon it, he is entitled to contest the existence or the validity of prior mortgage liens asserted by others, although his debt may not be due, and although his mortgage may not have been executed until after the prior mortgagees had instituted suit to enforce their liens.[5] Where prior incumbrancers are made parties defendant, it is not necessary for them to answer and to set up the priority of their respective liens, because the entry of the usual judgment of foreclosure and sale will not cut off nor in any way affect their liens, if they are actually prior to the mortgage under foreclosure.[6]

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[1] Post v. Springsted, 49 Mich. 90 (1882).

[2] Bowman v. Marshall, 9 Paige Ch. (N. Y.) 78 (1841); N. Y. Code Civ. Proc. §§ 537, 545; N. Y. Supreme Court Rule 60.

[3] Ladd v. Mason, 10 Oreg. 308 (1882). See N. Y. Code Civ. Proc. § 521.

[4] Merchants' Ins. Co. v. Marvin, 1 Paige Ch. (N. Y.) 557 (1829).

[5] Hart v. Hayden, 79 Ky. 346 (1881).

[6] Payn v. Grant, 23 Hun (N. Y.) 134 (1880). See *ante* §§ 188–190.

§ 322. **Claimants of interest in equity of redemption may answer.**—Defendants whose claims are against the equity of redemption only, can not file answers and litigate their claims to the surplus as between themselves, until it is ascertained that there will be a surplus; unless their liens are upon different parcels of the mortgaged premises, or their rights are of such a nature as to require them to be passed upon previous to the entry of a decree of sale.[1] But such defendants will always be permitted to set out their respective rights in their answers, so far as may be necessary to enable the court to make a proper decree for the sale of the mortgaged premises in parcels, so as to protect the rights of the several defendants upon the sale and upon the reference for the distribution of the surplus moneys.[2] And they may also set up in their answers any claims they have to the equity of redemption, as incumbrancers or otherwise, as against the complainant.[3]

Where a conveyance of mortgaged premises is not made by its terms subject to a mortgage, but purports to convey the whole title, and especially if it contains full covenants of warranty, the grantee, not having assumed the payment of the mortgage debt and the amount thereof not having been deducted from the purchase money, may interpose the same defences to the mortgage that the mortgagor might have interposed.[4]

A defendant who is entitled to relief against the complainant or a co-defendant, can obtain it only by filing a cross-bill for

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[1] Union Ins. Co. v. VanRensselaer, 4 Paige Ch. (N. Y.) 85 (1833). See N. Y. Code Civ. Proc. § 521; Farmers' Loan & Trust Co. v. Seymour, 9 Paige Ch. (N. Y.) 538 (1842). Prior to the adoption of rules 132 and 136 by the Court of Chancery in 1830, defendants who were junior incumbrancers were not only authorized to litigate their claims with the complainant, but also with their several co-defendants previous to a decree of sale. And as a general rule they were required to do so; Renwick v. Macomb, Hopk. Ch. (N. Y.) 277 (1824); Tower v. White, 10 Paige Ch. (N. Y.) 395, 397 (1843).

[2] Tower v. White, 10 Paige Ch (N. Y.) 397 (1843).

[3] Tower v. White, 10 Paige Ch. (N. Y.) 395 (1843).

[4] Bennett v. Keehn, 57 Wis. 582 (1883), distinguishing Bensley v. Homier, 42 Wis. 631 (1877), Crocker v. Bellangee, 6 Wis. 645 (1854), and Milwaukee M. & M. R. R. Co. v. Milwaukee & W. R. R. Co., 20 Wis. 174 (1865).

that purpose.[1] As a general rule a defendant will not be allowed by his answer to assail the subsequent mortgage of a co-defendant, although he alleges in his answer that such mortgage is fraudulent and void; and his co-defendant, to whom such subsequent mortgage belongs, will not be required to reply to such answer; nor will such answer be taken as confessed by him because of his failure to reply. If one defendant wishes to assail the mortgage of another, he must file a cross-bill for that purpose.[2]

§ 323. **When action ready for trial.**—Where a defendant raises substantial objections to a complaint by demurrer, or where his answer sets up any matter which raises an issue, the plaintiff will not be permitted to proceed against the other defendants until the issue is ready for trial. A foreclosure is noticed for trial, placed upon the calendar and brought on for trial, the same as any other equity cause. To entitle the cause to be placed upon the calendar, the demurrer or answer to the complaint must have been interposed in good faith. If it is frivolous, the plaintiff may apply for judgment on motion, without noticing the case for trial.[3] A defendant in a suit to foreclose a mortgage can defend only on the grounds set up in his answer.[4]

Besides special defences or such defences as arise out of the circumstances of each particular case, there are a number of general defences to an action for foreclosure which will be considered separately in this and in the following four chapters.

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[1] Brinkerhoff v. Franklin, 21 N. J. Eq. (6 C. E. Gr.) 334 (1871); Vanderveer's Admrs. v. Holcomb, 21 N. J. Eq. (6 C. E. Gr.) 105 (1870).

[2] Brinckerhoff v. Franklin, 21 N. J. Eq. (6 C. E. Gr.) 334 (1871).

[3] Bowman v. Marshall, 9 Paige Ch. (N. Y.) 78 (1841); N. Y. Code Civ. Proc. § 537; N. Y. Supreme Court Rule 60.

[4] Higman v. Stewart, 38 Mich. 513 (1878). See James v. McKernon, 6 Johns. (N. Y.) 548, 565 (1810); Beach v. Fulton, 3 Wend. (N. Y.) 573, 584 (1829); Philbrooks v. Mc Ewen, 29 Ind. 347 (1868); Matteson v. Morris, 40 Mich. 52 (1879); Van Dyke v. Davis, 2 Mich. 144 (1851); Hendrix v. Gore, 8 Oreg. 406 (1880); Irnham v. Child, 1 Bro. Ch. 92, 94 (1781); Smith v. Clarke, 12 Ves. 477, 480 (1806); Clarke v. Turton, 11 Ves. 240 (1805); Gilbert's Roman Forum, 218.

§ 324. **Insufficiency of service on another defendant.**—While a defendant may take advantage of a want of service or of a defective service of the summons upon himself, by a special appearance and plea in the suit, or while he may in such a case take no notice of the suit, because he will not be bound by the decree; yet, as a general rule, he can not object to a want of service or to a defective service of the summons upon another defendant, who is not a necessary party to the suit.[1] But the rule is otherwise, if the defendant who was defectively served, is a necessary defendant.[2] And a junior incumbrancer, who is a co-defendant with the mortgagor in a foreclosure, can not, on appeal, complain of the judgment against such mortgagor, on the ground that it was rendered without sufficient notice or service upon him.[3]

But a person, who stands in the relation of a surety for the mortgage debt, is entitled to have the entire equity of redemption applied in the first place to the payment of the debt, and may require all persons claiming an interest in the mortgaged premises to be made parties defendant, in order to make the title offered at the sale perfect against all equities, and may therefore object to a want of service, or to a defective or insufficient service, upon any of such parties.[4]

§ 325. **Objection of defect in parties—How made.**—It is the right of every person, who is liable for any deficiency that may arise upon the sale of the premises on foreclosure, to require that the whole equity of redemption be sold, and to demand that all persons necessary to be joined to accomplish that object be made parties to the action, because his ultimate liability for any deficiency makes it of the highest importance to him that the whole title to the premises be sold, in order that the largest sum possible may be realized.[5] And the objection that there is a want of proper parties defendant is available to the mortgagor who is liable for any

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[1] Mims v. Mims, 35 Ala. 23 (1859); Semple v. Lee, 13 Iowa, 304 (1862). See *ante* § 128.

[2] See *ante* § 128.

[3] Semple v. Lee, 13 Iowa, 304 (1862).

[4] Kortright v. Smith, 3 Edw. Ch. (N. Y.) 402, 404 (1840).

[5] Hall v. Nelson, 23 Barb. (N.Y.) 88, 91 (1856); s. c. 14 How. (N. Y.) Pr. 32. See *ante* §§ 128, 160.

deficiency that may arise on the sale of the premises, even though he may have parted with his interest in the equity of redemption.[1]

Where there is a defect of parties apparent upon the face of the complaint, the objection may be taken by demurrer, but where the defect does not appear upon the face of the complaint, the objection must be taken by answer.[2] In those cases where the objection of a want of parties is made out of season,[3] the want of parties may be supplied by a supplemental bill.[4]

§ 326. Parties personally liable for debt may object to defect in parties.—Every party personally liable for a debt is entitled to have all persons who have, or claim, an interest in the mortgage, made parties to the suit. In those cases where the ownership appears doubtful, the court will order all parties appearing to be interested, to be brought within its jurisdiction.[5] And where a complaint makes a mere surety of the mortgagor for the payment of the debt, a

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[1] Hall v. Nelson, 23 Barb. (N. Y.) 88 (1856); s. c. 14 How. (N. Y.) Pr. 32.

[2] N. Y. Code Civ. Proc. § 498; Dawley v. Brown, 79 N. Y. 397 (1880); Fox v. Moyer, 54 N. Y. 125 (1873); Morris v. Wheeler, 45 N. Y. 708 (1871); Fulton Ins. Co. v. Baldwin, 37 N. Y. 648 (1868); Pittman v. Johnson, 15 Abb. (N. Y.) N. C. 477 (1885); Dillaye v. Parks, 31 Barb. (N. Y.) 132 (1860); Scofield v. Van Syckle, 23 How. (N. Y.) Pr. 97 (1862); Browning v. Marvin, 22 Hun (N. Y.) 547, 551 (1880); Hall v. Richardson, 22 Hun (N. Y.) 446 (1880); Remington v. Walker, 21 Hun (N. Y.) 326 (1880); Holbrook v. Baker, 16 Hun (N. Y.) 176 (1878); Marshall v. Lippman, 16 Hun (N. Y.) 111 (1879); Barclay v. Quicksilver Mining Co., 6 Lans. (N. Y.) 25 (1872); Kittle v. VanDyck, 1 Sandf. Ch. (N. Y.) 76 (1843); Zimmerman v. Schoenfeldt, 6 T. & C. (N. Y.) 142 (1875); s. c. 3 Hun (N. Y.) 692; Hees v. Nellis, 1 T. & C. (N. Y.) 118 (1873); Biden v. James, 25 Week. Dig. (N. Y.) 141 (1886); Hamburger v. Baker, 21 Week. Dig. (N. Y.) 213 (1885). See *ante* § 128.

[3] As in Jones v. Jones, 3 Atk. 110, 217 (1744), where the case had been once heard, and was brought on again upon the equity reserved, when the objection was raised. See also Holdsworth v. Holdsworth, 2 Dick. 799 (1783), where parties appeared to be wanting on an appeal from the decree at the Rolls, and the case was ordered to stand over with liberty for the plaintiffs to file a supplemental bill, merely to add parties.

[4] Ensworth v. Lambert, 4 Johns. Ch. (N. Y.) 605 (1820).

[5] See Kortright v. Smith, 3 Edw. Ch. (N. Y.) 402, 404 (1840).

party to the bill to foreclose, for the purpose of obtaining a decree against such surety or his property, in the event the proceeds of the mortgaged premises are found to be insufficient to satisfy the debt and costs, such surety will have a right to insist that the principal debtor shall be made a party to the suit, if he is within the jurisdiction of the court; but where the principal debtor is an absentee, and has assigned all his right and interest in the equity of redemption in the mortgaged premises, such facts will be a sufficient reason for not making him a party to the foreclosure, even where the surety is made a party for the purpose of obtaining a decree over against him for any deficiency.[1] Where the mortgagor conveys the equity of redemption absolutely, without warranty, the mortgaged premises thereby become the primary fund for the payment of the mortgage debt, and the grantee thereof will have no right to object that the mortgagor is not made a party to a bill to foreclose.[2]

The real party in interest must be plaintiff in an action to foreclose a mortgage. Where the mortgagee has parted with his title to the mortgage before suit, or disposed of his interest therein after suit is instituted, the defendant will have a right to object that the proper party in interest is not before the court, and if this objection is sustained, it will be a bar to the action.[3]

§ 327. **Objection of pendency of action at law on note or bond.**—The pendency of an action at law for the recovery of a debt secured by a mortgage, if no judgment has been recovered in such action, will not prevent the filing of a complaint to foreclose the mortgage.[4] But the filing of

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[1] Bigelow v. Bush, 6 Paige Ch. (N. Y.) 343 (1837).

[2] Bigelow v. Bush, 6 Paige Ch. (N. Y.) 343 (1837).

[3] See Mills v. Hoag, 7 Paige Ch. (N. Y.) 18 (1837); s. c. 31 Am. Dec. 271; Field v. Maghee, 5 Paige Ch. (N. Y.) 539 (1836); Wallace v. Dunning, Walk. Ch. (Mich.) 416 (1844); Smith v. Bartholomew, 42 Vt. 356 (1869).

[4] Williamson v. Champlin, Clarke Ch. (N. Y.) 9 (1839); Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294 (1841); Guest v. Byington, 14 Iowa, 30 (1862); Tappan v. Evans, 11 N. H. 311 (1840).

such complaint for foreclosure will prevent the plaintiff from proceeding in his action at law, without the permission of the court.[1] The fact that a suit at law has been instituted by another party on the note, will not be a bar to the filing of a complaint in foreclosure by the holder of the mortgage. Thus, where a respondent answered among other things, that an action at law was pending in the name of the original payee of the notes mentioned in the mortgage, which the complainant, as the assignee thereof and the holder of the legal title, was seeking to foreclose, a demurrer to the answer was sustained. The court said: "The simple pendency of an action in the name of another plaintiff was no bar to the complainant's recovery."[2]

§ 328. Objection of recovery of judgment on note or bond.—The recovery of a judgment on a note secured by mortgage can not be set up as a defence to an action of foreclosure, if the judgment has not been satisfied,[3] because the merger of a note in a judgment does not extinguish the debt;[4] the land is liable, and the lien of the mortgage will continue until the debt is paid, or the judgment is barred by the statute of limitations.[5] And this is true, whether the note upon which the judgment was obtained, is secured by a

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[1] Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294 (1841).

[2] Guest v. Byington, 14 Iowa, 30, 32 (1862).

[3] Vansant v. Allmon, 23 Ill. 30 (1859); Severson v. Moore, 17 Ind. 231 (1861); Jenkinson v. Ewing, 17 Ind. 505 (1861); Goenen v. Schroeder, 18 Minn. 66 (1871).

[4] Priest v. Wheelock, 58 Ill. 114 (1871).

[5] See Butler v. Miller, 1 N. Y. 496 (1848), questioning s. c. 1 Den. (N. Y.) 407; Peck's Appeal, 31 Conn. 215 (1862); Darst v. Bates, 51 Ill. 439 (1869); Hewitt v. Templeton, 48 Ill. 367 (1868); Hamilton v. Quimby, 46 Ill. 90 (1867); Wayman v. Cochrane, 35 Ill. 152 (1864); Vansant v. Allmon, 23 Ill. 30 (1859); Cissna v. Haines, 18 Ind. 496 (1862); Jenkinson v. Ewing, 17 Ind. 505 (1861); O'Leary v. Snediker, 16 Ind. 404 (1861); Hensicker v. Lamborn, 13 Ind. 468 (1859); Applegate v. Mason, 13 Ind. 75 (1859); Markle v. Rapp, 2 Blackf. (Ind.) 268 (1829); Morrison v. Morrison, 38 Iowa, 73 (1874); Shearer v. Mills, 35 Iowa, 499 (1872); Jordan v. Smith, 30 Iowa, 500 (1870); Hendershott v. Ping, 24 Iowa, 134 (1867); State v. Lake, 17 Iowa, 215 (1864); Wahl v. Phillips, 12 Iowa, 81 (1861); Jewett v. Hamlim, 68 Me. 172 (1878); Torrey v. Cook, 116 Mass. 163 (1874); Ely v. Ely, 72 Mass. (6 Gray), 439 (1856); Thornton v. Pigg, 24 Mo. 249 (1857); Riley v. McCord, 21 Mo. 285 (1855); Lewis v. Conover, 21 N. J. Eq. (6

mortgage or a trust deed,[1] and whether the judgment be for the whole or only a part of the mortgage debt.[2]

It has been held in New York, that a decree for the foreclosure of a mortgage extinguishes the lien of the mortgage, although such decree is merely enrolled and not docketed;[3] but the prevailing doctrine is that the mortgage lien is not impaired either by a decree in foreclosure,[4] a judgment on *scire facias*,[5] or the taking of a recognizance in the place of the sum due on the mortgage note,[6] for even after the taking of such recognizance the mortgagee may foreclose his mortgage.[7] Where a judgment has been taken on a note, its only effect is to establish the validity of the note, and that of the mortgage securing it.[8] But satisfaction of the judgment may be set up as a defence;[9] the fact that the premises have been taken on execution,[10] and sold in satisfaction of the judgment, will also be a good defence.[11]

The effect of the commencement of a foreclosure is to work the discontinuance of every other action or proceeding on the note, except by leave of the court in which the foreclosure is pending.[12] Under the former New York practice,

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C. E. Gr.) 230 (1870); Flanagan v. Westcott, 11 N. J. Eq. (3 Stockt.) 264 (1856).

[1] Hamilton v. Quimby, 46 Ill. 90 (1867).

[2] Applegate v. Mason, 13 Ind. 75 (1859).

[3] People v. Beebe, 1 Barb. (N. Y.) 379 (1847). See Gage v. Brewster, 31 N. Y. 218 (1865).

[4] Peck's Appeal, 31 Conn. 215 (1862); Priest v. Wheelock, 58 Ill. 114 (1871); Evansville Gas Light Co. v. State, 73 Ind. 219 (1881); s. c. 38 Am. Rep. 129; Teal v. Hinchman, 69 Ind. 379 (1879); Lapping v. Duffy, 47 Ind. 51 (1874); Stahl v. Roost, 34 Iowa, 475 (1872); Hendershott v. Ping, 24 Iowa, 134 (1867); Riley v. McCord, 21 Mo. 285 (1855); Helmbold v. Man, 4 Whart. (Pa.) 410 (1839).

[5] Rockwell v. Servant, 63 Ill. 424 (1872); Helmbold v. Man, 4 Whart. (Pa.) 410 (1839).

[6] Davis v. Maynard, 9 Mass. 242 (1812).

[7] Thornton v. Pigg, 24 Mo. 249 (1857).

[8] Morris v. Floyd, 5 Barb. (N. Y.) 130 (1849); Hosford v. Nichols, 1 Paige Ch. (N. Y.) 220 (1828); Clarke v. Bancroft, 13 Iowa, 320 (1862).

[9] Farmers' Loan and Trust Co. v. Reid, 3 Edw. Ch. (N. Y.) 414 (1840).

[10] Applegate v. Mason, 13 Ind. 75 (1859).

[11] People v. Beebe, 1 Barb. (N. Y.) 379, 388 (1847).

[12] Williamson v. Champlin, Clarke Ch. (N. Y.) 9 (1839); s. c. aff'd 8 Paige Ch. (N. Y.) 70; Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294 (1841). See N. Y. Code Civ. Proc. §§ 1628–1630.

however, where an action at law was brought for the collection of a debt secured by mortgage, whether against a party to the action for foreclosure or against a third party, all proceedings in the foreclosure suit were stayed until the remedy in the action at law had been exhausted.[1]

§ 329. **Objection under the codes.** — Under the New York Code, and under all codes modeled after it, the pendency of proceedings on a note or bond for the recovery of a mortgage debt, will constitute no objection and can not be set up as a defence to the prosecution of a foreclosure, providing a judgment has not been obtained; but if a judgment on the note has been obtained, the remedy upon such judgment must be first exhausted by execution.[2] An action on the note will be suspended by the proceedings to foreclose,[3] and can not be proceeded with further, without leave first obtained from the court in which the foreclosure proceedings are pending.[4]

If it appears from the complaint to foreclose a mortgage, that the plaintiff has recovered a judgment for the mortgage debt, or that the mortgage was given as a collateral security for a demand which was already in judgment, it must also appear that an execution has been issued upon the judgment and returned unsatisfied, or it will be defective; the objection that such fact does not appear may be taken by answer or demurrer; or the defendant, without answering, may oppose the application for judgment.[5] If the defect does not appear upon the face of the complaint, it may be set up by answer.[6]

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[1] Pattison v. Powers, 4 Paige Ch. (N. Y.) 549 (1834).

[2] Shufelt v. Shufelt, 9 Paige Ch. (N. Y.) 137 (1841); s. c. 37 Am. Dec. 381; North River Bank v. Rogers, 8 Paige Ch. (N. Y.) 648 (1841); N. Y. Code Civ. Proc. §§ 1628, 1629, 1630.

[3] Williamson v. Champlin, Clarke Ch. (N. Y.) 9 (1839); s. c. aff'd 8 Paige Ch. (N. Y.) 70.

[4] Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294 (1841); Williamson v. Champlin, Clarke Ch. (N. Y.) 9 (1839); s. c. aff'd 8 Paige Ch. (N. Y.) 70; N. Y. Code Civ. Proc. § 1628.

[5] Grosvenor v. Day, Clarke Ch. (N. Y.) 109 (1839); Shufelt v. Shufelt, 9 Paige Ch. (N. Y.) 137 (1841); s. c. 37 Am. Dec. 381; N. Y. Code Civ. §§ 488, 1630.

[6] North River Bank v. Rogers, 8 Paige Ch. (N. Y.) 648 (1841); N. Y. Code Civ. Proc. § 498.

§ 330. **Denial of execution of mortgage.**—In his answer to a bill filed to foreclose a mortgage, the defendant may deny the execution and delivery of the mortgage. But the answer of a mortgagor, denying the execution and delivery of the mortgage, will not be sufficient to overcome the presumption of delivery, arising from the mortgagee's possession of the mortgage duly executed, acknowledged and recorded.[1] Where a mortgage has not been acknowledged, that fact must be set up affirmatively as a defence, if the party wishes to avail himself of the defect.[2] In an action to enforce a written instrument, in the form of a real estate mortgage purporting to have been executed and acknowledged as required by statute, an answer alleging that the defendant never acknowledged the execution of such instrument, will plead a good defence.[3]

§ 331. **Allegation of infancy.**—A mortgage executed by an infant is not void,[4] but merely voidable at his election.[5] If the infant has committed some act, within a reasonable time

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[1] Long v. Kinkel, 36 N. J. Eq. (9 Stew.) 359 (1883); Commercial Bank of N. J. v. Reckless, 5 N. J. Eq. (1 Halst.) 650 (1847).

[2] Sturgeon v. Board of Commissioners, 65 Ind. 302 (1879).

[3] Williamson v. Carskadden, 36 Ohio St. 664 (1881). In this case the court say: "If it is true, as alleged by the defendants joining in the answer, that they never appeared before the officer or acknowledged the execution of such mortgage, the certificate of acknowledgment is, as to them, fraudulent; and in availing themselves of that defence, it is not necessary to show that the mortgagee had notice of such fraud. In fact the governing principle is very broad. Thus it has been held that in an action on the recognizance, which is regarded as a record, a plea in bar that the defendant did not acknowledge the recognizance is sufficient." State v. Daily, 14 Ohio, 91 (1846); and see Callen v. Ellison, 13 Ohio St. 446, 454 (1862).

[4] Chapin v. Shafer, 49 N. Y. 407 (1872). See Randall v. Sweet, 1 Den. (N. Y.) 460 (1845); Flynn v. Powers, 36 How. (N. Y.) Pr. 289 (1868); Green v. Wilding, 59 Iowa, 679 (1882); s. c. 44 Am. Rep. 696; Roberts v. Wiggin, 1 N. H. 73 (1817); s. c. 8 Am. Dec. 38; Harner v. Dipple, 31 Ohio St. 72 (1876); s. c. 27 Am. Rep. 496; Callis v. Day, 38 Wis. 643 (1875). As to the ratification of contracts by infants, see Tobey v. Wood, 123 Mass. 88 (1877); s. c. 25 Am. Rep. 27, and notes 30 to 32.

[5] Walsh v. Powers, 43 N. Y. 23, 26 (1870); s. c. 3 Am. Rep. 654; Henry v. Root, 33 N. Y. 526 (1865). See Loomer v. Wheelwright, 3 Sandf. Ch. (N. Y.) 135 (1845); Flynn v. Powers, 35 How. (N. Y.) Pr. 279 (1868); aff'd 36 How. (N. Y.) Pr. 289.

after attaining his majority, clearly showing his intention not to be bound by the mortgage, it will be held void,[1] and the plea of infancy will constitute a good defence to the foreclosure of the mortgage.[2] But where an infant allows a mortgage to be foreclosed against him after attaining his majority, without pleading his infancy at the time of the execution of the mortgage, he will thereby waive his right to that defence, and will not be permitted to interpose it against a supplemental bill to enforce the decree.[3] The option which an infant has of disaffirming his contracts should be promptly exercised upon his attaining his majority ;[4] but the burden of proving that a contract entered into by an infant, has been ratified by him since attaining his majority, rests upon the party seeking to enforce it.

What acts amount to the confirmation of a contract is always a question of law for the court.[5] It has been said, where an infant purchases land and subsequently, but before

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[1] State v. Plaisted, 43 N. H. 413 (1861); Campbell v. Cooper, 34 N. H. 49, 67 (1856). See Carr v. Clough, 26 N. H. (6 Fost.) 280, 293 (1853); s. c. 59 Am. Dec. 345; Lufkin v. Mayall, 25 N. H. (5 Fost.) 82 (1852); State v. Howard, 88 N. C. 650 (1883).

[2] Willis v. Twambly, 13 Mass. 204 (1816). See Lynde v. Budd, 2 Paige Ch. (N. Y.) 191 (1830); s. c. 21 Am. Dec. 84; Flynn v. Powers, 35 How. (N. Y.) Pr. 279 (1868); s. c. aff'd 36 How. (N. Y.) Pr. 289; Roberts v. Wiggin, 1 N. H. 74 (1817); s. c. 8 Am. Dec. 38.

[3] Terry v. McClintock, 41 Mich. 492 (1879).

[4] Flynn v. Powers, 36 How. (N. Y.) Pr. 289 (1868), aff'g 35 How. (N. Y.) Pr. 279. See Walsh v. Powers, 43 N. Y. 23, 26 (1870); s. c. 3 Am. Rep. 654; Loomer v. Wheelwright Sandf. Ch. (N. Y.) 135 (1845); Kline v. Beebe, 6 Conn. 494 (1827); Baker v. Kennett, 54 Mo. 91 (1873); Richardson v. Boright, 9 Vt. 371 (1837); Cecil v. Salisbury, 2 Vern. 224 (1691).

[5] See Beardsley v. Hotchkiss, 96 N. Y. 211 (1884); Green v. Green, 69 N. Y. 553 (1877); Walsh v. Powers, 43 N. Y. 23, 26 (1870); s. c. 3 Am. Rep. 654; Henry v. Root, 33 N. Y. 526 (1865); Roof v. Stafford, 7 Cow. (N. Y.) 179, 183 (1827); Lynde v. Budd, 2 Paige Ch. (N. Y.) 191 (1830); s. c. 21 Am. Dec. 84; Bool v. Mix, 17 Wend. (N. Y.) 120 (1837); Hastings v. Dollarhide, 24 Cal. 195 (1864); Benham v. Bishop, 9 Conn. 330 (1832); s. c. 23 Am. Dec. 358; Rogers v. Hurd, 4 Day (Conn.) 57 (1809); s. c. 4 Am. Dec. 182; Harris v. Cannon, 6 Ga. 382 (1849); Illinois L. & L. Co. v. Bonner, 75 Ill. 315 (1874); Scranton v. Stewart, 52 Ind. 69 (1875); Philips v. Green, 3 A. K. Marsh. (Ky.) 7 (1820); s. c. 13 Am. Dec. 124; Lawson v. Lovejoy, 8 Me. (8 Greenl.) 405 (1832); s. c. 23 Am. Dec. 526; Dana v. Coombs, 6 Me. (6 Greenl.) 89 (1829);

his majority, sells it, that his retention of the proceeds of such sale after he becomes of age is not such an affirmance of the contract as will bind him personally upon an obligation given as a consideration for the land.[1] And where an infant bought land subject to a mortgage thereon, covenanting in the deed to pay such mortgage as a part of the consideration of the conveyance, and subsequently, but before coming of age, conveyed the land for a larger price and retained and enjoyed the proceeds of such sale for several years after attaining his majority, the court held that there was no personal liability on the covenant of assumption,[2] and that an appearance by an attorney for the infant in an action to foreclose such mortgage and to obtain a personal judgment against him, would not be a bar to the plea of infancy as a defence in an action against such infant by his grantor to recover the amount of the judgment for deficiency, which he had been obliged to pay.[3]

Where an infant has purchased real property and continued in possession thereof and exercised acts of ownership, after

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s. c. 19 Am. Dec. 194; Hubbard v. Cummings, 1 Me. (1 Greenl.) 11 (1820); Thompson v. Lay, 21 Mass. (4 Pick.) 48 (1826); s. c. 16 Am. Dec. 325; Whitney v. Dutch, 14 Mass. 457 (1817); s. c. 7 Am. Dec. 229; Martin v. Mayo, 10 Mass. 137 (1813); s. c. 6 Am. Dec. 103; Smith v. Mayo, 9 Mass. 62 (1812); s. c. 6 Am. Dec. 28; Dixon v. Merritt, 21 Minn. 196 (1875); Allen v. Poole, 54 Miss. 323 (1877); Norcum v. Sheahan, 21 Mo. 25 (1855); Roberts v. Wiggin, 1 N. H. 73 (1817); s. c. 8 Am. Dec. 38; Cresinger, v. Welch, 15 Ohio, 156 (1846); Drake v. Ramsay, 5 Ohio, 251 (1831); Cheshire v. Barrett, 4 McC. (S. C.) 241 (1827); s. c. 17 Am. Dec. 735; Scott v. Buchanan, 11 Hump. (Tenn.) 469 (1850); Bigelow v. Kinney, 3 Vt. 353 (1830); s. c. 21 Am. Dec. 589; Mustard v. Wohlford, 15 Gratt. (Va.) 329 (1859); Irvine v. Irvine, 76 U. S. (9 Wall.) 617 (1869); bk. 19 L. ed. 800; Tucker v. Moreland, 35 U. S. (10 Pet.) 58 (1836); bk. 9 L. ed. 346. To constitute a ratification, there must be something more than a mere acknowledgment; Benham v. Bishop, 9 Conn. 330 (1832); Thompson v. Lay, 21 Mass. (4 Pick.) 48 (1826); s. c. 16 Am. Dec. 325. Anything from which assent may fairly be deduced may be regarded as an affirmance; Cheshire v. Barrett, 4 McC. (S. C.) L. 241 (1827); s. c. 17 Am. Dec. 735; Wheaton v. East, 5. Yerg. (Tenn.) 41 (1833); s. c. 26 Am. Dec. 251.

[1] Walsh v. Powers, 43 N. Y. 23 (1870); s. c. 3 Am. Rep. 654.

[2] Walsh v. Powers, 43 N. Y. 23 (1870); s. c. 3 Am. Rep. 654.

[3] Walsh v. Powers, 43 N. Y. 23 (1870); s. c. 3 Am. Rep. 654, reversing Flynn v. Powers, 35 How. (N. Y.) Pr. 279 (1868), on this point; s. c. 36 How. (N. Y.) Pr. 289.

becoming of full age, the retention of the property and the failure to disaffirm the contract, within a reasonable time after attaining his majority, will operate as a ratification of the contract and bar the defence of infancy.[1] It is a well established principle, that an infant will not be permitted to retain property purchased by him, and at the same time to repudiate the contract of purchase;[2] he must either confirm or abandon the contract as a whole.[3]

A continuance in the possession of the property purchased by an infant, after he attains his majority, is in all instances regarded as an affirmance of the transaction by which title to the property was acquired, and entitles the vendor to a recovery in an action therefor.[4]

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[1] Beardsley v. Hotchkiss, 96 N. Y. 211 (1884). See Walsh v. Powers, 43 N. Y. 23, 26 (1870); 3 Am. Rep. 654; Henry v. Root, 33 N. Y. 526 (1865); Lynde v. Budd, 2 Paige Ch. (N. Y.) 191 (1830); s. c. 21 Am. Dec. 84; Kline v. Beebee, 6 Conn. 494 (1827); Hubbard v. Cummings, 1 Me. (1 Greenl.) 11 (1820); Cecil v. Salisbury, 2 Vern. 225 (1691); Ketley's Case, 1 Brownl. 120 (1675).

[2] Henry v. Root, 33 N. Y. 526 (1865); Flynn v. Powers, 54 Barb. (N. Y.) 554 (1868); s. c. 35 How. (N. Y.) Pr. 279: Gray v. Lessington, 2 Bosw. (N. Y.) 263 (1857); Kitchen v. Lee, 11 Paige, Ch. (N. Y.) 107 (1844); Lynde v. Budd, 2 Paige Ch. (N.Y.) 191 (1830); Deason v. Boyd, 1 Dana (Ky.) 45 (1833); Cheshire v. Barrett, 4 McC. (S.C.) 241 (1827); s. c. 17 Am. Dec. 735.

[3] Overbach v. Heermance, Hopk. Ch. (N. Y.) 337 (1824); s. c. 14 Am. Dec. 546. See Walsh v. Powers, 43 N. Y. 23, 26 (1870); s. c. 3 Am. Rep. 654; Henry v. Root, 33 N. Y. 526, 553 (1865); Flynn v. Powers, 54 Barb. (N. Y.) 554 (1868); s. c. 35 How. (N. Y.) Pr. 279; Bartholomew v. Finnemore, 17 Barb. (N. Y.) 428 (1854); Coutant v. Servoss, 3 Barb. (N. Y.) 128 (1848); Gray v. Lessington, 2 Bosw. (N. Y.) 263 (1857); Kitchen v. Lee, 11 Paige Ch. (N.Y.) 107 (1844); s. c. 43 Am. Dec. 101; Lynde v. Budd, 2 Paige Ch. (N. Y.) 191 (1830); s. c. 21 Am. Dec. 84; Kline v. Beebe, 6 Conn. 494 (1827); Carpenter v. Carpenter, 45 Ind. 146 (1873); Deason v. Boyd, 1 Dana (Ky.) 45 (1833); Hubbard v. Cummings, 1 Me. (1 Greenl.) 11, 13 (1820); Badger v. Phinney, 15 Mass. 359 (1819); s. c. 8 Am. Dec. 105; Young v. McKee, 13 Mich. 552 (1865); Ladd v. Wiggin, 35 N. H. 428 (1857); Cheshire v. Barrett, 4 McC. (S. C.) L. 241 (1827); s. c. 17 Am. Dec. 735; Morrill v. Aden, 19 Vt. 505 (1847); Farr v. Sumner, 12 Vt. 28 (1840); s. c. 36 Am. Dec. 327; Irish v. Clayes, 10 Vt. 85 (1838); Bigelow v. Kinney, 3 Vt. 353 (1830); s. c. 21 Am. Dec. 589.

[4] Henry v. Root, 33 N. Y. 526 (1865). See Walsh v. Powers, 43 N. Y. 23 (1870); Coutant v. Servoss, 3 Barb. (N. Y.) 128 (1848); Kitchen v. Lee, 11 Paige Ch. (N. Y.) 107 (1844); s. c. 43 Am. Dec. 101; Lynde v. Budd, 2 Paige Ch. (N. Y.)

§ 332. **Foreclosure of infant's purchase money mortgage.**—Where an infant executes a mortgage to secure the purchase money, or a portion thereof, for premises purchased by him, and ratifies the same on attaining his majority, the mortgage will become valid and binding.[1] A retention of possession and the continued use of the property, or a sale of the whole or of a part of the premises after attaining his majority, is to be regarded as an affirmance of the contract of purchase, and will bind the infant for the payment of the agreed consideration.[2] Where infancy is set up as a defence on coming of age, the infant can relinquish the land to his grantor and demand the return of the purchase money which was paid at the time the contract was entered into,[3] but he can not affirm the contract in part and avoid it in part. The mortgage can not be avoided without making the deed void also.[4] He can not retain possession of the property, thereby affirming the purchase, and plead his infancy at the time of making the contract, to avoid the payment of the purchase money.[5]

If an infant wishes to avoid the payment of his purchase money mortgage, he must surrender and reconvey the property; for, as we have seen, an infant can not retain

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191 (1830); s. c. 21 Am. Dec. 84; Boyden v. Boyden, 50 Mass. (9 Metc). 519 (1845); Badger v. Phinney, 15 Mass. 359 (1819); s. c. 26 Am. Dec. 611; Boody v. McKenny, 23 Me. 517 (1844); Hubbard v. Cummings, 1 Me. (1 Greenl.) 11 (1820); Roberts v. Wiggin, 1 N. H. 73 (1817); s. c. 8 Am. Dec. 38.

[1] Eagle Fire Ins. Co. v. Lent, 1 Edw. Ch. (N. Y.) 304 (1832); Lynde v. Budd, 2 Paige Ch. (N. Y.) 191 (1830); s. c. 21 Am. Dec. 84.

[2] See Lynde v. Budd, 2 Paige Ch. (N. Y.) 191 (1830); s. c. 21 Am. Dec. 84; Flynn v. Powers, 54 Barb. (N. Y.) 554 (1868); s. c. 35 How. (N. Y.) Pr. 282; Boody v. McKenney, 23 Me. 517 (1844); Dana v. Coombs, 6 Me. (6 Greenl.) 89 (1829); Hubbard v. Cummings, 1 Me. (1 Greenl.) 11 (1820); Boyden v. Boyden, 50 Mass. (9 Metc.) 519 (1845); Robbins v. Eaton, 10 N. H. 563 (1840); Callis v. Day, 38 Wis. 643 (1875).

[3] See Lynde v. Budd, 2 Paige Ch. (N. Y.) 191 (1830); s. c. 21 Am. Dec. 84; Willis v. Twambly, 13 Mass. 204 (1816).

[4] Wood v. Gosling, 1 N. Y. Leg. Obs. 74 (1841); Coutant v. Servoss, 3 Barb. (N. Y.) 128 (1848); Roberts v. Wiggin, 1 N. H. 73 (1817); s. c. 8 Am. Dec. 38.

[5] See Henry v. Root, 33 N. Y. 526 (1865); Kitchen v. Lee, 11 Paige Ch. (N. Y.) 109 (1844); s. c. 42 Am. Dec. 102; Kline v. Beebe, 6 Coun. 494 (1827); Deason v. Boyd, 1

the property and at the same time avoid his obligation on the mortgage.[1] The deed and the purchase money mortgage, being presumptively executed at the same time and forming parts of the same contract, are to be considered together and regarded as forming but one instrument.[2] They must stand or fall together, and for that reason the defence of infancy can not be pleaded to the foreclosure of such a mortgage, where the infant still retains possession of the property.[3]

§ 333. **Allegation of insanity of mortgagor.** — The insanity of the mortgagor, at the time of the execution of a bond and mortgage, may be set up as a defence in an action for the foreclosure of the mortgage, the same as in an action on any other kind of a contract. But where a mortgage is executed under the direction and by the authority of a court, the sanity or insanity of the mortgagor is not material;[4] and in an equitable proceeding it will be immaterial whether a mortgagee was sane or not at the date of the execution of a mortgage to him, where it was executed in strict pursuance of a written agreement entered into by such mortgagee when sane.[5] It would seem, where a mortgage is given to secure the repayment of money previously loaned, that the insanity of the mortgagor at the time of the

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Dana (Ky.) 46 (1833); Cheshire v. Barrett, 4 McC. (S. C.) 241 (1827); s. c. 17 Am. Dec. 735; Bigelow v. Kinney, 3 Vt. 353 (1830).

[1] Henry v. Root, 33 N. Y. 526, 553 (1865). See Chapin v. Shafer, 49 N. Y. 407 (1872); Kitchen v. Lee, 11 Paige Ch. (N. Y.) 107 (1844); s. c. 42 Am. Dec. 101; Lynde v. Budd, 2 Paige Ch. (N. Y.) 191 (1830); s. c. 21 Am. Dec. 84; Kline v. Beebe, 6 Conn. 494 (1827); Deason v. Boyd, 1 Dana (Ky.) 45 (1833); Dana v. Coombs, 6 Me. (6 Greenl.) 89 (1829); s. c. 19 Am. Dec. 194; Badger v. Phinney, 15 Mass. 359 (1819); s. c. 8 Am. Dec. 105; Heath v. West, 28 N. H. (8 Fost.) 101 (1853).

[2] Rawson v. Lampman, 5 N. Y. 461 (1851); Lynde v. Budd, 2 Paige Ch. (N. Y.) 191 (1830); s. c. 21 Am. Dec. 84.

[3] Coutant v. Servoss, 3 Barb. (N. Y.) 128 (1848); Lynde v. Budd, 2 Paige Ch. 191 (1830); s. c. 21 Am. Dec. 84; Stow v. Tifft, 15 Johns. (N. Y.) 458 (1818); s. c. 8 Am. Dec. 266; VanHorne v. Crain, 1 Paige Ch. (N. Y.) 455 (1829); Hubbard v. Cummings, 1 Me. (1 Greenl.) 11 (1820); Roberts v. Wiggin, 1 N. H. 73 (1817); s. c. 8 Am. Dec. 38.

[4] Grier's Appeal, 101 Pa. St. 412 (1882).

[5] Bevin v. Powell, 83 Mo. 365 (1884).

execution of the mortgage will not be material.[1] It is an unsettled question what degree of unsoundness of mind must be shown to enable a defendant to avoid his contracts; but the rules which apply to contracts generally will govern mortgages also.

Where the insanity is such as to apprise all persons dealing with the party of his mental condition, there is no question regarding the non-liability of the mortgagor upon any contract entered into by him;[2] but where his mental disorder is of such a character as not to apprise a man of ordinary discernment of his mental condition, there is more difficulty and uncertainty. A contract, though fair, entered into by a man under such circumstances, will sometimes be held void. Thus, where a man, who had been insane for some time, but who had only periodical recurrences of insanity, was insane at the time of the execution of a mortgage, the mortgage was set aside as being made while the mortgagor was *non compos mentis*, although he managed his own affairs with average correctness and was treated by his neighbors as competent to do business, even while they considered him of unsound mind, and although he was not so manifestly insane as to make the conduct of the mortgagee fraudulent in accepting the mortgage security.[3]

Where the sanity of the mortgagor is in question, the burden of proof is upon the party who seeks to avoid the

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[1] See Copenrath v. Kienby, 83 Ind. 18 (1882). In this case the answer set up the mortgagor's unsoundness of mind and incapacity to contract at the time he executed the mortgage, in bar of the action to foreclose. The mortgagee replied to such answer by showing that the mortgage was given to secure the repayment of money borrowed by the mortgagor to enable him to pay his *bona fide* debt to a third person, and that, when the mortgage was executed, the mortgagee had no knowledge whatever of any disability of the mortgagor to contract, but believed him to be sober, in his right mind, and capable of entering into a contract, and also that the transaction between them was *bona fide*. On demurrer to such reply, for want of facts, the court held it to be good.

[2] There are exceptions to the general rule of the non-liability of a person unmistakably insane upon his contracts, such as contracts which are fair and beneficial to him or his estate. But it is not the province of this work to consider these distinctions, which are fully treated in all standard works on contracts.

mortgage;[1] and he must show not merely an incapacity to make a valid contract at the time of the execution of the mortgage, but also that the mortgagee knew, and took advantage of, the mortgagor's state of mind.[2] Where the consideration has been paid and the conveyance was perfectly fair, no undue advantage having been taken, the security will be held good for its amount, although the insanity may be admitted or proved, if it has not been judicially established.[3] If the insanity of the mortgagor has once been established, however, it will devolve upon the party claiming under the mortgage to establish by clear and satisfactory evidence that it was executed during a lucid interval,[4] because a person, once proved to have been insane, will be presumed to remain so until the contrary is shown.[5]

§ 334. **Defect in execution and record of mortgage.**— If a mortgage was defectively executed, and not properly recorded, these facts may be shown in defence by any party not absolutely estopped by concurrence in the transaction, such as a subsequent incumbrancer who was not chargeable with notice of the lien.[6] Where the record of a mortgage is made out of the order required by law, it will not be sufficient to give notice to any one dealing with the title to the land, and will be invalid as to *bona fide* purchasers and incumbrancers, without actual notice;[7] and the same is true where the record is made in the wrong register, or in the wrong book

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[1] Fay v. Burditt, 81 Ind. 433 (1862); s. c. 43 Am. Rep. 142; Day v. Seely, 17 Vt. 542 (1845); Jacobs v. Richards, 18 Beav. 300 (1854).

[2] VanHorn v. Keenan, 28 Ill. 445 (1862); Copenrath v. Kienley, 83 Ind. 18 (1882); Fay v. Burditt, 81 Ind. 443 (1862); s. c. 43 Am. Rep. 142; Marmon v. Marmon, 47 Iowa, 121 (1877).

[3] Schuff v. Ransom, 79 Ind. 458 (1881); Hardenbrook v. Sherwood, 72 Ind. 403 (1880); Lancaster Co. National Bank v. Moore, 78 Pa. St. 407 (1875); s. c. 21 Am. Rep. 24, and notes 29 to 35.

[4] Ripley v. Babcock, 13 Wis. 425 (1861). See Schuff v. Ranson, 79 Ind. 458 (1881); Bevin v. Powell, 11 Mo. App. 216 (1882).

[5] Saxon v. Whittaker, 30 Ala. 237 (1857). See Sprague v. Duel, Clarke Ch. (N. Y.) 90 (1839); Breed v. Pratt, 35 Mass. (18 Pick.) 115 (1836); Ballew v. Clark, 2 Ired. (N. C.) L. 23 (1841); Titlow v. Titlow, 54 Pa. St. 216 (1867); Ripley v. Babcock, 13 Wis. 245 (1861).

[6] New York Life Ins. and Trust Co. v. Staats, 21 Barb. (N. Y.) 570

of the right register. Thus, where a mortgage deed was recorded by the officer entrusted with the duty of recording deeds, on the last page of a former volume of records in which no mortgages had been recorded for upwards of twelve years, and the names of the parties were not entered in the index of mortgages, it was held that the mortgage was not duly recorded and that a subsequent lienor had a priority over the mortgagee.[1] In an action to foreclose a mortgage, the fact that such mortgage was not recorded within the time prescribed by statute, is not a defence that can be pleaded by the administrator or heirs of the deceased mortgagor.[2]

It has been held in New York,[3] that the index of a mortgage is no part of the record thereof, that the neglect of the county clerk to index it in the proper book will not deprive the mortgagee of his right of priority, and that the mortgage is notice to all subsequent purchasers from the time it is left for record.[4] A mortgage is considered as recorded from the time of its delivery to the county clerk. After such delivery nothing more is required to be done to perfect the record, except at the proper time to copy the mortgage in its proper order in the proper book; and yet, if the mortgage should be mislaid, or lost or purloined before it is copied, the record thereof would still remain complete.[5]

Where an essential part of the mortgage is omitted from the record, it will be constructive notice to subsequent mortgagees and purchasers in good faith only of what appears on the record.[6] Thus, where a mortgage was given to secure three thousand dollars, but, by mistake of the clerk,

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(1854); aff'd *sub nom.* New York Life Ins. Co. v. White 17 N. Y. 469 (1858).

[7] New York Life Ins. Co. v. White, 17 N. Y. 469 (1858); Sawyer v. Adams, 8 Vt. 172 (1836); s. c. 30 Am. Dec. 459.

[1] Sawyer v. Adams, 8 Vt. 172 (1836); s. c. 30 Am. Dec. 459. See Gillig v. Maas, 28 N. Y. 191, 214 (1853).

[2] Evans v. Pence, 78 Ind. 439 (1881).

[3] The Mut. Life Ins. Co. v. Dake, 87 N. Y. 257 (1881), aff'g 1 Abb. (N. Y.) N. C. 381 (1876).

[4] Wadsworth v. Wendell, 5 Johns. Ch. (N. Y.) 224, 230 (1821).

[5] Mut. Life Ins. Co. v. Dake, 87 N. Y. 257, 264 (1881).

[6] Frost v. Beekman, 1 Johns. Ch. (N. Y.) 288 (1814). See Mut. Life Ins. Co. v. Dake, 87 N. Y. 257, 263 (1881).

was registered for only three hundred dollars, it was held to be notice to subsequent *bona fide* purchasers, only to the extent of the sum described in the registry.[1]

§ 335. **Allegation of alteration of instrument.**—The material alteration of a mortgage by the mortgagee, or by any other person at his instance or with his knowledge and consent, after it has been executed and delivered to him, and while it is in his possession or custody, by changing the description of the premises,[2] by increasing the stated consideration of the mortgage, or by inserting therein an additional obligation,[3] without the knowledge or consent of the mortgagor, will have the effect of destroying and annulling the instrument as between the parties, and the mortgage will not be enforceable as a security for the payment of any portion of the indebtedness therein described.[4] The rule is different, however, where the instrument is altered by a mere stranger, without the privity or consent of the mortgagee or of other parties interested, if the contents of the instrument, as it originally existed, can be ascertained.[5]

Thus, it has been held that the validity of a mortgage will not be impaired by the accidental detachment of the seal after the mortgage has been left at the proper office for record; and where the preponderance of evidence shows that the mortgage was signed and sealed at the time of its acknowledgment, the absence of the seal afterwards will not render the mortgage void.[6]

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[1] Frost v. Beekman, 1 Johns. Ch. (N. Y.) 288 (1814).

[2] Pereau v. Frederick, 17 Neb. 117 (1885).

[3] Johnson v. Moore, 33 Kan. 90 (1885).

[4] Johnson v. Moore, 33 Kan. 90 (1885). See Smith v. Fellows, 41 N. Y. Supr. Ct. (9 J. & S.) 36, 51 (1876); Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119 (1847); Lewis v. Payn, 8 Cow. (N. Y.) 71 (1827); s. c. 18 Am. Dec. 427; Jackson v. Malin, 15 Johns. (N. Y.) 293, 297, (1818); Marcy v. Dunlap, 5 Lans. (N. Y.) 365 (1872). See Pigot's Case, 11 Coke, 26 (1580); Shep. Touch. 69.

[5] Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119 (1874); Lewis v. Payn, 8 Cow. (N. Y.) 71 (1827); s. c. 18 Am. Dec. 427; Rees v. Overbaugh, 6 Cow. (N. Y.) 746 (1827); Jackson v. Malin, 15 Johns. (N. Y.) 293, 297 (1818); Marcy v. Dunlap, 5 Lans. (N. Y.) 365 (1872); United States v. Linn, 42 U. S. (1 How.) 104 (1843); bk. 11 L. ed. 64.

[6] VanRiswick v. Goodhue, 50 Md. 57 (1878).

As early as Pigot's Case,[1] it was decided that "when a deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, raising, or by drawing of a pen through a line, or through the midst of any material word, the deed thereby becomes void." "So, if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void; if a stranger without his privity alters the deed by any of the said ways, in any point not material, it shall not avoid the deed."[2] But in an early New York case,[3] a doubt was expressed whether the act of a stranger should be allowed to prejudice a party, although the alteration might be in a material part of the instrument; and in a later case[4] it was held that it should not.[5]

It is now the well settled doctrine in this country, that an immaterial alteration of a mortgage, made by a person who stands in the position of a stranger to the party claiming under it, will not render the instrument invalid, and that it may be enforced according to its original terms.[6] The doctrine announced in Pigot's Case was recently considered and doubted by the English Court of Queen's Bench in the case of Aldous v. Cornwall,[7] where it was held that the addition

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[1] 11 Coke, 26 (1615). The doctrine of Pigot's Case is doubted in Bigelow v. Stilphens, 35 Vt. 521, 525 (1863); Miller v. Stewart, 22 U. S. (9 Wheat.) 681, 718 (1824); bk. 6 L. ed. 189.

[2] See Lewis v. Payn, 8 Cow. (N. Y.) 71, 73 (1827); s. c. 18 Am. Dec. 427; Jackson v. Malin, 15 Johns. (N. Y.) 293, 297 (1818).

In Sheppard's Touchstone, p. 69, it is said: "If the alteration be made by the party himself that owneth the deed albeit it be in a place not material and it tend to the advantage of the other party and his own disadvantage, yet the deed is hereby become void."

[3] Jackson v. Malin, 15 Johns. (N. Y.) 293, 297 (1818).

[4] Rees v. Overbaugh, 6 Cow. (N. Y.) 746 (1827).

[5] See Lewis v. Payn, 8 Cow. (N. Y.) 71, 73 (1827); s. c. 18 Am. Dec. 427.

[6] Casoni v. Jerome, 58 N. Y. 315, 321 (1874); Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119 (1847); Rees v. Overbaugh, 6 Cow. (N. Y.) 746 (1827); Malin v. Malin, 1 Wend. (N. Y.) 625 (1828); United States v. Hatch, 1 Paine C. C. 336 (1824).

[7] L. R. 3 Q. B. 573 (1868); s. c. 37 L. J. Q. B. 201. Lush, J., speaking for the court, says: "We are not bound by the doctrine of Pigot's Case,

to a note of words which could not prejudice any person, would not destroy its validity.

§ 336. Allegation of illiteracy and negligence.—Illiteracy or ignorance can not be set up as a defence to a suit on a contract, where there was no fraud on the part of the plaintiff, nor any for which he was responsible. Consequently, where a person, who is illiterate, executes a mortgage without knowing its contents, he can not plead his ignorance as a valid defence, if no fraud is shown;[1] neither can his grantee, who purchased with knowledge of the mortgage, avail himself of such defence,[2] unless such mortgagor was prevented from knowing the contents of the mortgage by artifice or trickery for which the mortgagee was responsible.[3] But where fraud, artifice or deceit is used, the rule is different. Thus, it has been held that the employment of a trusted kinsman and friend, as an agent of the mortgagee, to misrepresent the contents of the mortgage, whereby its execution is obtained without its being read, is a fraud from which relief will be granted,[4] because, where a known trust and confidence is reposed in the person making the representations and there is a relationship justifying such trust and confidence, the person to whom the representations are made may rely upon them without being guilty of negligence.[5]

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or the authority cited for it; and, not being bound, we are certainly not disposed to lay down as a rule of law, that the addition of words which can not possibly prejudice any one, destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it, because the holder has put in writing on the note what the law would have supplied if the words had not been written."

[1] Leslie v. Merrick, 99 Ind. 180 (1884); Robinson v. Glass, 94 Ind. 211 (1883).

[2] Leslie v. Merrick, 99 Ind. 180 (1884).

[3] See Leslie v. Merrick, 99 Ind. 180 (1884); Robinson v. Glass, 94 Ind. 211 (1883).

[4] Robinson v. Glass, 94 Ind. 211 (1883).

[5] Albany Savings Inst. v. Burdick, 87 N. Y. 40 (1881); Robinson v. Glass, 94 Ind. 211 (1883); Worley v. Moore, 77 Ind. 567 (1881); Matlock v. Todd, 19 Ind. 130 (1862); Peter v. Wright, 6 Ind. 183 (1855); Bischof v. Coffelt, 6 Ind. 23 (1854); Shaeffer v. Sleade, 7 Blackf. (Ind.) 178 (1844).

In an action by a mortgagor for equitable relief from a bond and mortgage, which he had been fraudulently induced to execute, which bond and mortgage had been assigned to a *bona fide* purchaser, it is not enough for him to show that the execution of such instruments was induced by the false and fraudulent representations of the mortgagee; the mortgagor must also show that the execution of the papers was without negligence on his part, and this although he was old, infirm and illiterate.[1]

Negligence in the execution of an instrument furnishes no defence to a suit founded thereon. Thus, where one who can read, depending upon the representations of another as to the contents of a mortgage, neglects to read it before he executes it, he will be bound thereby, although he may sign what he would not have executed had he known its contents.[2] A person who executes a mortgage without a knowledge of its contents, will not be relieved therefrom, because of the fact that its contents were not as the mortgagee represented them, in the absence of any relation of trust or confidence between the parties, and of any artifice or trick for which the mortgagee was responsible, by which the signature to the mortgage was procured.[3]

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[1] Montgomery v. Scott, 9 S. C. 20 (1877); s. c. 30 Am. Rep. 1.

[2] See Chapman v. Rose. 56 N. Y. 137 (1874); s. c. 15 Am. Rep. 401; American Ins. Co. v. McWhorter, 78 Ind. 136 (1881); Nebeker v. Cutsinger, 48 Ind. 436 (1874); Douglass v. Matting, 29 Iowa, 498 (1870); s. c. 4 Am. Rep. 238; Putnam v. Sullivan, 4 Mass. 45 (1808); s. c. 3 Am. Dec. 206; Mackey v. Peterson, 29 Minn. 298, 305 (1882); Shirts v. Overjohn, 60 Mo. 305 (1875); Foster v. Mackinnon, L. R. 4 C. P. 704 (1869).

[3] Robinson v. Glass, 94 Ind. 211 (1883).

CHAPTER XVI.

ANSWERS AND DEFENCES.

CONSIDERATION—USURY—DEFENCES AGAINST ASSIGNEE OF MORTGAGE, AND AGAINST PURCHASER OF NEGOTIABLE PAPER SECURED BY MORTGAGE.

§ 337. Want of consideration.
338. Partial failure of consideration.
339. What is not a sufficient consideration.
340. Mortgage securing future advances—Actual consideration.
341. Mortgage as security for goods to be furnished—Actual consideration.
342. Defence of illegal or void consideration.
343. Illegal or void consideration—When no defence to action on note secured by mortgage.
344. Usury as a defence.
345. How to allege usury—What law governs.
346. Who may avail themselves of the defence of usury.
§ 347. Defences against assignee of mortgage.
348. Defence against voluntary assignee in bankruptcy.
349. Defence against a fraudulent assignment.
350. Defence against transferred mortgage payable to mortgagee alone.
351. Defences against foreclosure by *bona fide* purchaser of negotiable paper secured by mortgage.
352. Purchaser of negotiable paper secured by mortgage takes subject to equities against it.
353. Same rule in Illinois.
354. Defences against assignee of mortgage securing a non-negotiable instrument.
355. Other defences against such an assignee.

§ 337. Want of consideration.—It is common information that want of consideration may be shown in answer to an action on a contract, and that when established, it furnishes a complete defence. It follows, necessarily, that want of consideration for a mortgage may be set up as a defence in an action to foreclose such mortgage.[1] Where the answer, in

[1] See Bridges v. Blake, 106 Ind. 332 (1885); Dugan v. Trisler, 69 Ind. 553 (1880); Gilchrist v. Manning, 54 Mich. 210 (1884); Hughes v. Thweatt, 57 Miss. 376 (1879); Blanchard v. Morey, 56 Vt. 170 (1883).

As to when the defence of a want of consideration will not be sufficient, see Long v. Kinkel, 36 N. J. Eq. (9 Stew.) 359 (1883); Best v. Thiel, 79 N. Y. 15 (1879).

an action to foreclose a mortgage, admits the execution of the mortgage as a security for the debt, it substantially admits the cause of action; the mere denial of the remaining allegations of a complaint, being aimed at a legal conclusion, raises no issue, and is, therefore, insufficient.[1]

Want of consideration will constitute a good defence to a suit for foreclosure brought by a mortgagee's administrator, even though the mortgage may have been given to defraud creditors;[2] because, as regards such fraudulent purpose, the mortgagee is in no better condition than the mortgagor, as he must have participated in it.[3] It is said that the meaning of the familiar maxim, *in pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stood,—not that it prefers the defendant to the plaintiff, but it will not recognize a right of action founded on an illegal contract in favor of either party as against the other.[4]

A want of consideration for a note secured by a mortgage is a good defence to a suit for foreclosure of the mortgage,[5] parol evidence being admissible to show that no debt ever existed between the parties to the mortgage.[6] And upon a motion for judgment in the foreclosure of such a mortgage, evidence will be admissible of the amount of liabilities, actual and contingent, which the mortgage was given to secure.[7] Want of consideration may be set up by the owner

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[1] Kay v. Churchill, 10 Abb. (N. Y.) N. C. 83 (1881). See Fosdick v. Groff, 22 How. (N. Y.) Pr. 158 (1861); Edson v. Dillaye, 8 How. (N. Y.) Pr. 273 (1853); McMurray v. Gifford, 5 How. (N. Y.) Pr. 14 (1850); Cooley v. Hobart, 8 Iowa, 358 (1859).

[2] Hannan v. Hannan, 123 Mass. 441 (1877); Wearse v. Peirce, 41 Mass. (24 Pick.) 141 (1837); Goudy v. Gebhart, 1 Ohio St. 262 (1853). See Hughes v. Thweatt, 57 Miss. 376 (1879).

[3] Wearse v. Peirce, 41 Mass. (24 Pick.) 141 (1837).

[4] Atwood v. Fisk, 101 Mass. 363 (1869).

[5] Conwell v. Clifford, 45 Ind. 392 (1873); Hannan v. Hannan, 123 Mass. 441 (1877); Freeland v. Freeland, 102 Mass. 475 (1869); Wearse v Peirce, 41 Mass. (24 Pick.) 141 (1837); Matteson v. Morris, 40 Mich. 52 (1879). See Bolling v. Munchus, 65 Ala. 558 (1882); Mell v. Mooney, 30 Ga. 413 (1860); Coleman v. Witherspoon, 76 Ind. 285 (1881); Price v. Pollock 47 Ind. 362 (1874).

[6] Hannan v. Hannan, 123 Mass. 441 (1877); Wearse v. Peirce, 41 Mass. (24 Pick.) 141 (1837).

[7] Freeland v. Freeland, 102 Mass. 475 (1869).

of the equity of redemption, or by any one entitled to or interested in the surplus arising on the sale of the premises. Thus, a junior mortgagee has a right to defeat the lien of a senior mortgage, by showing that it was executed without consideration.[1]

§ 338. **Partial failure of consideration.**—Where the actual consideration for a mortgage was less than the amount for which it was executed as a security, the decree on a foreclosure should be entered only for the actual amount due on the mortgage;[2] the amount of the consideration may be proved by the admissions of the mortgagee.[3] A partial failure of consideration is always a defence *pro tanto*. But such failure of consideration must be distinctly pleaded,[4] for, where the real debt owing to the mortgagees is in fact less than the sum named in the mortgage, neither they nor their assignees can enforce it for more than the actual amount due.[5] The burden of proof is always on the defendant to show that the actual consideration was less than the amount secured by the mortgage, if the plaintiff claims the full amount,[6] for it is a presumption of fact that the sum mentioned in a mortgage as the consideration therefor, is the actual amount secured; and very convincing proof is required to rebut this presumption.[7]

§ 339. **What is not a sufficient consideration.**—Where a claim is without foundation, a release therefrom will not constitute a valid consideration for a mortgage;[8] but an extension of time for the payment of an existing obligation

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[1] Coleman v. Witherspoon, 76 Ind. 285 (1880).

[2] Dunham v. Cudlipp, 94 N. Y. 129 (1883); Laylin v. Knox, 41 Mich. 40 (1879).

[3] Mackay v. Brownfield, 13 Serg. & R. (Pa.) 239 (1825). See Abbe v. Newton, 19 Conn. 20 (1848); Rood v. Winslow, Walk. Ch. (Mich.) 340 (1844) s. c. 2 Doug. (Mich.) 68 (1845).

[4] Dunham v. Cudlipp, 94 N. Y. 129 (1883).

[5] Rood v. Winslow, Walk. Ch. (Mich.) 340 (1844); s. c. 2 Doug. (Mich.) 68 (1845). See Philbrook v. McEwen, 29 Ind. 347 (1868).

[6] Wiswall v. Ayres, 51 Mich. 324 (1883).

[7] Wiswall v. Ayres, 51 Mich. 324 (1883).

[8] Harris v. Cassady, 107 Ind. 158 (1886).

will be a sufficient consideration to support a mortgage;[1] so also will an existing promissory note,[2] or an existing indebtedness of any kind, be a sufficient consideration.[3] But a mortgage given to secure the pre-existing debt of another, there being no extension of time for payment nor any new consideration, will not be founded upon a sufficient consideration to support a foreclosure;[4] neither will a promise to pay the debt of another, for which the mortgagor is already liable as surety, be a sufficient consideration to sustain a mortgage.[5] It has been held in Indiana that a mortgage executed by a husband and wife, upon the separate property of the latter to secure an overdue note, on which the husband was liable as surety, and without any other or further consideration, is invalid, although under the statute a married woman is empowered to incumber her separate property for the debt of a third person.[6]

Where a mortgage, which was given to secure the payment of judgments confessed by the mortgagor, is sought to be foreclosed, the fact that the judgments were void for want of compliance with the statute, may be set up as a defence to show a want of consideration.[7] But it has been held that where there was any consideration whatever for the mortgage, inquiry could not be made upon the trial whether the consideration was full and adequate.[8] Where a mortgage is executed and entrusted to an agent for the purpose of procuring a loan, and the agent, instead of procuring the loan, uses it for another purpose and misappropriates the proceeds, the mortgage will be void, there being no consideration therefor,[9] except in a case where the assignee thereof

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[1] Farmers' Bank of Mooresville v. Butterfield, 100 Ind. 229 (1884); Port v. Embree, 54 Iowa, 14 (1880).

[2] Ayers v. Adams, 82 Ind. 109 (1882); Rowell v. Williams, 54 Wis. 636 (1882).

[3] Buck v. Axt, 85 Ind. 512 (1882); Evans v. Pence, 78 Ind. 439 (1881).

[4] Kansas Manuf. Co. v. Gandy, 11 Neb. 451 (1881).

[5] Harris v. Cassady, 107 Ind. 158 (1886).

[6] Bridges v. Blake, 106 Ind. 332 (1885).

[7] Austin v. Grant, 1 Mich. 490 (1850).

[8] Norton v. Pattee, 68 N. Y. 144 (1877).

[9] Davis v. Beohstein, 69 N. Y. 440 (1877); Craver v. Wilsor, 14 Abb. (N. Y.) Pr. N. S. 374 (1872).

might be entitled to the protection accorded to a *bona fide* holder of negotiable paper.

§ 340. **Mortgage securing future advances—Actual consideration.**—A mortgage to secure indefinite future advances is valid not only between the parties, but also as to third persons;[1] so also is a mortgage given to secure a pre-existing debt and future advances.[2] As between the parties, whatever may be its effect as to third persons, it is not essential to the validity of a mortgage lien to secure future advances and also a pre-existing debt, that the instrument should recite fully the character of the indebtedness which it was given to secure.[3]

Where it appears that a mortgage was given to secure future advances which were never made, a complaint to foreclose will of course be dismissed;[4] because, if no advances were made upon the mortgage and no credit was given, it is absolutely without consideration. A mortgage executed for the purpose of securing future advances can not be enforced for a different liability or purpose.[5] When the mortgage in terms secures future advances, the sum named as the consideration is of no importance,[6] because it will be security for the money actually advanced upon it, and for nothing more.[7] And in an action for the foreclosure of a mortgage given to secure future advances, a failure to advance the entire amount desired to be secured by such executory mortgage, can not be set up as a defence against advances actually made.[8]

§ 341. **Mortgage as security for goods to be furnished —Actual consideration.**—A mortgage taken in good faith,

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[1] Jarratt v. McDaniel, 32 Ark. 598 (1877).

[2] Sanders v. Farrell, 83 Ind. 28 (1882).

[3] Forsyth v. Preer, Illges & Co., 62 Ala. 443 (1878).

[4] McDowell v. Fisher, 25 N. J. Eq. (10 C. E. Gr.) 93 (1874).

[5] Mizner v. Kussell, 29 Mich. 229 (1874).

[6] Miller v. Lockwood, 32 N. Y. 293, 299 (1865).

[7] The mortgage may also stand as security for the accomplishment in the future of definite plans or purposes. See Bell v. Radcliff, 32 Ark. 645 (1878).

[8] Dart v. McAdam, 27 Barb. (N. Y.) 187 (1858).

the consideration for which is a present debt and the promise of the mortgagee to furnish in the future a stated amount of goods, is valid as between the parties, is not a fraud upon creditors of the mortgagor, and will be upheld by the courts.[1] Thus, where a deed of trust recited that it was executed to secure a given sum for supplies already furnished, and supplies to be furnished and cash to be advanced during the year to enable the grantors to accomplish a specified purpose, the court held that, while the amount was limited in terms, the controlling purpose of the deed was to secure a sufficient amount of supplies to enable the grantors to accomplish a specified purpose, and that a court of equity, if necessary, in order to carry out the purpose of the trust, will uphold and protect additional advances over and above the limitations stated in the deed.[2]

A mortgage given to secure the value of goods to be purchased, is valid to the extent of the goods sold, although the mortgagor may in fact be insolvent at the time, and becomes a bankrupt shortly afterwards.[3] A mortgage given to secure a note for a fixed sum, payable absolutely, but with no actual consideration other than an undertaking to furnish goods, which the mortgagees fail to carry out, can not be enforced, except where the action is brought by a *bona fide* assignee thereof.[4]

§ 342. **Defence of illegal or void consideration.**—A mortgage executed upon an illegal consideration is void *ab initio*, because the nullity of the principal debt destroys all securities accompanying it;[5] and the actual facts of the transaction may be shown in defence, though they contradict the terms of the instrument.[6] In an action to foreclose a mortgage, where the defence set up was that the mortgage was given

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[1] Sanders v. Farrell, 83 Ind. 28 (1882).

[2] Bell v. Radcliff, 32 Ark. 645 (1878).

[3] Marvin v. Chambers, 12 Blatchf. C. C. 495 (1875).

[4] Fisher v. Meister, 24 Mich. 447 (1872).

[5] Chatenond v. Herbert, 30 La. An. 404 (1878).

[6] Norris v. Norris, 9 Dana (Ky.) 317 (1840); s. c. 35 Am. Dec. 138; McQuade v. Rosecrans, 36 Ohio St. 442 (1881); Goudy v. Gebhart, 1 Ohio St. 262 (1853); Raguet v. Roll, 7 Ohio 77 (1835).

to secure twice the amount of money loaned thereon by the mortgagee, with the intention of defrauding the creditors of the mortgagor, the court held that the consideration of the mortgage being entire and illegal, a court of equity could not aid in its foreclosure; and that the defence of illegality of consideration in such a case may be made by the mortgagor or by any person succeeding to his rights and interests.[1]

Every contract or agreement, the consideration for which is immoral, criminal or unlawful, is absolutely void, and no action can be sustained for its enforcement. Thus, a promissory note, the consideration for which is an agreement not to prosecute the maker for a felony, is a contract against public policy,[2] and therefore void; and a mortgage given to secure such a note can not be enforced.[3] In an action to foreclose a mortgage executed upon the consideration, that the son of the mortgagor who was then under arrest for embezzlement should not be prosecuted, it was held that the mortgage was based upon an illegal consideration and was therefore void.[4] A mortgage, the consideration of which is in whole or in part the withdrawing of a prosecution for conspiracy to defraud and for embezzlement as a bank officer, is likewise void.[5]

In an action to foreclose a mortgage, a subsequent incumbrancer by attachment and judgment against the mortgagor,

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[1] McQuade v. Rosecrans, 36 Ohio St. 442 (1881).

[2] See Vanover v. Thompson, 4 Jones (N. C.) L. 485 (1857); Thompson v. Whitman, 4 Jones (N. C.) L. 47 (1856); Bostick v. McLarren, 2 Brev. (S. C.) L. 275 (1809); Badger v. Williams, 1 D. Chip. (Vt.) 137 (1797); Rourke v. Mealy, Ir. L. R. 4 Ch. Div. 166, 175 (1879). See also Hoyt v. Macon, 2 Colo. 502 (1875); Bierbauer v. Worth, 10 Biss. C. C. 60 (1880); s. c. 5 Fed. Rep. 336.

[3] Cameron v. McFarland, 2 Car. L. R. (N. C.) 415 (1815); s. c. 6 Am. Dec. 566; Roll v. Raguet, 4 Ohio 400 (1829); s. c. 22 Am. Dec 759. See Spalding v. Bank of Muskingum. 12 Ohio, 544, 548 (1841); Moore v. Adams, 8 Ohio, 372, 375 (1838); Goudy v. Gebhart, 1 Ohio St. 265 (1853).

[4] Peed v. McKee, 42 Iowa, 689 (1876); s. c. 20 Am. Rep. 631; Raguet v. Roll, 7 Ohio, 77 (1835); Roll v. Raguet, 4 Ohio, 400 (1829); s. c. 22 Am. Dec. 759.

[5] Pearce v. Wilson, 111 Pa. St. 14 (1885); Ormerod v. Dearman, 100 Pa. St. 561 (1882); s. c. 45 Am. Rep. 391; Riddle v. Hall, 99 Pa. St. 116 (1881); Bredin's Appeal, 92 Pa. St. 241 (1879).

claimed that the mortgage, upon which the suit was founded, was void, because it was intended to hinder, delay and defraud the creditors of the mortgagor, and because it was against public policy as being an attempt to escape taxation. The court held that neither of these defences could be set up by such subsequent incumbrancer, after the mortgagor had waived them by making a default, and that it was questionable whether even the mortgagor could have availed himself of them.[1]

§ 343. **Illegal or void consideration—When no defence to action on note secured by mortgage.**—Where a negotiable instrument secured by a mortgage has been transferred to a *bona fide* purchaser, it has been said that even duress in its execution will not be available as a defence against such assignee in an action on the note.[2] And the fact that the consideration of a promissory note secured by a mortgage was illegal or void, can not be set up as a defence in an action by an assignee who purchased the note and mortgage in good faith for a valuable consideration and without notice.[3]

It has been said by the supreme court of Iowa that while it is true, that a *bona fide* purchaser of a note before maturity takes the mortgage securing it, as he takes the note, free from the defences to which it is subject in the hands of the mortgagee, yet that this doctrine will not be extended to a case where the mortgage is upon the homestead of a woman who did not sign the note and whose signature to the mortgage was obtained by duress.[4]

An exception to the general rule laid down above, exists where the assignment of the note and mortgage is made subject by its terms to the rights of the mortgagor; for in such a case, the assignee acquires no greater rights than the mortgagee himself possessed.[5]

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[1] Nichols v. Weed Sewing Machine Co., 27 Hun (N. Y.) 200 (1882).

[2] Beals v. Neddo, 1 Mc Cr. C. C. 206 (1880).

[3] Smart v. Bement, 4 Abb. App. Dec. (N. Y.) 253 (1866); Taylor v. Page, 88 Mass. (6 Allen), 86 (1863).

[4] First National Bank of Nevada v. Bryan, 62 Iowa, 42 (1883).

[5] Fisher v. Otis, 3 Chand. (Wis.) 83 (1852).

§ 344. **Usury as a defence.**—It is well settled that usury may be set up as a defence to a bill to foreclose a mortgage, and that the mortgage will be declared void, if such defence is established.[1] This is especially true when the evidence shows that the mortgage was executed in pursuance of an usurious agreement.[2] But where a valid and subsisting

[1] See Freeman v. Auld, 44 N. Y. 50 (1870); Mumford v. American Life Ins. and Trust Co., 4 N. Y. 463 (1851); Brooks v. Avery, 4 N. Y. 225 (1850); McCraney v. Alden, 46 Barb. (N. Y.) 272 (1866); Soule v. The Union Bank, 45 Barb. (N. Y.) 111 (1865); Vickery v. Dickson, 35 Barb. (N. Y.) 96 (1861); Lane v. Losee, 2 Barb. (N. Y.) 56 (1847); Warner v. Gouverneur, 1 Barb. (N. Y.) 36 (1847); Bush v. Livingston, 2 Cai. Cas. (N. Y.) 66 (1805); s. c. 2 Am. Dec. 316; Jackson v. Colden, 4 Cow. (N. Y.) 266 (1825); Miller v. Hull, 4 Den. (N. Y.) 104 (1847); Pearsall v. Kingsland, 3 Edw. Ch. (N. Y.) 195 (1838); Wheaton v. Voorhis, 53 How. (N. Y.) Pr. 319 (1877); Stoney v. American L. Ins. Co., 11 Paige Ch. (N. Y.) 635 (1845); Righter v. Stall, 3 Sandf. Ch. (N. Y.) 608 (1846); Neefus v. Vanderveer, 3 Sandf. Ch. (N. Y.) 268 (1846); New York Dry Dock Co. v. American L. Ins. & T. Co., 3 Sandf. Ch. (N. Y.) 215 (1846); Fox v. Lipe, 24 Wend. (N. Y.) 164 (1840); Jackson v. Packard, 6 Wend. (N. Y.) 415 (1831); Munter v. Linn, 61 Ala. 492 (1878); Mitchell v. Preston, 5 Day (Conn.) 100 (1811); Nichols v. Cosset, 1 Root (Conn.) 294 (1791); Sherman v. Gassett, 9 Ill. (4 Gilm.) 521 (1847); Gambril v. Doe, 8 Blackf. (Ind.) 14 (1846); s. c. 44 Am. Dec. 760; Tyson v. Rickard, 3 Har. & J. (Md.) 109 (1810); s. c. 5 Am. Dec. 424; Drury v. Morse, 85 Mass. (3 Allen), 445 (1862); Hart v. Goldsmith, 83 Mass. (1 Allen), 145 (1861); Baxter v. McIntire, 79 Mass. (13 Gray), 168 (1859); Thomes v. Cleaves, 7 Mass. 361 (1811); Donnington v. Mecker, 11 N. J. Eq. (3 Stockt.) 362 (1857); Cotheal v. Blydenburgh, 5 N. J. Eq. (1 Halst.) 17 (1845); Cunningham v. Davis, 7 Ired. (N. C.) Eq. 5 (1850); Ballinger v. Edwards, 4 Ired. (N. C.) Eq. 449 (1847); Union Bank v. Bell, 14 Ohio St. 200 (1862); Lockwood v. Mitchell, 7 Ohio St. 387 (1857); s. c. 70 Am. Dec. 78; Morris v. Way, 16 Ohio, 469 (1847); Heath v. Page, 48 Pa. St. 130 (1864); Greene v. Tyler, 39 Pa. St. 361 (1861); Dyer v. Lincoln, 11 Vt. 300 (1839); Robertson v. Campbell, 2 Call (Va.) 354, 421 (1800); Fay v. Lovejoy, 20 Wis. 407 (1866); Richards v. Worthley, 5 Wis. 73 (1856); DeButts v. Bacon, 10 U. S. (6 Cr.) 252 (1810); bk. 3 L. ed. 215; Morgan v. Tipton, 3 McL. C. C. 339 (1844); Hodgkison v. Wyatt, 4 Ad. & E. N. S. 749 (1843); Blackburn v. Warwick, 2 Y. & C. 92 (1836).

[2] See Walch v. Cook, 65 Barb. (N. Y.) 30 (1873); Vickery v. Dickson, 35 Barb. (N. Y.) 96 (1861); Andrews v. Poe, 30 Md. 485 (1869); Aldrich v. Wood, 26 Wis. 168 (1870). But see Patterson v. Birdsall, 64 N. Y. 294 (1876); s. c. 21 Am. Rep. 609; Spencer v. Ayrault, 10 N. Y. 202 (1854); Abrahams v. Claverson, 52 How. (N. Y.) Pr. 241 (1876); White v. Lucas, 46 Iowa, 319 (1877).

debt is included in a security, or made the subject of a contract, which is void for usury or for any other reason, it will not be destroyed. Although a valid mortgage may be satisfied and canceled of record upon being made a part of a new usurious mortgage, it can nevertheless be revived and enforced in case the new security is declared to be void.[1] Thus, where a plaintiff advanced money to pay a mortgage, taking another mortgage to secure such advance, and the second mortgage was declared void for usury, it was held that the usury of the second mortgage did not affect the validity of the first mortgage and that, the latter mortgage being void, the prior mortgage survived and could be enforced by the plaintiff,[2] because by paying the first mortgage the plaintiff became equitably subrogated to all the rights of the mortgagee whom he paid, and the mortgage must be regarded as still subsisting and unextinguished, as against the mortgagors.[3]

§ 345. **How to allege usury — What law governs.**— While full effect will be given to the statute against usury, yet nice distinctions will not be favored for the purpose of extending its penalties to cases not within the spirit of the statute.[4] Where usury is set up as a defence to a bill to foreclose a mortgage, the defendant will be held strictly to proof of the usurious contract as alleged in his answer;[5] and a variance between the usurious contract set up in the answer and that established by the evidence at the hearing, will be fatal to the defence.[6] If the defendant pleads generally that

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[1] Patterson v. Birdsall, 64 N. Y. 294 (1876). See Gerwig v. Sitterly, 56 N. Y. 214 (1874), aff'g 64 Barb. (N. Y.) 620; Winsted Bank v. Webb, 39 N. Y. 325 (1868); Farmers & Mechanics' Bank of Genesee v. Joslyn, 37 N. Y. 353 (1867); Cook v. Barnes, 36 N. Y. 520 (1867); Rice v. Welling, 5 Wend. (N. Y.) 595 (1830).

[2] Patterson v. Birdsall, 64 N. Y. 294 (1876); s. c. 21 Am. Rep. 609.

[3] Patterson v. Birdsall, 64 N. Y. 294 (1876); s. c. 21 Am. Rep. 609. See Elsworth v. Lockwood, 42 N. Y. 89 (1870); Averill v. Taylor, 8 N. Y. 44 (1853); Pardee v. VanAnken, 3 Barb. (N. Y.) 534 (1848); Jenkins v. Continental Ins. Co., 12 How. (N. Y.) Pr. 67 (1855).

[4] See Patterson v. Birdsall, 64 N. Y. 294, 298 (1876); s. c. 21 Am. Rep. 609.

[5] Richards v. Worthley, 5 Wis. 73 (1856). See Atwater v. Walker, 16 N. J. Eq. (1 C. E. Gr.) 42 (1863).

the mortgage contract is usurious without a specific allegation as to where the contract was made, the defence will be limited to the statute regarding usury in the state in which the suit is pending, and its usurious character under any other statute can not be shown.[1]

The law governing a contract is that of the state where it was made, if it was entered into in a state other than that in which the mortgaged property is situated.[2] Where both parties reside in the same state which is also the place of contract, but the land is situated in another state, if nothing is said about the place of payment, the debt is presumably payable in the state where the parties reside and where the contract was made; and the validity of the contract will be determined by the laws of such state;[3] but if the note and mortgage are made payable in the state where the land is situated, the laws of that state will govern the construction and the legal effect of the contract.[4]

In cases where the defence relied on is that the contract is usurious by the laws of the state where it was made, the defendant must plead this fact, and show in what state the contract was made, and allege that it is in violation of the usury laws of such state.[5] It is not within the scope of this work to deal with the vexed question of what

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[1] Atwater v. Walker, 16 N. J. Eq. (1 C. E. Gr.) 42 (1863). See also Mosier v. Norton, 83 Ill. 519 (1876); Bennington Iron Co. v. Rutherford, 9 N. J. L. (3 Harr.) 467 (1842); Dolman v. Cook, 14 N. J. Eq. (1 McCart.) 56 (1861).

[2] Cope v. Wheeler, 41 N. Y. 303, 309 (1869), aff'g 53 Barb. (N. Y.) 350 (1867); McCraney v. Alden, 46 Barb. (N. Y.) 272 (1866); Dolman v. Cook, 14 N. J. Eq. (1 McCart.) 56 (1861); Kennedy v. Knight, 21 Wis. 340 (1867); Newman v. Kershaw, 10 Wis. 333 (1860).

[3] See Cope v. Wheeler, 41 N. Y. 303, 309 (1869), aff'g 53 Barb. (N. Y.) 350 (1867); Williams v. Fitzhugh, 37 N. Y. 444 (1868); Williams v. Ayrault, 31 Barb. (N. Y.) 364 (1860); Dobbin v. Hewett, 19 La. An. 513 (1867); Blydenburgh v. Cotheal, 5 N. J. Eq. (1 Halst.) (1847).

[4] Nichols v. Cosset, 1 Root (Conn.) 294 (1791); Duncan v. Helm, 22 La. An. 418 (1870).

[5] Curtis v. Mastin, 11 Paige Ch. (N. Y.) 15 (1844); Dolman v. Cook,

[6] Wheaton v. Voorhis, 53 How. (N. Y.) Pr. 319 (1877). See Cloyes v. Thayer, 3 Hill (N. Y.) 564 (1842); Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 526 (1834); Munter v. Linn, 61 Ala. 492 (1878); s. c. 2 South. L. J. 205; Baldwin v. Norton, 2 Conn. 161 (1817); Maher v. Lanfrom, 86 Ill. 513 (1877); Richards v. Worthley, 5 Wis. 73 (1856).

is and what is not usury; the reader is referred to the standard text-books dealing with that subject.

§ 346. **Who may avail themselves of the defence of usury.**—The defence of usury may be set up not only by the mortgagor himself, but by any person claiming under or in privity with him;[1] but it can not be set up by a stranger to the original transaction.[2] Some of the cases hold that any person who has become interested in the property subject to the mortgage, may set up the defence of usury, unless he purchased the property expressly subject to such mortgage, or assumed the payment of it.[3]

Thus, it has been held that the defence of usury is available to a wife for the protection of her homestead or her dower interest, although her husband may be estopped by his acts from pleading it as a defence.[4] It may also be set up by the heirs or devisees of the mortgagor; by a judgment creditor;[5] by a person holding a subsequent mechanic's lien upon the premises;[6] by an assignee of the mortgagor's property for

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14 N. J. Eq. (1 McCart.) 56 (1861); Cotheal v. Blydenburgh, 5 N. J. Eq. (1 Halst.) 17 (1845).

[1] Brooks v. Avery, 4 N. Y. 225 (1850); Carow v. Kelly, 59 Barb. (N. Y.) 239 (1871); Maher v. Lanfrom, 86 Ill. 513 (1877); Westerfield v. Bried, 26 N. J. Eq. (11 C. E. Gr.) 357 (1857); Brolasky v. Miller, 9 N. J. Eq. (1 Stockt.) 807 (1852); s. c. 8 N. J. Eq. (4 Halst.) 789 (1852); Greene v. Tyler, 39 Pa. St. 361 (1861).

[2] Ohio & M. R. R. Co. v. Kasson, 37 N. Y. 218 (1867); Williams v. Birch, 2 Trans. App. (N. Y.) 133 (1867); s. c. *sub nom.* Williams v. Tilt, 36 N. Y. 319; Stoney v. American Life Ins. Co., 11 Paige Ch. (N. Y.) 635 (1845), rev'g 4 Edw. Ch. (N. Y.) 332 (1843); Brolasky v. Miller, 9 N. J. Eq. (1 Stockt.) 814 (1852).

[3] See Brooks v. Avery, 4 N. Y. 225 (1850); Post v. Dart, 8 Paige Ch. (N. Y.) 640 (1841); Banks v. McClellan, 24 Md. 62 (1865); McAlister v. Jerman, 32 Miss. 142 (1856); Gunnison v. Gregg, 20 N. H. 100 (1849); Cummins v. Wire, 6 N. J. Eq. (2 Halst.) 73 (1846); Union Bank v. Bell, 14 Ohio St. 200 (1862).

[4] Campbell v. Babcock, 27 Wis. 512 (1871).

[5] Merchants' Ex. Bank v. Commercial Warehouse Co., 49 N.Y. 636, 643 (1872), note; Mason v. Lord, 40 N.Y. 476 (1869); Thompson v. VanVechten, 27 N. Y. 568, 585 (1863); Carow v. Kelly, 59 Barb. (N. Y.) 239 (1871); Jackson v. Tuttle, 9 Cow. (N. Y.) 233 (1828); Schroeppel v. Corning, 5 Den. (N. Y.) 236 (1848); Dix v. VanWyck, 2 Hill (N. Y.) 522 (1842); Knickerbocker Life Ins. Co. v. Hill, 6 T. &. C. (N. Y.) 285 (1875); s. c. 3 Hun (N. Y.) 577; Post v. Dart, 8 Paige Ch. (N. Y.) 639 (1841).

the benefit of his creditors ;[1] by creditors for whose benefit the land has been conveyed in trust, where the trustee has neglected to set up such defence ;[2] by subsequent incumbrancers,[3] or by a purchaser from the mortgagor.[4]

But where the purchaser of the equity of redemption, covered by an usurious mortgage, takes the land subject to the lien of the mortgage, he can not plead usury as a defence to the foreclosure of such mortgage.[5] And this is particularly true where he assumes and agrees to pay the mortgage debt.[6] There is also a line of cases holding that the defence of usury is a personal privilege of the debtor, and that where he himself is willing to abide by the terms of his contract, no one can interfere and plead it as a defence.[7]

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[6] Knickerbocker Life Ins. Co. v. Hill, 6 T. & C. (N. Y.) 285 (1875); s. c. 3 Hun (N. Y.) 577.

[1] Pearsall v. Kingsland, 3 Edw. Ch. (N. Y.) 195 (1838).

[2] Union Bank of Masillon v. Bell, 14 Ohio St. 200 (1862). *Contra*, Sands v. Church, 6 N. Y. 347 (1852).

[3] Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618 (1866) ; Brooke v. Morris, 2 Cin. (O.) Supr. Ct. Rep. 528 (1873).

[4] Brooks v. Avery, 4 N. Y. 225 (1850). See Bullard v. Raynor, 30 N. Y. 197 (1864); Matthews v. Coe, 56 Barb. (N. Y.) 430 (1870) ; Shufelt v. Shufelt, 9 Paige Ch. (N. Y.) 137 (1841) ; s. c. 37 Am. Dec. 381 ; Post v. Dart, 8 Paige Ch. (N. Y.) 639 (1841).

[5] Hartley v. Harrison, 24 N. Y. 170 (1861) ; Sands v. Church, 6 N. Y. 347 (1852) ; Morris v. Floyd, 5 Barb. (N. Y.) 130 (1849) ; Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 527 (1834) ; Dolman v. Cook, 14 N. J. Eq. (1 McCart.) 56, 61 (1861) ; Brolasky v. Miller, 9 N. J. Eq. (1 Stockt.) 814 (1852).

[6] Parkinson v. Sherman, 74 N. Y. 88 (1878) ; s. c. 30 Am. Rep. 268 ; Sands v. Church, 6 N. Y. 347 (1852); Burlington Mut. Assoc. v. Heider, 55 Iowa, 424 (1880) ; Hough v. Horsey, 36 Md. 181 (1872) ; s. c. 11 Am. Rep. 484 ; Conover v. Hobart, 24 N. J. Eq. (9 C. E. Gr.) 120 (1873) ; Cramer v. Lepper, 26 Ohio St. 59 (1875) ; s. c. 20 Am. Rep. 756.

[7] See McGuire v. VanPelt, 55 Ala. 344 (1876) ; Fielder v. Varner, 45 Ala. 429 (1871) ; Cain v. Gimon, 36 Ala. 168 (1860) ; Fenno v. Sayre, 3 Ala. 458 (1842) ; Loomis v. Eaton, 32 Conn. 550 (1865) ; Adams v. Robertson, 37 Ill. 45 (1865) ; Studabaker v. Marquardt, 55 Ind. 341 (1876) ; Carmichael v. Bodfish, 32 Iowa, 418 (1871) ; Huston v. Stringham, 21 Iowa, 36 (1866) ; Powell v. Hunt, 11 Iowa, 430 (1860) ; Pritchett v. Mitchell, 17 Kan. 355 (1876); s. c. 22 Am. Rep. 287 ; Campbell v. Johnson, 4 Dana (Ky.) 178 (1836) ; Green v. Kemp, 13 Mass. 515 (1816); s. c. 7 Am. Dec. 169 ; Farmers' & Mechanics' Bank v. Kimmel, 1 Mich. 84 (1848) ; Ransom v. Hays, 39 Mo. 445 (1867) ; Miners' Trust Bank v. Roseberry, 81 Pa. St. 309 (1876) ; Lamoille County Bank v. Bingham, 50 Vt. 105 (1877) ; s. c. 28 Am. Rep.

§ 347. **Defences against assignee of mortgage.** — In those states where the transfer of a note carries with it the security collateral thereto, in an action by an assignee to foreclose the mortgage securing a note transferred to him, the defendant can not set up as a defence the want of a formal assignment of the mortgage,[1] nor a denial of knowledge of the assignment,[2] nor the fact that the note secured was purchased at a discount,[3] nor that the plaintiff purchased the note from motives of malice, nor that the assignor and his assignee acted in concert with a view unnecessarily to harass and oppress the mortgagor, or with the intention of preventing his paying the note, so that the equity of redemption might be foreclosed and that they might become the purchasers of the mortgaged premises for a sum less than their value;[4] nor that he has been evicted from the premises, where the mortgage sought to be foreclosed was given for part of the purchase price;[5] nor defects in the title to the land conveyed and damages awarded against him therefor;[6] nor merger,[7] it being sufficient to sustain the action, that the mortgage debt is due and that it has been transferred to, and is owned by, the plaintiff.[8] But, in an action by the assignee of a note and mortgage for foreclosure, the defendant may show a mistake in drawing the instrument and have it reformed;[9]

490; Austin v. Chittenden, 33 Vt. 553 (1861); Ready v. Huebner, 46 Wis. 692 (1879); s. c. 32 Am. Rep. 749; DeWolf v. Johnson, 23 U. S. (10 Wheat.) 367 (1825); bk. 6 L. ed. 343.

[1] Jackson v. Blodget, 5 Cow. (N. Y.) 202, 205 (1825); Jackson v. Willard, 4 Johns. (N. Y.) 41, 43 (1809); Rice v. Cribb, 12 Wis. 179 (1860).

[2] Brown v. Woodbury, 5 Ind. 254 (1854). The oath of affirmation or denial of an assignment under the Indiana Rev. Stat. of 1843 was required to be to the effect that the party had reason to believe and did believe that no assignment had been made. Brown v. Woodbury, *supra*.

[3] Grissler v. Powers, 53 How. (N. Y.) Pr. 194 (1877); Knox v. Galligan, 21 Wis. 470 (1867); Croft v. Bunster, 9 Wis. 503 (1859).

[4] Morris v. Tuthill, 72 N. Y. 575 (1878).

[5] National Fire Ins. Co. v. McKay, 21 N. Y. 191 (1860). See Hill v. Butler, 6 Ohio St. 207 (1856).

[6] Hill v. Butler, 6 Ohio St. 207 (1856).

[7] See Reed v. Latson, 15 Barb. (N. Y.) 9 (1853).

[8] Morris v. Tuthill, 72 N Y. 575 (1878).

[9] Andrews v. Gillespie, 47 N. Y. 487 (1872).

or that the assignee could not make a valid assignment.[1]

In an action for the foreclosure of a mortgage by the assignee thereof, the defendant may allege in his answer that the mortgage was assigned without authority of law,[2] or that it was assigned to procure the performance of an agreement void for illegality.[3] And where a mortgagor has made *bona fide* payments to an indorsee upon a note secured by a mortgage, without notice that the indorsee's title is invalid, such payments will be valid as against the rightful owner of the mortgage debt.[4]

The fact that a complainant, after having commenced an action to foreclose a mortgage, borrowed money of a third person on such mortgage, with the understanding that the plaintiff was to continue the prosecution of the suit, and, in the event of success, to repay the money so borrowed with interest, can not be set up as a defence to the foreclosure.[5]

But an answer is insufficient which alleges that the assignee took his assignment of the mortgage from motives of malice, and solely for the purpose of bringing a foreclosure, and that the assignor transferred the mortgage with a like motive and without consideration.[6]

It has been said that any defendant to a mortgage foreclosure suit, who is personally liable for the debt, or whose land is affected by the lien of the mortgage, may introduce a set-off to reduce or extinguish the plaintiff's claim, and may show that the plaintiff has taken only a colorable or a

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[1] Renaud v. Conselyea, 7 Abb. (N. Y.) Pr. 105 (1858), reconsidering and reversing s. c. 5 Abb. (N. Y.) Pr. 346; 4 Abb. (N. Y.) Pr. 280.

[2] Leavitt v. Palmer, 3 N. Y. 19 (1849); s. c. 51 Am. Dec. 333; Johnson v. Bush, 3 Barb. Ch. (N. Y.) 207 (1848); N. Y. Trust & Loan Co. v. Helmer, 12 Hun (N. Y.) 35, 44 (1877); Green v. Seymour, 3 Sandf. Ch. (N. Y.) 285 (1846).

[3] Dewitt v. Brisbane, 16 N. Y. 508 (1858); Talmage v. Pell, 7 N. Y. 328 (1852); Leavitt v. Palmer, 3 N. Y. 19 (1849); s. c. 51 Am. Dec. 333; Green v. Seymour, 3 Sandf. Ch. (N. Y.) 285 (1846); Adams v. Rowan, 16 Miss. (8 Smed. & M.) 624 (1847). See Wyeth v. Braniff, 84 N. Y. 627, 633 (1881); Fish v. DeWolf, 4 Bosw. (N. Y.) 573 (1859).

[4] Vanarsdall v. State, 65 Ind. 176 (1879).

[5] Chase v. Brown, 32 Mich. 225 (1875).

[6] Morris v. Tuthill, 72 N. Y. 575 (1878); Davis v. Flagg, 35 N. J. Eq. (8 Stew.) 491 (1882).

fraudulent assignment of the mortgage and holds it for the benefit of one against whom such a right of set-off exists.[1]

§ 348. **Defence against voluntary assignee in bankruptcy.**—The assignee of an insolvent mortgagee for the benefit of creditors, is not entitled to the same favor in equity that is accorded to the purchaser of a mortgage for a valuable consideration. He is not a *bona fide* holder nor a purchaser for value, but takes the property simply as a trustee, subject to all equities which may exist between the debtor and his creditors. He is in no sense a purchaser, because the assignment is simply an appropriation by the debtor of his property, in trust for the payment of his debts in the order and manner specified; an act by which he divests himself of such property for the time being, without altering or parting with his interest in it, for should any property or its proceeds remain after the trust has been executed, it must be returned to the assignor. For these reasons a voluntary assignee in bankruptcy is in no better position, and acquires no better title, than his assignor held.[2]

Where a debtor executed a mortgage and before its maturity made a valid assignment of all his property for the benefit of his creditors, in an action to foreclose such mortgage, the assignee alone can attack its validity, if none of the creditors had a specific lien upon the property by judgment prior to the execution of the assignment. The creditors of the mortgagor are not necessary parties to the action, and the fact that they are made parties will not entitle them to interpose a defence.[3]

§ 349. **Defence against a fraudulent assignment.**—Fraud voids all contracts and transfers into which it enters, at the election of the party defrauded; *ex dolo malo non oritur*

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[1] Lathrop v. Godfrey, 3 Hun (N. Y.) 739 (1875).

[2] Schieffelin v. Hawkins, 1 Daly (N. Y.) 289 (1863); s. c. 14 Abb. (N. Y.) Pr. 112. See VanHeuson v. Radcliff, 17 N. Y. 580 (1858); s. c. 72 Am. Dec. 480; Warren v. Fenn, 28 Barb. (N. Y.) 333 (1858); Leger v. Bonnaffe, 2 Barb. (N. Y.) 475 (1848); *In re* Howe, 1 Paige Ch. (N. Y.) 125 (1828); s. c. 19 Am. Dec. 395; Mead v. Phillips, 1 Sandf. Ch. (N. Y.) 83 (1843).

[3] Spring v. Short, 90 N. Y. 538 (1882). See Geery v. Geery, 63 N. Y. 252 (1875).

actio is a maxim of very wide, if not universal, application. It applys even to the holder of commercial paper, and more strongly to assignees of choses in action.[1] Thus, where a party obtains an assignment of a bond and mortgage by means of fraud and with the ostensible purpose of selling the same for the owner, the equitable ownership thereof still remains in the assignor, and in an action brought by the assignee for foreclosure, the defendant may show payment to the mortgagee.[2] And where a mortgage is assigned immediately before the right of redemption would expire, for the purpose of preventing the redemption, it will have the effect of keeping the equity open until a tender can be made.[3]

§ 350. Defence against transferred mortgage payable to mortgagee alone.—A mortgage, like a note which is payable to the payee alone, is not negotiable, and is always subject to all equities existing between the original parties.[4] And where a mortgage, which was the only evidence of the indebtedness secured, was by its terms, "to be paid by the mortgagor to the mortgagee when called on by said mortgagee, and the mortgagor does not agree to pay the above sum to any one else except the said mortgagee," on suit brought by the administrator of the deceased mortgagee, it not appearing that the mortgagee had in his life-time, either personally or by agent, made a demand upon the mortgagor for payment of the sum secured, the court held, that an action to foreclose the mortgage could not be maintained by such administrator; that on the death of such mortgagee, without having demanded payment of such debt of the mortgagor, the consideration for the debt became a gift to the mortgagor; and

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[1] Hall v. Erwin, 60 Barb. (N. Y.) 349 (1871); s. c. 57 N. Y. 643.

[2] Hall v. Erwin, 66 N. Y. 649 (1876).

[3] Deming v. Comings, 11 N. H. 474 (1841).

[4] Ingraham v. Disborough, 47 N. Y. 421, 423 (1872). See Bush v. Lathrop, 22 N. Y. 535 (1860); Richards v. Waring, 1 Keyes (N. Y.) 576 (1864); James v. Morey, 2 Cow. (N. Y.) 246 (1823); s. c. 14 Am. Dec. 475; Clute v. Robinson, 2 Johns. (N. Y.) 595 (1807); Livingstone v. Dean, 2 Johns. Ch. (N. Y.) 479 (1817); Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441 (1817).

that a demand by the administrator would not be sufficient.[1]

§ 351. **Defences against foreclosure by bona fide purchaser of negotiable paper secured by mortgage.**—The assignee, before maturity, of a negotiable promissory note secured by mortgage, takes it free from all equities which existed between the original parties thereto;[2] but he takes it subject to such equities as appear from stipulations or recitals contained in any recorded instrument which forms a link in his chain of title.[3] In a case, however, where a mortgage, purporting to secure a promissory note of the mortgagor, was executed to a party who knew that it was without consideration, and that no note was ever delivered, it was held that an assignee of the mortgage took it subject to all equities existing between the original parties and that it could not be enforced.[4]

The assignee of a mortgage, securing a negotiable promissory note, who takes it in good faith before maturity for value, takes it as he does the note free from equities between

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[1] Sebrell v. Couch, 55 Ind. 122, 124 (1876). The court said: "The demand was not only to be made, but it was to be made by the mortgagee himself; implying, when taken in connection with what follows in the mortgage, that, if he did not choose to make it, the debt was not to be paid at all."

[2] Gould v. Marsh, 4 T. & C. (N. Y.) 128 (1874); s. c. 1 Hun (N. Y.) 566; Updegraft v. Edwards, 45 Iowa, 513 (1877); Farmers' National Bank of Salem v. Fletcher, 44 Iowa, 252 (1876); Preston v. Morris, 42 Iowa, 549 (1876); Duncan v. Louisville, 13 Bush (Ky.) 378 (1877); s. c. 26 Am. Rep. 201; Billgerry v. Ferguson, 30 La. An. 84 (1878); Pierce v. Faunce, 47 Me. 507 (1859); Sprague v. Graham, 29 Me. 160 (1848); Taylor v. Page, 88 Mass. (6 Allen), 86 (1863); Helmer v. Krolick, 36 Mich. 371 (1877); Jones v. Smith, 22 Mich. 360 (1871); Bloomer v. Henderson, 8 Mich. 395 (1860); s. c. 77 Am. Dec. 453; Cicotte v. Gagnier, 2 Mich. 381 (1852); Reeves v. Scully, Walk. Ch. (Mich.) 248 (1843); Logan v. Smith, 62 Mo. 455 (1876), overruling Linville v. Savage, 58 Mo. 248 (1874); Sawyer v. Prickett, 86 U. S. (19 Wall.) 146, 166 (1872); bk. 22 L. ed. 80; Kenicott v. Supervisors of Wayne County, 83 U. S. (16 Wall.) 452 (1872); bk. 21 L. ed. 319; Carpenter v. Longan, 83 U. S. (16 Wall.) 271 (1872); bk. 21 L. ed. 313; Beals v. Neddo, 1 McCr. C. C. 206 (1880). See Trustees of Union College v. Wheeler, 61 N. Y. 88, 107 (1874).

[3] Orrick v. Durham, 79 Mo. 175 (1883).

[4] Burbank v. Warwick, 52 Iowa, 493 (1879).

the original parties;[1] but it will be otherwise, where the mortgage is taken after maturity and without inquiry, although in good faith and for full value.[2] And where a note, and a mortgage given to secure it, are transferred before maturity to a *bona fide* purchaser, the mortgagor, although having no notice whatever of such assignment and transfer, can not thereafter pay the note or mortgage to the mortgagee so as to defeat the real owner and holder thereof from recovering.[3] It seems that a purchaser in good faith and for value from the one of a number of contemporaneous mortgagees, who first recorded his mortgage, will take the same free from a parol agreement between the mortgagees of which he was ignorant, that the mortgages should be equal liens.[4] But the rule that the assignee of a mortgage before maturity, takes it free from the equities existing between the original parties to the instrument, applies only to such mortgages as are collateral to and secure negotiable instruments.[5]

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[1] Mundy v. Whittemore, 15 Neb. 647 (1884). See Burhans v. Hutcheson, 25 Kan. 625 (1881); s. c. 37 Am. Rep. 274.

[2] Osborn v. McClelland, 43 Ohio St. 284 (1885). In this case O., for value received, made and delivered to F. her negotiable note, secured by mortgage, payable to the order of F. in five years. Two years before the same became due F., without consideration, and solely for the accommodation of B. & S., bankers, loaned the same temporarily to them, to enable them to use the same as collateral for a loan to meet a present emergency, B. & S. promising to keep and return them safely. B. & S. did not use them, but they were suffered to remain in their custody until after the note became due, when S., survivor of B. & S., without the knowledge of F., or without authority from her, hypothecated them to M. by delivery, merely saying the note would be paid. M. took the same in good faith, and for full value, without inquiry, guaranty, or indorsement by S., relying solely on his possession and the blank indorsement of F., that S. was the owner. It was held that M., having received the note after maturity and without inquiry, acquired no better title than S. had, and, as S. had neither title nor interest, which was good against F., he could not transfer a title to M. which would give him the right to foreclose the mortgage as against the real owner.

[3] Burhans v. Hutcheson, 25 Kan. 625 (1881); s. c. 37 Am. Rep. 274.

[4] Decker v. Boice, 19 Hun (N. Y.) 152 (1879).

[5] Crane v. Turner, 67 N. Y. 437 (1876); Trustees of Union College v. Wheeler, 61 N. Y. 88, 107 (1874); Ingraham v. Disborough, 47 N. Y. 421 (1872); Rice v. Dewey, 54 Barb. (N. Y.) 455 (1862); Hartley v. Tatham, 10 Bosw. (N. Y.) 273 (1863);

In an action to foreclose a mortgage, brought by an assignee thereof, where a defence which would be valid as against the assignor is made, the plaintiff will be required to show that his purchase was *bona fide* in all respects.[1] The rule in this regard is the same in a majority of the states, whether the note transferred is, or is not, secured by a mortgage.[2]

§ 352. Purchaser of negotiable paper secured by mortgage takes subject to equities against it.—On the other hand, it has been held that while the purchaser of a negotiable instrument before maturity, without notice, will be protected against all defences to such negotiable instrument, yet that when the negotiable instrument is secured by a mortgage or other collateral security, such security will not for that reason be invested with any of the privileges or immunities belonging to negotiable paper; and, not being assignable separately and apart from the debt, either at common-law[3] or by the law merchant[4] or by statute,[5] the mortgagor may successfully

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s. c. 24 How. (N. Y.) Pr. 505; Niagara Bank v. Roosevelt, 9 Cow. (N. Y.) 409 (1827); s. c. Hopk. Ch. (N. Y.) 579; James v. Morey, 2 Cow. (N. Y.) 246 (1823); s. c. 16 Am. Dec. 465; Clute v. Robinson, 2 Johns. (N. Y.) 595 (1807); Ellis v. Messervie, 11 Paige Ch. (N. Y.) 467 (1844); s. c. 5 Den. (N. Y.) 640; Pendleton v. Fay, 2 Paige Ch. (N. Y.) 202 (1803); Nichols v. Lee, 10 Mich. 526 (1862); Reeves v. Scully, Walk. Ch. (Mich.) 248 (1843); Russell v. Waite, Walk. Ch. (Mich.) 31 (1842); Kamena v. Huelbig, 23 N. J. Eq. (8 C. E. Gr.) 75 (1872); Andrews v. Torrey, 14 N. J. Eq. (1 McCart.) 355 (1862); Losey v. Simpson, 11 N. J. Eq. (3 Stockt.) 246 (1856); Dunn v. Seymour, 11 N. J. Eq. (3 Stockt.) 278 (1856); Cornish v. Bryan, 10 N. J. Eq. (2 Stockt.) 146 (1856); Twitchell v. McMurtrie, 77 Pa. St. 383 (1875); Horstman v. Gerker, 49 Pa. St. 282, 289 (1865); Pryor v. Wood, 31 Pa. St. 142 (1858); Mott v. Clark, 9 Pa. St. 399 (1848); s. c. 49 Am. Dec. 566; Goulding v. Bunster, 9 Wis. 513 (1859); Croft v. Bunster, 9 Wis. 503 (1859).

[1] Getzlaff v. Seliger, 43 Wis. 297 (1877). See Matterson v. Morris, 40 Mich. 52 (1879).

[2] See Carpenter v. Longan, 83 U. S. (16 Wall.) 271; bk. 21 L. ed. 313 (1872); Bennett v. Taylor, 5 Cal. 502 (1855); Potts v. Blackwell, 4 Jones (N. C.) Eq. 58 (1858); Martineau v. McCollum, 4 Chand. (Wis.) 153 (1852).

[3] Medley v. Elliott, 62 Ill. 532 (1872); Sumner v. Waugh, 56 Ill. 531 (1869).

[4] *In re* Kansas City Marble and Stone Manufacturing Co., 9 Bankr. Reg. 76, 82 (1872); Corbett v. Woodward, 5 Sawy. C. C. 403 (1879).

[5] Medley v. Elliott, 62 Ill. 532 (1872); Sumner v. Waugh, 56 Ill. 531 (1869).

interpose any defence in an action brought by the assignee to foreclose the mortgage, that he could have made against the mortgagee,[1] even though the assignee may have purchased the note and mortgage in good faith for a valuable consideration in the regular course of business.[2] This doctrine is held in Colorado,[3] Illinois,[4] Louisiana,[5] Minnesota,[6] New Jersey,[7] Ohio[8] and Oregon,[9] and in the inferior courts of the United States.[10]

§ 353. **Same rule in Illinois.**—It has been held in Illinois that the same doctrine applies to a trust deed, and that in

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[1] White v. Sutherland, 64 Ill. 181 (1872); Sumner v. Waugh, 56 Ill. 531 (1869); Walker v. Dement, 42 Ill. 272 (1866); Johnson v. Carpenter, 7 Minn. 176 (1862).

[2] White v. Sutherland, 64 Ill. 181 (1872); Olds v. Cummings, 31 Ill. 188 (1863).

[3] Longan v. Carpenter, 1 Colo. 205 (1870). This case was reversed on appeal by the supreme court of the United States. See Carpenter v. Longan, 83 U. S. (16 Wall.) 271; bk. 21 L. ed. 313 (1872). The supreme court hold that where a mortgage is given at the time of the execution of a negotiable note, and to secure its payment, and the mortgage is subsequently, but before the maturity of the note, transferred *bona fide* with the note, the holder of the note, when obliged to resort to the mortgage, will be unaffected by any equities arising between the mortgagor and mortgagee, *subsequently to the transfer*, and of which, he, the assignee, had no notice at the time it was made.

[4] Ellis v. Sisson, 96 Ill. 105 (1880); United States Mortgage Co. v. Gross, 93 Ill. 483 (1879); Chicago D. & V. R. Co. v. Lœwenthal, 93 Ill. 433 (1879); Colehour v. State Savings Inst., 90 Ill. 152 (1878); Brant v. Vix, 83 Ill. 11 (1876); White v. Sutherland, 64 Ill. 181 (1872); Medley v. Elliott, 62 Ill. 532 (1872); Sumner v. Waugh, 56 Ill. 531 (1869); Walker v. Dement 42 Ill. 272 (1866); Olds v. Cummings, 31 Ill. 188, 192 (1863).

[5] Bouligny v. Frotier, 17 La. An. 121 (1865); Schmidt v. Frey, 8 Rob. (La.) 435 (1844).

[6] Hostetter v. Alexander, 22 Minn. 559 (1876); Johnson v. Carpenter, 7 Minn. 176 (1862).

[7] Woodruff v. Morristown Institution for Savings, 34 N. J. Eq. (7 Stew.) 174 (1881); Vredenburgh v. Burnet, 31 N. J. Eq. (4 Stew.) 229, 231 (1879); Putnam v. Clark, 29 N. J. Eq. (2 Stew.) 412, 415 (1878); Atwater v. Underhill, 22 N. J. Eq. (7 C. E. Gr.) 599, 606 (1872); Conover v. VanMater, 18 N. J. Eq. (3 C. E. Gr.) 481, 484 (1867); Woodruff v. Depue, 14 N. J. Eq. (1 McCart.) 168, 175 (1861); Losey v. Simpson, 11 N. J. Eq. (3 Stockt.) 246, 254 (1856).

[8] Baily v. Smith, 14 Ohio St. 396 (1863).

[9] Corbett v. Woodward, 5 Sawy. C. C. 403 (1879).

[10] See *In re* Kansas City Marble and Stone Manufacturing Co., 9 Bankr. Reg. 76, 82 (1872); Falcs v. Mayberry, 2 Gall. C. C. 560 (1815); United States v. Sturges, 1 Paine C. C. 525, 534 (1826); Corbett v. Woodward, 5 Sawy. C. C. 403 (1879).

an action for its foreclosure by an assignee, the defendant may interpose any equitable defence he had against the mortgagee arising out of the original transaction; but this rule does not extend to the set-off of a debt due from the assignor to the defendant arising out of a collateral transaction or a subsequent matter.[1] The principle upon which this doctrine is founded, is that while the notes are made negotiable by commercial usage or by statutory regulation, there is no such usage or provision as to the mortgages securing them, and that for this reason the assignee of the mortgage takes it, as he would any other chose in action, subject to all the rights which existed against the mortgage while in the hands of the mortgagee, except as to the latent equities of third persons, whose rights he could not know.[2]

§ 354. **Defences against assignee of mortgage securing a non-negotiable instrument.**—At common-law, a mortgage, as far as it is a debt or merely a security for a debt, is simply a chose in action, non-negotiable, and therefore can not be transferred by delivery or indorsement. A bond, also, is a non-negotiable instrument, and when assigned is subject to the equities existing between the original parties,[3] and subject to the same equities when assigned with the mortgage, which is simply collateral

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[1] Colchour v. State Savings Institution, 90 Ill. 152 (1878).

[2] Sumner v. Waugh, 56 Ill. 531 (1869). See Fortier v. Darst, 31 Ill. 212 (1863); Olds v. Cummings, 31 Ill. 188, 192 (1863); Woodruff v. Morristown Institution for Savings, 34 N. J. Eq. (7 Stew.) 174 (1881); Vredenburgh v. Burnet, 31 N. J. Eq. (4 Stew.) 229, 231 (1879); Putnam v. Clark, 29 N. J. Eq. (2 Stew.) 412, 415 (1878); DeWitt v. Van Sickle, 29 N. J. Eq. (2 Stew.) 212 (1878); Starr v. Haskins, 26 N. J. Eq. (11 C. E. Gr.) 415 (1875); Atwater v. Underhill, 22 N. J. Eq. (7 C. E. Gr.) 599, 606 (1872); Conover v. VanMater, 18 N. J. Eq (3 C. E. Gr.) 482 (1867); Andrews v. Torrey, 14 N. J. Eq. (1 McCart.) 355 (1861); Lee v. Kirkpatrick. 14 N. J. Eq. (1 McCart.) 264 (1861); Danbury v. Robinson, 14 N. J. Eq. (1 McCart.) 213 (1861); Woodruff v. Depue, 14 N. J. Eq. (1 McCart.) 168, 175 (1861); Losey v. Simpsou, 11 N. J. Eq. (3 Stockt.) 246, 254 (1856); Jacques v. Elser, 4 N. J. Eq. (3 H. W. Gr.) 461 (1844); Shannon v. Marselis, 1 N. J. Eq. (Saxt.) 413 (1831).

[3] Richardson v. Woodruff, 20 Neb. 132 (1886).

to it.[1] The bond being a mere chose in action, and neither it nor the mortgage having any negotiable character, the mortgagor's rights, in respect to the obligation, will not be changed in any way by the transfer of the bond and mortgage.[2] Where a non-negotiable note is secured by mortgage, and is assigned, it will be subject to the equities existing between the original parties at the time of the transfer, the same as a bond or other chose in action.[3] This rule, however, is generally understood to mean, the equity residing in the original obligor or debtor, and not an equity residing in some third person.[4]

In an action for foreclosure brought by the assignee of a bond and mortgage, the mortgagor may set up any equitable defence he would have had in a suit brought by the mortgagee, on the well established principle that the assignee of a chose in action takes it subject to all the equities against it in the hands of the assignor.[5] A mortgage not

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[1] Strong v. Jackson, 123 Mass. 60, 63 (1877); s. c. 25 Am. Rep. 19. See Crane v. March, 21 Mass. (4 Pick.) 131 (1826); s. c. 16 Am. Dec. 329.

[2] See Davis v. Beckstein, 69 N. Y. 440 (1877); Moore v. Metropolitan National Bank, 55 N. Y. 41 (1873); Ingraham v. Disborough, 47 N. Y. 421 (1872); Mason v. Lord, 40 N. Y. 476 (1869); Reeves v. Kimball, 40 N. Y. 299 (1869); Bush v. Lathrop, 22 N. Y. 535 (1860); Mickles v. Townsend, 18 N. Y. 575 (1859); Westfall v. Jones, 23 Barb. (N. Y.) 9 (1853); Ely v. McNight, 30 How. (N. Y.) Pr. 97 (1864); Hovey v. Hill, 3 Lans. (N. Y.) 167 (1870); Godeffroy v. Caldwell, 2 Cal. 489 (1852); s. c. 56 Am. Dec. 360; Cumberland Coal & Iron Co. v. Parish, 42 Md. 598 (1875); Jones v. Hardesty, 10 Gill & J. (Md.) 404, 420 (1839); s. c. 32 Am. Dec. 180; Mathews v. Heyward, 2 S. C. 239 (1870).

[3] White v. Heylman, 34 Pa. St. 142 (1859); Matthews v. Wallwyn, 4 Ves. 118, 126 (1798).

[4] Woodruff v. Morristown Inst. for Savings, 34 N. J. Eq. (7 Stew.) 174 (1881). See Warner v. Blakeman, 36 Barb. (N. Y.) 501, 517 (1862); Thompson v. VanVechten, 6 Bosw. (N. Y.) 373, 411 (1860); James v. Morey, 2 Cow. (N. Y.) 246, 249 (1823); s. c. 16 Am. Dec. 475; Livingstone v. Dean, 2 Johns. Ch. (N. Y.) 479 (1817); Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 442 (1817); Mott v. Clark, 9 Pa. St. 399 (1848).

[5] Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 442 (1817); Covell v. Tradesman's Bank, 1 Paige Ch. (N. Y.) 131, 135 (1828). See Riggs v. Purssell, 89 N. Y. 608 (1882); James v. Morey, 2 Cow. (N. Y.) 246, 298 (1823); s. c. 16 Am. Dec. 475; Muir v. Schenck, 3 Hill (N. Y.) 230 (1842); s. c. 38 Am. Dec. 633; Young v. Guy, 23 Hun (N. Y.) 1 (1881); Hovey v. Hill, 3 Lans. (N. Y.) 167, 172 (1870); Tabor v. Foy,

being transferable at law by delivery or indorsement, the assignee takes it subject to all equities between the parties; the fact that he takes the note secured by the mortgage by assignment before maturity free from all defences at law, does not protect the mortgage against equitable defences,[1] for while a purchaser in good faith of a note before its maturity, which is indorsed in blank, acquires the legal title, and may enforce his rights in a court of law, yet if the note is secured by a mortgage on real estate, and he resorts to a court of equity to foreclose the mortgage, that court will let in any defence which would have been good against the mortgage in the hands of the mortgagee.[2]

§ 355. Other defences against such an assignee.—A mortgage absolute on its face, assigned by the mortgagee to the holder as collateral security, may be shown, on foreclosure, by way of defence, to have been originally given as a collateral mortgage.[3] And while the assignee of a mortgage takes the same subject to all equities between the mortgagor and the mortgagee, yet he does not take it subject to the equities between the mortgagor and a prior assignee of the mortgage.[4] The reason for the rule is said to be found in the fact, that the assignee can always go to the mortgage debtor and ascertain what off-sets he may have against the mortgage or other chose in action which he is about to purchase from the mortgagee;[5] and where he neglects this

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56 Iowa, 539 (1881); Woodruff v. Morristown Inst. for Savings, 34 N. J. Eq. (7 Stew.) 171 (1881); Earnest v. Hoskins, 100 Pa. St. 551 (1882); McMullen v. Wenner, 16 Serg. & R. (Pa.) 18, 20 (1827); s. c. 16 Am. Dec. 543; Bury v. Hartman, 4 Serg. & R. (Pa.) 175 (1818); Foot v. Ketchum, 15 Vt. 258, 268 (1843); Norton v. Rose, 2 Wash. (Va.) 298 (1796); Pickett v. Morris, 2 Wash. (Va.) 325 (1796); Withers v. Greene, 50 U. S. (9 How.) 213, 224 (1850); bk. 13 L. ed. 109; United States v. Sturges, 1 Paine C. C. 525, 534 (1826); Bradley v. Trammel, Hempst. C. C. 164, 168 (1832); Priddy v. Rose, 3 Meriv. 86 (1817); Coles v. Jones, 2 Vern. 692 (1715); Hill v. Caillovel, 1 Ves. Sr. 122 (1748); Turton v. Benson, 1 P. Wms. 496 (1718).

[1] Towner v. McClelland, 110 Ill. 542 (1884).

[2] Towner v. McClelland, 110 Ill. 542 (1884).

[3] Dickerson v. Wenman, 35 N. J. Eq. (8 Stew.) 368 (1882).

[4] Reineman v. Robb, 98 Pa. St. 474 (1881).

[5] Westfall v. Jones, 23 Barb. (N. Y.) 9, 13 (1856); Murray v. Lylburn,

precaution, he will be deemed to have taken the securities upon the representations of the assignor alone as to their legal validity.[1]

The right of the obligor to defend against his bond and mortgage, or non-negotiable note and mortgage, in the hands of an assignee, is limited to matters affecting the existence of the debt, to off-sets against it, and to a want of consideration. A secret equity can not be pleaded by the mortgagor against an assignee of the bond and mortgage; neither can an agreement with the obligee merely collateral to or inconsistent with the import or legal effect of the instrument.[2]

In Pennsylvania, a bond is used almost exclusively in connection with the mortgage; and, although the mortgage may be assigned so as to enable the assignee to sue in his own name, yet it will be subject to the same equities and rules that govern other non-negotiable instruments or claims.[3] The same is true in New York[4]

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2 Johns. Ch. (N. Y.) 441 (1817). See Corning v. Murray, 3 Barb. (N. Y.) 652, 654 (1848); Hovey v. Hill, 3 Lans. (N. Y.) 167, 172 (1870); L'Amoreux v. Vandenburg, 7 Paige Ch. (N. Y.) 316 (1838); s. c. 32 Am. Dec. 635.

[1] Willis v. Twambly, 13 Mass. 204, 206 (1816).

[2] McMasters v. Wilhelm, 85 Pa. St. 218 (1877); Commonwealth v. Pittsburgh, 34 Pa. St. 496, 520 (1859); Pryor v. Wood, 31 Pa. St. 142 (1858); Davis v. Barr, 9 Serg. & R. (Pa.) 137, 141 (1822).

[3] Twitchell v. McMurtrie, 77 Pa. St. 383 (1875); Horstman v. Gerker, 49 Pa. St. 282 (1865); Pryor v. Wood, 31 Pa. St. 142 (1858).

[4] Trustees of Union College v. Wheeler, 61 N. Y. 88 (1874).

CHAPTER XVII.

ANSWERS AND DEFENCES.

FRAUD, MISREPRESENTATION, MISTAKE AND DURESS.

§ 356. Defence of fraud—Generally.
357. Defence of fraud by mortgagor.
358. Remedies on purchase money mortgage in case of fraud.
359. Remedies by mortgagor against fraud.
360. Defence of fraud against purchase money mortgage.
361. False representations as a defence.
362. Defence of false representations by a married woman.
363. Defence of false representations by purchaser who assumed mortgage.
364. Misrepresentation as to number of acres — Purchase money mortgage.
§ 365. False representations as to extent and boundaries of land.
366. Mutual mistake of parties as a defence.
367. Against whom mutual mistakes may be corrected.
368. Remedies for correcting a mistake.
369. Mutual mistake as to title.
370. Mutual mistake as to quantity of land.
371. Defence of undue influence.
372. Duress as a defence.
373. Duress under Ohio doctrine.
374. Mortgage executed by married woman under duress.
375. Duress of person.

§ 356. **Defence of fraud—Generally.**—It is a general rule that fraud vitiates everything it touches; but where fraud enters into a mortgage contract, it will not necessarily render the mortgage void, unless the fraud was committed upon the mortgagor by the mortgagee or his agent, or with the knowledge and assent of the mortgagee or his agent. There may be fraud without a deliberate intention to mislead or deceive; it may consist merely in the denial of what has been previously affirmed.[1] It has been said that in an action to foreclose a mortgage executed by a married woman upon her separate estate, she may set up as a defence, that she was induced to execute the mortgage by reason of fraudulent representations made to her with reference to the nature of the consideration thereof, even though such representations

[1] Ward v. Berkshire Life Ins. Co., 108 Ind. 301 (1886); s. c. 6 West. Rep. 596.

were not made by the mortgagee nor with his knowledge and consent.[1]

Though a mortgage may be made with the intention of defrauding the creditors of the mortgagor, it will not necessarily be void as between the parties; and in an action for foreclosure, where the mortgagee can show a *prima facie* right to recover on the face of the instrument, without revealing the fraud in the transaction, the defendant will not be permitted to plead as a defence, his own and the plaintiff's fraudulent intention, and that the mortgage was without consideration.[2] And where a debtor purchased real estate which he caused to be conveyed to his wife in fraud of his creditors, it was held that a *bona fide* mortgage from the husband and wife would not be affected by the fraud.[3] Possession of the premises by the husband and wife at the time of the execution of the mortgage, will not charge the mortgagee with notice of the fraud; neither will he be affected by notice of levies upon the property as that of the husband, subsequent to the conveyance to the wife.[4] But where a conveyance was made with the intention of defrauding creditors, such fraudulent intention may be shown by the parties whom it was intended to defraud.[5]

§ 357. **Defence of fraud by mortgagor.**—Fraud can be pleaded in answer by the mortgagor only where it was practiced upon him by the mortgagee or his agents, or with the mortgagee's knowledge;[6] and where a mortgagor has been

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[1] Cridge v. Hare, 98 Pa. St. 561 (1881).

[2] Bonesteel v. Sullivan, 104 Pa. St. 9 (1883); Gill v. Henry, 95 Pa. St. 388 (1880); Blystone v. Blystone, 51 Pa. St. 373 (1865); Williams v. Williams, 34 Pa. St. 312 (1859); Hendrickson v. Evans, 25 Pa. St. 441 (1855); Evans v. Dravo, 24 Pa. St. 62 (1854); s. c. 62 Am. Dec. 359; Sherk v. Endress, 3 Watts & S. (Pa.) 255 (1842).

[3] Shorten v. Drake, 38 Ohio St. 76 (1882).

[4] Shorten v. Drake, 38 Ohio St. 76 (1882).

[5] Gill v. Henry, 95 Pa. St. 388 (1880).

[6] Reed v. Latson, 15 Barb (N. Y.) 9 (1853); Aiken v. Morris, 2 Barb. Ch. (N. Y.) 140 (1847); Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817); s. c. 7 Am. Dec. 554; Champlin v. Laytin, 6 Paige Ch. (N. Y.) 189 (1836); aff'd 18 Wend. (N. Y.) 407; s. c. 31 Am. Dec. 382; Allen v. Shackleton, 15 Ohio St. 145 (1864).

imposed upon by intentional misrepresentation or concealment, he may have redress in equity for damages in addition to and beyond the canceling of his covenants.[1] Where a trusted kinsman and friend, as an agent of the mortgagee, is employed to misrepresent the contents of a mortgage, whereby its execution is secured without its being read to the mortgagor, it is a fraud against which relief will be promptly granted.[2] If fraud is practiced upon a mortgagor in any manner, it will void the mortgage and an action in equity to set it aside may be maintained, although the plaintiff may be in possession and might maintain his possession against the fraudulent mortgagee in an action at law.[3]

To constitute a good defence to an action to foreclose a mortgage, on the ground of fraud in obtaining such mortgage, it must be shown, not only that the defendant was defrauded, but also that he was defrauded by the mortgagee or his agent, or at least, that the mortgagee, at the time of the execution and delivery of the mortgage, was aware that a fraud was being committed upon the mortgagor. All the facts necessary to establish the fraud and to bring the knowledge of it home to the mortgagee, must be distinctly stated in the answer.[4]

§ 358. **Remedies on purchase money mortgage in case of fraud.**—It is a well established doctrine in American courts that a purchaser of land, who has gone into possession and accepted a deed, can not have relief in equity against the payment of the purchase money, except in cases of fraud. Unless he has taken the precaution to

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[1] Belknap v. Sealey, 2 Duer (N. Y.) 570 (1853); aff'd in 14 N. Y. 143 (1856); s. c. 67 Am. Dec. 120; Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519, 522 (1817); s. c. 7 Am. Dec. 554; Cornell v. Corbin, 64 Cal. 197 (1883); Pierce v. Tiersch, 40 Ohio St. 168 (1883); Edwards v. McLeay, 1 Cooper Eq. 308 (1815).

[2] Robinson v. Glass, 94 Ind. 211 (1883).

[3] Marston v. Brackett, 9 N. H. 336 (1838): Allen v. Shackleton, 15 Ohio St. 145 (1864). See Wilcox v. Howell, 44 Barb. (N. Y.) 396 (1864); Butler v. Viele, 44 Barb. (N. Y.) 166 (1865); Aiken v. Morris, 2 Barb. Ch. (N. Y.) 140 (1847); Hall v. Sands, 52 Me. 355 (1864); Burns v. Hobbs, 29 Me. 273 (1849); Baily v. Smith, 14 Ohio St. 396 (1863).

[4] Aiken v. Morris, 2 Barb. Ch. (N. Y.) 140 (1847).

require covenants as to his title before paying the contract price, his only remedy will be in a court of law.[1] If the purchaser has not protected himself with covenants in his deed of purchase, he will have no remedy upon a failure of title either at law or in equity, in the absence of fraud.[2] In certain cases, however, relief has been granted in equity against the payment of the purchase money, until the purchaser could be secured against existing incumbrances or defects in his title, where the conveyance was made with full covenants and there were doubts of the grantor's solvency.[3]

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[1] Denston v. Morris, 2 Edw. Ch. (N. Y.) 37 (1833); Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817); s. c. 7 Am. Dec. 554. See Corning v. Smith, 6 N. Y. 82 (1851); Leggett v. McCarty, 3 Edw. Ch. (N. Y.) 124 (1837); Gouverneur v. Elmendorf, 5 Johns. Ch. (N. Y.) 79 (1821); Chesterman v. Gardner, 5 Johns. Ch. (N. Y.) 29 (1820); Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 213 (1814); Bates v. Delavan, 5 Paige Ch. (N. Y.) 300 (1835); Davison v. DeFreest, 3 Sandf. Ch. (N. Y.) 456 (1846); Banks v. Walker, 2 Sandf. Ch. (N. Y.) 348 (1845); Edwards v. Bodine, 26 Wend. (N. Y.) 109 (1841); Tallmadge v. Wallis, 25 Wend. (N. Y.) 107 (1840); Tobin v. Bell, 61 Ala. 125 (1878); Strong v. Waddell, 56 Ala. 473 (1876); Cullum v. Branch Bank, 4 Ala. 21 (1842); Alden v. Pryal, 60 Cal. 222 (1882); Barkhamsted v. Case. 5 Conn. 528 (1825); Harding v. Commercial Loan Co., 84 Ill. 261 (1876); Beebe v. Swartwout, 8 Ill. (3 Gilm.) 162 (1846); James v. Hays, 34 Ind. 274 (1870); Laughery v. McLean, 14 Ind. 106 (1860); Natchez v. Minor, 17 Miss. (9 Smed. & M.) 544 (1848); Anderson v. Lincoln, 6 Miss. (5 How.) 279 (1840); Waddell v. Beach, 9 N. J. Eq. (1 Stockt.) 793 (1852); Van Waggoner v. McEwen, 2 N. J. Eq. (1 H. W. Gr.) 412 (1841); Shannon v. Marselis, 1 N. J. Eq. (1 Saxt.) 426 (1831); Maner v. Washington, 3 Strobh. (S. C.) Eq. 171 (1849); Commonwealth v. McClanachan, 4 Rand. (Va.) 482 (1826); Noonan v. Lee, 67 U. S. (2 Black), 507 (1862); bk. 17 L. ed. 280; Patton v. Taylor, 48 U. S. (7 How.) 159 (1849); bk. 12 L. ed. 649; Greenleaf v Cook, 15 U. S. (2 Wheat.) 16 (1817); bk. 4 L. ed. 173; McFarlane v. Griffith, 4 Wash. C. C. 585 (1826).

[2] Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817); s. c. 7 Am. Dec. 554; Laughery v. McLean, 14 Ind. 108 (1860); Hyatt v. Twomey, 1 Dev. & B. (N. C.) Eq. 317 (1836); Maney v. Porter, 3 Humph. (Tenn.) 363 (1842).

[3] See Jones v. Stanton, 11 Mo. 436 (1848); Woodruff v. Bunce, 9 Paige Ch. (N. Y.) 443 (1842); Bowen v. Thrall, 28 Vt. 385 (1856). But ordinarily the insolvency or the absence from the state of the vendor will not take the case out of the general principle stated in the text. See Platt v. Gilchrist, 3 Sandf. (N. Y.) 120 (1849); Hill v. Butler, 6 Ohio St. 218 (1856).

§ 359. **Remedies by mortgagor against fraud.**—Where fraud has been practiced upon the mortgagor by the mortgagee or his agent, or with the mortgagee's knowledge, in an action to foreclose a mortgage executed under such circumstances, the remedy of the mortgagor is to allege damages for such fraud and to recoup them by way of a counter-claim.[1] In such a case, in addition to the defences which the mortgagor may set up in an action to foreclose the mortgage, he may seek the affirmative aid of the court, as a court of equity, to cancel the instrument sued upon as fraudulent.[2] This remedy would seem to be founded upon the well established rule, that relief in equity can be had against any deed or contract in writing founded on mistake or fraud.[3]

This remedy, however, has been questioned in some states. Thus, in an early Maine case,[4] it was said that the learned chancellor in Gillespie v. Moon,[5] "maintains that relief may be had in chancery against any deed or contract in writing founded in mistake or fraud, and that the mistake may be shown by parol proof, and relief granted to the

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[1] Ludington v. Slauson, 38 N. Y. Supr. Ct. (6 J. & S.) 81 (1874). See Greene v. Tallman, 20 N. Y. 191 (1859); s. c. 75 Am. Dec. 384; Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817); s. c. 7 Am. Dec. 554; Lathrop v. Godfrey, 6 T. & C. (N. Y.) 96 (1875); s. c. 3 Hun (N. Y.) 739.

[2] Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585 (1817); s. c. 7 Am. Dec. 559; Glass v. Hulbert, 102 Mass. 41 (1869); 1 Story Eq. Jur. § 161.

[3] Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585 (1817). See Willes v. Yates, 44 N. Y. 529 (1871); Wood v. Hubbell, 10 N. Y. 486 (1853); Faure v. Martin, 7 N. Y. 213 (1852); Hutcheon v. Johnson, 33 Barb. (N. Y.) 398 (1861); Kent v. Manchester, 29 Barb. (N. Y.) 595 (1859); Fishell v. Bell, Clarke Ch. (N. Y.) 38 (1839); Roosevelt v. Fulton, 2 Cow. (N. Y.) 133 (1823); Funch v. Abenheim, 20 Hun (N. Y.) 1, 6 (1880); Champlin v. Laytin, 18 Wend. (N. Y.) 422 (1837); s. c. 31 Am. Dec. 393; Alden v. Pryal, 60 Cal. 222 (1882); Bishop v. Clay Ins. Co., 49 Conn. 176 (1881); Reading v. Weston, 8 Conn. 122 (1830); s. c. 20 Am. Dec. 99; Phœnix Ins. Co. v. Hoffheimer, 46 Miss. 658 (1872); Firmstone v. DeCamp, 17 N. J. Eq. (2 C. E. Gr.) 309 (1865); Huss v. Morris, 63 Pa. St. 373 (1869); Walden v. Skinner, 101 U. S. (11 Otto), 585; bk. 25 L. ed. 966 (1879); Snell v. Atlantic F. & M. Ins. Co., 98 U. S. (8 Otto), 89 (1878); bk. 25 L. ed. 54.

[4] Elder v. Elder, 10 Me. (1 Fairf.) 86 (1833); s. c. 25 Am. Dec. 208.

[5] 2 Johns. Ch. (N. Y.) 585 (1817); opinion *per* Chancellor Kent.

injured party, where he sets up the mistake affirmatively by bill or as a defence. We have looked into the cases cited by him, but are not satisfied that they sustain the doctrine to the extent which his language would seem to imply." This case, however, was an application for the reformation of a written contract by enlarging its terms by parol, and for a specific execution of it as amended; and the same is true of all the other decisions in which the doctrine laid down by Chancellor Kent in Gillespie v. Moon is questioned. It is worthy of note that in most of the cases the statute of frauds is relied upon as a defence.

§ 360. **Defence of fraud against purchase money mortgage.**—In an action by the mortgagee against the mortgagor, upon a note secured by a mortgage given for the purchase money of certain premises, the mortgagor may, as a defence, set up a counter-claim for damages by reason of the fraud of the mortgagee in concealing from him material facts as to the situation and extent of the premises;[1] and if such damages exceed, or are equal to, the amount of the mortgage, the claim under the mortgage will be wholly defeated.[2] And it has been held, that in an action against a mortgagor for purchase money, his right to set up a counter-claim for any excess in price, paid through the vendor's misrepresentations of the extent or value of the property, is the same whether such misrepresentations were wilfully or innocently made.[3]

In some states the defence of fraud in the consideration of a mortgage, where the fraud is not such as to render the

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[1] Baughman v. Gould, 45 Mich. 481 (1881); Burchard v. Frazer, 23 Mich. 224 (1871); Dayton v. Melick, 32 N. J. Eq. (5 Stew.) 570 (1880); Pierce v. Tiersch, 40 Ohio St. 168 (1883); Allen v. Shackleton, 15 Ohio St. 145 (1864).

[2] Greene v. Tallman, 20 N. Y. 191 (1851); Lathrop v. Godfrey, 6 T. & C. (N. Y.) 96 (1875); s. c. 3 Hun (N. Y.) 739.

[3] Baughman v. Gould, 45 Mich. 481 (1881). See Lockridge v. Foster, 5 Ill. (4 Scam.) 569 (1843); Starkweather v. Benjamin, 32 Mich. 305 (1875); Webster v. Bailey, 31 Mich. 36 (1875); Steinbach v. Hill, 25 Mich. 78 (1872); Converse v. Blumrich, 14 Mich. 109 (1866); Pierce v. Tiersch, 40 Ohio St. 168 (1883); Smith v. Richards, 38 U. S. (13 Pet.) 26 (1839); bk. 10 L. ed. 42; Tuthill v. Babcock, 2 Woodb. & M. C. C. 298 (1846); Smith v. Babcock, 2 Woodb. & M. C. C. 246 (1846); Taylor v. Ashton, 11 Mees. & W. 401 (1843); Ainslie v. Medlycott, 9 Ves. 21 (1803).

instrument void, but merely to reduce the amount to be recovered upon it, can not be pleaded by an answer alone. Such a defence, it is held, must be set up in a cross-bill.[1]

§ 361. **False representations as a defence.**—It is well established that a vendee may set up as a defence to the foreclosure of a purchase money mortgage, or in mitigation of damages, false and fraudulent representations by the vendor.[2] But a fraudulent representation as to the value of property, does not of itself invalidate a purchase money mortgage for its whole amount, if the property purchased has any value at all; in any event the property must be restored or a reconveyance thereof tendered, before the mortgage can be canceled,[3] because, where a party derives any benefit from a purchase, he can not rescind the contract as long as he retains the thing purchased.[4] And where a purchaser receives anything valuable either to himself or to the fraudulent seller, and does not return it, he thereby affirms the contract, inasmuch as it is void or valid, only at his election.[5]

§ 362. **Defence of false representations by a married woman.**—To enable the defence of fraud or misrepresentation to be set up in an action to foreclose a mortgage, it seems that the mortgagee must have participated in or have been in some way privy to such fraud or misrepresentation. Thus, where a mortgage covering a homestead and other

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[1] Parker v. Hartt, 32 N. J Eq. (5 Stew.) 225 (1880); O'Brien v. Hulfish, 22 N. J. Eq. (7 C. E. Gr.) 472 (1871); Graham v. Berryman, 19 N. J. Eq. (4 C. E. Gr.) 29 (1868); Miller v. Gregory, 16 N. J. Eq. (1 C. E. Gr.) 274 (1863).

[2] See Carey v. Guillow, 105 Mass. 18 (1870); Tuttle v. Brown, 70 Mass. (4 Gray), 457 (1855); Burnett v. Smith, 70 Mass. (4 Gray), 50 (1855); Dorr v. Fisher, 55 Mass. (1 Cush.) 271 (1848); Mixer v. Coburn, 52 Mass. (11 Metc.) 559, 561 (1846); Howard v. Ames, 44 Mass. (3 Metc.) 308, 311 (1841); Perley v. Balch, 40 Mass. (23 Pick.) 283 (1839); s. c. 34 Am. Dec. 56.

[3] Perley v. Balch, 40 Mass. (23 Pick.) 283 (1839); s. c. 34 Am. Dec. 56; Sanborn v. Osgood, 16 N. H. 112 (1844); Shepherd v. Temple, 3 N. H. 455 (1826).

[4] Perley v. Balch, 40 Mass. (23 Pick.) 283 (1839); s. c. 34 Am. Dec. 56; Sanborn v. Osgood, 16 N. H. 112 (1844).

[5] Rowley v. Bigelow, 29 Mass. (12 Pick.) 307 (1832); s. c. 23 Am. Dec. 607; Ayers v. Hewitt, 19

property was presented to a wife by her husband for execution, and signed by her under the supposition that the homestead was not included therein, it was held that the mortgage was valid, as it did not appear that the mortgagee had any knowledge of the circumstances under which it was signed.[1]

In the case of Alexander v. Bouton,[2] a married woman, to secure the debt of her husband, joined him in the execution of a note and mortgage upon her separate property, having been induced to do so by the representations of her husband that she was to be liable only to the extent of the mortgaged property. The mortgagee also took a collateral agreement from others to secure any deficiency that might remain after the sale of the mortgaged property; but the defendants were not parties to this agreement. In a foreclosure of the mortgage it was held, that the wife was bound as principal, and that her liability was not modified by her agreement with her husband, nor by the additional security taken by the plaintiff. But, in Indiana, a person taking an incumbrance on the property of a married woman, is bound to inquire whether the consideration is for her benefit or for the benefit of another; and, unless he is misled by her conduct or misrepresentations, he will be held to have acquired a knowledge of the facts which prudent inquiry would have disclosed.[3]

§ 363. Defence of false representations by purchaser who assumed mortgage.—It has been held in an action by a mortgagee to recover the amount of his mortgage against a purchaser of the mortgaged premises, who received a conveyance thereof subject to the mortgage and assumed the payment of the same, that it is a good defence, that the grantor of the defendant had no title to the property; that his representations respecting the same were false and fraudulent, and that the defendant was induced thereby to assume

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Me. 281 (1841); Sanborn v. Osgood, 16 N. H. 112 (1844); Ayer v. Hawkes, 11 N. H. 148 (1840).

[1] Edgell v. Hagens, 53 Iowa, 223 (1880).

[2] 55 Cal. 15 (1880).

[3] Cupp v. Campbell, 103 Ind. 213 (1885); s. c. 1 West Rep. 255.

the payment of the mortgage.[1] Where a person has purchased land expressly subject to a mortgage, such purchaser can not set up as a counter-claim, a fraud practiced upon him after the mortgage was given, if there is nothing to connect the plaintiff with the fraud of the mortgagor.[2]

Where a vendor, under a misapprehension of his legal rights, makes false representations on which his grantee relies, they will constitute such a fraud as will be a ground for relief in an action for the foreclosure of a mortgage given for part of the purchase money.[3]

To be available as a defence the misrepresentations must be as to facts; misrepresentations merely as to the value of the property will not be sufficient.[4] And where a defendant in a foreclosure suit avers that the mortgage was procured by false representations, the burden of proving the same will be on him.[5]

§ 364. **Misrepresentation as to number of acres—Purchase money mortgage.**—In cases where a vendor fraudulently misrepresents the number of acres and thereby induces the vendee to pay more for the premises than he otherwise would have paid, an abatement will be allowed.[6] And where the vendor of land, by misrepresenting its extent, induces a purchaser to incur a liability for land which the vendor is unable to convey, the effect of the transaction, in the eyes of the law, is a fraud upon the purchaser, even though both parties may act in good faith.[7]

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[1] Benedict v. Hunt, 32 Iowa, 27 (1871).

[2] Reed v. Latson, 15 Barb. (N. Y.) 9 (1853).

[3] Champlin v. Laytin, 6 Paige Ch. (N. Y.) 189 (1836); aff'd 18 Wend. (N. Y.) 407; s. c. 31 Am. Dec. 382.

[4] Sanborn v. Osgood, 16 N. H. 112 (1844).

[5] Ricord v. Jones, 33 Iowa, 26 (1871); Perrett v. Yarsdorfer, 37 Mich. 596 (1877); Sloan v. Holcomb, 29 Mich. 153 (1874); Baldwin v. Bucklin, 11 Mich. 389 (1863). See Buck v. Sherman, 2 Doug. (Mich.) 176 (1845); Flint v. Jones, 5 Wis. 424 (1856); Coulson v. Coulson, 5 Wis. 79 (1856); Savery v. King, 5 H. L. Cas. 627 (1856); s. c. 35 Eng. L. & Eq. 100.

[6] Dayton v. Melick, 34 N. J. Eq. (7 Stew.) 245 (1881).

[7] Baughman v. Gould, 45 Mich. 481 (1881). See Starkweather v. Benjamin, 32 Mich. 305 (1875); Webster v. Baily, 31 Mich. 36 (1875); Steinbach v. Hill, 25 Mich. 78 (1872); Convers v. Blumrich, 14 Mich. 109 (1866).

But it has been held that the vendee of land can not claim a deduction from a purchase money mortgage in a foreclosure suit, on the ground that his vendor, who was not the mortgagor, misstated the number of acres of land conveyed, and that the vendor of such vendor, who was the mortgagee and complainant, made a similar misstatement when he sold such land. To authorize a deduction the mortgagee and the owner must be privies in contract. Thus, where A. sold a farm to B., misstating the number of acres, and taking a mortgage for part of the consideration, and B. sold, making the same misstatement, to C., who assumed the payment of B.'s mortgage, in an action by A. to foreclose, it was held that C. could not set up these facts in order to offset his damages against the mortgage.[1]

§ 365. False representations as to extent and boundaries of land.—It is no defence to an action for fraud in misrepresenting the quantity of land in a parcel which the defendant was selling the plaintiff by the acre, that the latter saw the land and was as able to judge of its size as the defendant; a positive assurance of the area of the parcel of land made under such circumstances is very material, and is equivalent to an assurance of measurement; and if the statement is false and the vendee is deceived thereby, it constitutes a fraud for which a court of equity will grant relief.[2]

The court held in a recent Michigan case,[3] that the principle, that there is no fraud where both parties have equal means of judging, is not applicable to such a case, for it will not be presumed that people generally can judge with accuracy, by the eye, of the contents of a parcel of land; but that the principle, that one who dissuades another from inquiry and deceives him to his prejudice is responsible, is in point.

Where a vendor in the sale of land misrepresents the boundaries of such land, the vendee may plead in defence fraudulent representations as to the extent of the property

[1] Davis v. Clark, 33 N. J. Eq. (6 Stew.) 579 (1881).
[2] Starkweather v. Benjamin, 32 Mich. 305 (1875).
[3] Starkweather v. Benjamin, 32 Mich. 305 (1875).

and recoup in damages in an action by such vendor to foreclose a mortgage taken to secure part of the purchase price thereof,[1] whether the vendor's misrepresentations were innocently or wilfully made.[2]

§ 366. **Mutual mistake of parties as a defence.**—Courts of equity will relieve against a mistake as well as against fraud in a deed or contract in writing, both where the plaintiff seeks the relief affirmatively and where the defendant pleads it as a defence,[3] and will correct the instrument so as to make it express the intention and agreement of the parties.[4] Where the fact of a mistake appears and the interests of no third party intervene to raise questions of equitable rights, it is the duty of the court to make the correction; and this duty is co-extensive with the mistake, and extends not merely to the reformation of the original instrument, but also to all subsequent proceedings, judgments and decrees, into which the mistake may have been carried.[5]

To entitle a party to relief on the ground of mutual mistake, in a case free from fraud, the mistake must be as to a material fact, constituting the very essence and terms of the contract; and the fact must be of such a nature that the party could not by reasonable diligence obtain knowledge of it when put upon inquiry.[6] But it will be sufficient notice of the mistake, if the facts stated in the record of the mortgage are such as to put a subsequent purchaser from the mortgagor, or a judgment creditor, upon inquiry, which would lead to a knowledge of the mistake.[7]

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[1] Pierce v. Tiersch, 40 Ohio St. 168 (1883); Allen v. Shackleton, 15 Ohio St. 145 (1864).

[2] Baughman v. Gould, 45 Mich. 481 (1881); Pierce v. Tiersch, 40 Ohio St. 168, 172 (1883).

[3] Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585 (1817); s. c. 7 Am. Dec. 559; Bush v. Bush, 33 Kan. 556 (1885); s. c. 6 Pac. Rep. 794; Davenport v. Sovil, 6 Ohio St. 459 (1856). The evidence to show a mistake in a mortgage must be clear and strong, so as to establish the mistake to the entire satisfaction of the court; Gillespie v. Moon, *supra*.

[4] See Dayton v. Melick, 24 N. J. Eq. (7 Stew.) 245 (1881).

[5] First National Bank of Parsons v. Wentworth, 28 Kan. 183 (1882).

[6] Taylor v. Fleet, 4 Barb. (N. Y.) 95 (1848). See Melick v. Dayton, 34 N. J. Eq. (7 Stew.) 245 (1881); Hammond v. Allen, 2 Sumn. C. C. 387 (1836).

§ 367. **Against whom mutual mistakes may be corrected.**—Such a mutual mistake may be corrected not only as against the mortgagor, but also as against his heirs, representatives,[1] assigns,[2] attaching creditors,[3] judgment creditors,[4] and purchasers[5] with notice of the mistake, and as against a junior mortagagee whose lien was given as a security for an antecedent debt,[6] but not as against subsequent *bona fide* purchasers.[7] Where a clause is surreptitiously inserted in a deed conveying property, contrary to the contract of the parties, purporting to bind the purchaser personally with the assumption of the mortgage debt existing against the property, the vendee may have the deed reformed by striking out such clause.[8]

§ 368. **Remedies for correcting a mistake.**—A mortgagee may come into a court of equity and have his mortgage reformed by the correction of a mistake in the description of the lands conveyed, and have it foreclosed in the same

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[7] National Bank v. Dayton, 116 Ill. 257 (1886).

[1] McKay v. Wakefield, 63 Ind. 27 (1878).

[2] Andrews v. Gillespie, 47 N. Y. 487 (1872).

[3] Bush v. Bush, 33 Kan. 556 (1885); s. c. 6 Pac. Rep. 794.

[4] Boyd v. Anderson, 102 Ind. 217 (1885); Duncan v. Miller, 64 Iowa, 223 (1884). See Monticello Hydraulic Works v. Loughry, 72 Ind. 562 (1880); Wainwright v. Flanders, 64 Ind. 306 (1878); Busenbarke v. Ramey, 53 Ind. 499 (1876); Flanders v. O'Brien, 46 Ind. 284 (1874); Glideweld v. Spaugh, 26 Ind. 319 (1866); Sample v. Rowe, 24 Ind. 208 (1865); Orth v. Jennings, 8 Blackf. (Ind.) 420 (1847); Sparks v. State Bank, 7 Blackf. (Ind.) 469 (1845); s. c. 39 Am. Dec. 437; White v. Wilson, 6 Blackf. (Ind.) 448 (1843).

[5] Gouverneur v. Titus, 6 Paige Ch. (N. Y.) 347 (1837); Whitehead v. Brown, 18 Ala. 682 (1851); Wall v. Arrington, 13 Ga. 88 (1853); White v. Wilson, 6 Blackf. (Ind.) 448 (1843); s. c. 39 Am. Dec. 437; Simmons v. North, 11 Miss. (3 Smed. & M.) 67 (1844); Strang v. Beach, 11 Ohio St. 283 (1860); s. c. 78 Am. Dec. 308.

[6] Busenbarke v. Rainey, 53 Ind. 499 (1876). See VanHeusen v. Radcliff, 17 N. Y. 580 (1858); s. c. 72 Am. Dec. 480; Manhattan Co. v. Evertson, 6 Paige Ch. (N. Y.) 457 (1837); Powell v. Jeffries, 5 Ill. (4 Scam.) 387 (1843); Clay v. Hildebrand, 34 Kan. 694 (1886); Cox v. Esteb, 81 Mo. 393 (1884); Morse v. Godfrey, 3 Story C. C. 364 (1844).

[7] Busenbarke v. Ramey, 53 Ind. 499 (1876); Flanders v. O'Brien, 46 Ind. 284 (1874); 2 Hare & W. Lead. Cas. (3d Am. ed.) 104.

[8] Albany City Savings Inst. v. Burdick, 87 N. Y. 40, 48 (1881). See *ante* § 224.

action, even after the law day has passed,[1] because when a court once acquires jurisdiction for the purpose of foreclosing a mortgage, it may proceed to settle all questions in litigation between the parties growing out of the mortgage.[2]

Where there has been a mutual mistake in the description of the premises mortgaged, which is not discovered until after the sale on foreclosure, the judgment and sale may be set aside and an amended complaint may be filed, so as to obtain a new judgment correcting the description, reforming the mortgage and directing a new sale, providing the property was bought in by the mortagagee at the foreclosure sale,[3] on the principle that where the plaintiff in a foreclosure has become the purchaser and has not parted with his interest, the decree may be opened by the court which granted it, if the error can not be corrected on a rehearing or upon a bill to review;[4] or a new action may be maintained to correct the misdescription.[5] But it has been held, that a purchaser upon foreclosure can not come into court and ask that other property, in the place of that sold to and purchased by him, be subjected to his purchase on the ground that by mistake, the mortgage covered different property from that intended.[6]

§ 369. **Mutual mistake as to title.**—Although, as a general rule, a mistake of law forms no ground for reforming a contract,[7] yet, where parties enter into a contract under a

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[1] Alexander v. Rea, 50 Ala. 450 (1873). See Savings & Loan Society v. Mecks, 66 Cal. 371 (1885); s. c. 5 Pac. Rep. 624; Doe v. Vallejo, 29 Cal. 385 (1866); Halsted v. Lake County, 56 Ind. 363 (1877); Barnaby v. Parker, 53 Ind. 271 (1876); Palmer v. Windrom, 12 Neb. 494 (1882); Davenport v. Sovil, 6 Ohio St. 459 (1856). See also Bentley v. Smith, 2 Keyes (N. Y.) 343 (1866).

[2] Alexander v. Rea, 50 Ala. 450 (1873); Scruggs v. Driver, 31 Ala. 274 (1857); Stow v. Bozeman, 29 Ala. 397 (1856).

[3] Thompson v. Maxwell, 16 Fla. 773 (1878); Schwickerath v. Cooksey, 53 Mo. 75 (1873); Davenport v. Sovil, 6 Ohio St. 459 (1856).

[4] Thompson v. Maxwell, 16 Fla. 773, 778 (1878). See Millspaugh v. McBride, 7 Paige Ch. (N. Y.) 509 (1839); s. c. 34 Am. Dec. 360.

[5] Burkam v. Burk, 96 Ind. 270 (1884); Armstrong v. Short, 95 Ind. 26 (1883); First National Bank of Parsons v. Wentworth, 28 Kan. 183 (1882).

[6] Schwickerath v. Cooksey, 53 Mo. 75 (1873). See Barnard v. Duncan, 38 Mo. 170 (1866); Haley v. Bagley, 37 Mo. 363 (1866).

mutual mistake of law, or a mutual misconception of their legal rights amounting to a mistake of law, by reason of which their object is prevented from being accomplished, such contract is as liable to be set aside or reformed as a contract founded upon a mistake in matters of fact.[1]

Thus, where a vendor, under a misapprehension of his legal rights, sold a lot of land, which, by the terms of conveyances of adjoining lands to prior purchasers, had been constructively dedicated for the purposes of a public street, and represented to the purchaser that the lot would not be taken for a street without paying to the vendee the full value thereof, but without communicating the facts upon which the legal question as to the rights of the prior purchasers depended, and the vendee, relying upon this information, purchased and in part paid for a lot, which was in fact of no value either to him or to the vendor, it was held that the vendee was entitled to relief as against a bond and mortgage given by him on such contract, and to a return of the purchase money which had been paid toward the lot under such mutual misapprehension.[2]

It is a general rule, however, that ignorance of the law, with a full knowledge of the facts, can not generally be pleaded as a defence; nor will it protect a party from the operation of a rule of equity law, when the circumstances would otherwise create an equitable bar.[3]

§ 370. Mutual mistake as to quantity of land.—A mere mistake of both parties as to the number of acres of land conveyed, is no ground of defence to a mortgage given for

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[1] Garnar v. Bird, 57 Barb. (N. Y.) 277, 291 (1870). But it has been held in South Carolina that the maxim *ignorantia juris non excusat*, applies in civil cases where redress is sought for a wrong done or a right withheld. Lawrence v. Beaubien, 2 Bail. (S. C.) L. 623 (1831); s. c. 23 Am. Dec. 155.

[1] Champlin v. Laytin, 1 Edw. Ch. (N. Y.) 467 (1832); s. c. aff'd 6 Paige Ch. (N. Y.) 189; 18 Wend. 407; s. c 31 Am. Dec. 382. See Garnar v. Bird, 57 Barb. (N. Y.) 277, 291 (1869); Mount v. Morton, 20 Barb. (N. Y.) 123 (1855).

[2] Champlin v. Laytin, 6 Paige Ch. (N. Y.) 189 (1836); aff'd 18 Wend. (N. Y.) 407; s. c. 31 Am. Dec. 382.

[3] Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166 (1882). But see Lawrence v. Beaubien, 2 Bail. (S. C.) L. 623 (1831); 23 Am. Dec. 155.

the purchase money, there being no fraud or misrepresentation by the grantor.[1] But the question of abatement from the amount of the mortgage on account of a deficiency in the area of the premises, may be raised by answer by the mortgagor in foreclosure proceedings.[2]

It has been held that a reply to a counter-claim, which sets up a prior mortgage on the premises, alleging a material mistake in the description of the lands in the defendant's mortgage, and that it was not intended to cover the same premises as the mortgage sought to be foreclosed, is good on demurrer.[3] And under executory contracts relief will be granted, where it clearly appears that the parties acted under a mutual mistake as to the quantity of land sold, and it is proved that the deficiency was material, if the mistake on the part of the vendee was caused by the misrepresentation of the vendor, although not fraudulently made.[4] Thus, where the owner of a farm, innocently but untruly, states the quantity of land contained therein, and a purchaser, relying upon the statement, buys the land and takes a deed thereof, and

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[1] Nelson v. Hall, 60 N. H. 274 (1880); Melick v. Dayton, 34 N. J. Eq. (7 Stew.) 245 (1881). Where there has been no fraud or misrepresentation, the purchaser is neither liable for a surplus nor entitled to a deduction on account of any deficiency in the quantity or measurement of the premises mentioned in the contract or deed. Morris Canal Co. v. Emmett, 9 Paige Ch. (N. Y.) 168 (1841); s. c. 37 Am. Dec. 388. See Northup v. Sumney, 27 Barb. (N. Y.) 196 (1858); Mann v. Pearson, 2 Johns. (N. Y.) 37 (1806); Kirkpatrick v. McMillen, 14 La. 497 (1840); Powell v. Clark, 5 Mass. 355 (1809); s. c. 4 Am. Dec. 67; Clark v. Davis, 32 N. J. Eq. (5 Stew.) 530 (1880); Beach v. Stearnes, 1 Aik. (Vt.) 325 (1825). It seems that while a deficiency in the quantity of the land sold may be set up by the vendee in an action to foreclose a mortgage given as part of the purchase price, it can not be pleaded by the grantee of the vendee, who has assumed and covenanted to pay the mortgage as part of his purchase money. Clark v. Davis. *Supra.*

[2] Melick v. Dayton, 34 N. J. Eq. (7 Stew.) 245 (1881).

[3] Porter v. Reid, 81 Ind. 569 (1882).

[4] Belknap v. Sealey, 14 N. Y. 143 (1856); s. c. 67 Am. Dec. 120; aff'g s. c. 2 Duer (N. Y.) 570. Where the statement made by the vendor of the quantity of land sold is mere matter of description and not of the essence of the contract, no relief will be granted. Stebbins v. Eddy, 4 Mason C. C. 414 (1827). See this case, collating the authorities, for a full discussion as to when a court will grant relief for a deficiency in the quantity of land purchased.

subsequently discovers that the actual quantity deeded to him is materially less than that stated, he will be entitled to plead such deficiency as a defence in abatement in an action to foreclose a mortgage given by him as part of the purchase money.[1]

§ 371. **Defence of undue influence.**—A contract made between persons sustaining relations of trust and confidence, where it appears that the stronger and controlling mind has obtained an advantage, will be set aside as fraudulent unless the beneficiary shows good faith in the transaction.[2] Thus, where a daughter, through undue influence, and without an adequate consideration, procured from her aged and infirm mother the execution of a note and mortgage, it was held that these obligations should be canceled upon the petition of the heirs of the mother.[3] And relief may be granted as against a mortgage extorted by a son from his parents by oppressive means and for an inadequate consideration, while he was practically in a position of guardianship over them and their property.[4]

Where one standing *in loco parentis* to minor owners of real estate, who are accustomed to obey him, and are ignorant of business affairs, induces them after they have attained their majority, to execute to him a mortgage, it may be impeached for fraud and undue influence.[5] And where a man, who lived for years in unlawful relations with a woman who shared his home and who claimed to be a spiritualistic medium and to have daily communication with his deceased wife, executed a mortgage in favor of such woman, it was held that fraud and undue influence would be presumed in

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[1] Paine v. Upton, 87 N. Y. 327 (1882); s. c. 41 Am. Rep. 371. See Couse v. Boyles, 4 N. J. Eq. (3 H. W. Gr.) 212 (1842); s. c. 38 Am. Dec. 514; Darling v. Osborne, 51 Vt. 148 (1878); Quesnel v. Woodlief, 2 Hen. & Munf. (Va.) 173 (1808); Hill v. Buckley, 17 Ves. 395 (1811); Shovel v Bogan, 2 Eq. Cas. Abr. 688 (1708).

[2] Spargur v. Hall, 62 Iowa, 498 (1883); Leighton v. Orr, 44 Iowa, 679 (1876); Tucke v. Buchholz, 43 Iowa, 415 (1876).

[3] Spargur v. Hall, 62 Iowa, 498 (1883).

[4] Bowe v. Bowe, 42 Mich. 195 (1879).

[5] Tucke v. Buchholz, 43 Iowa, 415 (1876).

the absence of proof of a valid consideration for the conveyance.[1]

§ 372. **Duress as a defence.**—A defendant may show as a defence to an action to foreclose a mortgage that the instrument was executed under duress, and that it is for that reason, void.[2] The duress need not be actual physical restraint, or duress of the person; it may be a species of force, terrorism or coercion which overcomes free agency, and under which fear seeks security in concession to threats and to apprehensions of injury.[3]

The defendant may show that the note was paid, as well as given, under duress, such as a threat to have the obligor's son arrested and prosecuted for burglary, larceny or other crime;[4] but if the money be voluntarily paid in fulfillment of such an agreement, it can not be recovered.[5] The defence of duress is available to one who stands in the relation of surety as well as to the principal.[6] Where threats of a criminal prosecution are resorted to, for the purpose of overcoming the will of the party threatened by intimidating or terrifying him, they amount to such duress or pressure as will avoid a contract thereby obtained.[7] And where a person has been induced by threats of a groundless prosecution to execute a note and mortgage, a court of equity will grant relief and restrain their collection.[8]

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[1] Leighton v. Orr, 44 Iowa, 679 (1876).

[2] Vinton v. King, 86 Mass. (4 Allen), 562, 564 (1862). See Eadie v. Slimmon 26 N. Y. 9 (1862); Sears v. Shafer, 1 Barb. (N. Y.) 408 (1847); s. c. 6 N. Y. 272; Whelan v. Whelan, 3 Cow. (N. Y.) 537 (1824); Evans v. Ellis, 5 Den. (N. Y.) 640 (1846); Schoener v. Lissauer, 36 Hun (N. Y.) 100 (1885); Mills v. Rodewald, 17 Hun (N. Y.) 297, 304 (1879); Howell v. Ransom, 11 Paige Ch. (N. Y.) 538 (1845); Ellis v. Messervie, 11 Paige Ch. (N. Y.) 467 (1845); Spargur v. Hall, 62 Iowa, 498 (1883); First Nat. Bank of Nevada v. Bryan, 62 Iowa, 42 (1883).

[3] Eade v. Slimmon, 26 N. Y. 9 (1862), and Lefebvre v. Dutruit, 51 Wis. 326 (1881); s. c. 37 Am. Rep. 833.

[4] Schultz v. Culbertson, 49 Wis. 122 (1880).

[5] Schultz v. Culbertson, 49 Wis. 122 (1880).

[6] Ingersoll v. Roe, 65 Barb. (N. Y.) 346 (1873).

[7] Eadie v. Slimmon, 26 N. Y. 9 (1862); Fisher v. Bishop, 36 Hun (N. Y.) 112, 114 (1885); Haynes v. Rudd, 30 Hun (N. Y.) 239 (1883); s. c. 83 N. Y. 251; Williams v. Bayley, 35 L. J. Ch. 717 (1866).

Where the consideration of a bond is an agreement to interfere with the due administration of a criminal prosecution, or its execution is procured by duress, it will not be binding on the obligor.[1] But, if such a bond is voluntarily executed for the purpose of making reparation to the persons defrauded by the obligor, it will be binding, notwithstanding the fact that such persons were prosecuting the obligor for the fraud, and such prosecution was pending at the time of the execution of the bond.[2]

§ 373. **Duress under Ohio doctrine.**—In a recent case[3] the supreme court of Ohio held, that in an action by a mortgagee against the mortgagor under the statute,[4] to recover possession of the lands mortgaged, the fact that such mortgage was given to compound a felony, is not available as a defence. The court say, Okey, C. J., writing the opinion, that, "An examination of these cases will show very clearly, that under the law as it existed before the adoption of the Code of Civil Procedure of 1853, there was no such defence to an action of ejectment based on a mortgage like this; nor could a bill in chancery, founded on such facts, be entertained to restrain such action or quiet the title of the mortgagor. As against such mortgage the only relief in the courts available to the mortgagor or his heirs, on the facts here stated, was a bill to redeem. It is urged, however, that the rule is now very different, and that by reason of the blending of legal and equitable actions and defences, under the Code of Civil Procedure, the defence of illegality is equally available to the defendant whether an action is brought upon the note or upon the mortgage to obtain a sale of the property, or for the recovery of the possession of the land under the mortgage. True, the rights of parties, with respect to a few matters, are changed by the Code, as, for instance, the acknowledgment of a debt sufficient to take

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[8] James v. Roberts, 18 Ohio, 548 (1849).

[1] Avery v. Layton, (Pa.) 12 Crit. Rep. 159 (1888); s. c. 19 Pitts. L. J. 84; 21 Chicago Leg. News, 47.

[2] Avery v. Layton, (Pa.) 12 Crit. Rep. 159 (1888); s. c. 19 Pitts. L J. 84; 21 Chicago Leg. News, 47.

[3] Williams v. Englebrecht, 37 Ohio St. 383 (1881).

[4] Ohio Civil Code, § 558; Rev. Stat. §§ 57, 81.

a case out of the statute of limitations, must now be in writing; and the practical effect of permitting, in a proper case, the determination of the rights of the parties, legal and equitable, in the same suit, enables a person sometimes to secure rights, which, under the former practice, would have been lost. But, with the exception of the express changes referred to, the rights of parties are unaffected by the Code.

This view is well expressed in Dixon v. Caldwell,[1] where it was said: 'The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The Code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action; yet the rights and liabilities of parties, legal and equitable, as distinguished from the mode of procedure, remain the same since, as before, the adoption of the Code.' As the heirs of the mortgagor could, in a case like this, have maintained a bill under the former practice, to redeem, they may, of course, obtain the same relief in this case by cross-petition.[2] This is not a change of the rights of the parties. But, as we have seen, a bill in chancery could not have been entertained to restrain an action of ejectment on a mortgage like this, and hence the heirs of the mortgagor can not maintain a cross-petition for such relief in this case. To hold otherwise is to affirm that the Code has effected most material changes in the rights of the parties, without any words to indicate a purpose to make such change."

§ 374. **Mortgage executed by married woman under duress.**—Where the signature of a woman to a mortgage was obtained by duress, the mortgage purporting in terms to charge her separate estate, and stating that the consideration therefor was for the benefit of such estate, it may be shown in defence that such statement was not true, that the note was not given in the course of any separate business carried on by her, but that it was obtained by duress and fraud. Such a mortgage can not be enforced against her

[1] 15 Ohio St. 412, 415 (1864).

[2] Ohio Rev. St. § 5071.

even in the hands of a *bona fide* holder.[1] Thus, where a woman's husband was illegally restrained in the office of an attorney, who represented to her that unless she executed a mortgage on her homestead, her husband would be arrested on a charge of felony, and she executed the mortgage sued upon, solely to avoid his arrest, the mortgage was held to have been obtained under duress and therefore to be void.[2]

But it will not be a good plea of duress in an action to foreclose a mortgage executed by a husband and wife, that she was induced to sign the mortgage through representations that the plaintiff would pursue legal remedies against the husband, to collect the debt secured, and would sell them out of house and home, in case she did not execute it.[3] And where a husband threatened to poison himself unless his wife signed a note as security for him, which threat was conveyed to her through the payee, by means whereof she was induced to sign such note, the court held that this did not amount to such duress as would avoid her contract.[4]

Where a public defaulter disclosed his situation and his liability to a criminal prosecution to his wife, and urged her to execute a mortgage to secure his sureties, declaring at the time that he would commit suicide before he would go to jail, and she executed, acknowledged and delivered the mortgage without final objection after several days' hesitation and importunity—the mortgagees having no knowledge of her reluctance, and no prosecution having been commenced or threatened against the husband, and he not having represented to his wife that there had been—the mortgage was held to be valid.[5]

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[1] Loomis v. Ruck, 56 N. Y. 462 (1874).

[2] First Nat. Bank of Nevada v. Bryan, 62 Iowa, 42 (1883); Green v. Scranage, 19 Iowa, 461 (1865).

[3] Buck v. Axt, 85 Ind. 512 (1882).

[4] Wright v. Remington, 41 N. J. L. (12 Vr.) 48 (1879); s. c. 32 Am. Rep. 180.

[5] Lefebvre v. Dutruit, 51 Wis. 326 (1881); s. c. 37 Am. Rep. 833. See also Smith v. Allis, 52 Wis. 337 (1881), and Wright v. Remington, 41 N. J. L. (12 Vr.) 48 (1879); s. c. 32 Am. Rep. 180; aff'd 43 N. J. L. (14 Vr.) 451 (1881).

§ 375. **Duress of person.**—Where a note and mortgage are obtained from a prisoner falsely charged with felony, they are obtained under duress and are void in the hands of one who received them with knowledge of the facts.[1]

It is a general rule that the assignment of property by a wife to free her husband from imprisonment, must be obtained under circumstances which leave no doubt either of the validity of the claim against the husband or of the full consciousness on her part of the effect of her own deed.[2] It matters not whether the threats are made by the husband or by a third party against the husband, provided they be of such a character as to show beyond a question that the wife acted under an apprehension of personal injury or grievous wrong.[3] Thus, it has been held, that terrifying a woman so as nearly to produce hysterics, by threatening to prosecute her husband for alleged embezzlement, will be such coercion as will avoid a mortgage which was thus procured upon her separate property.[4]

It has been said that the constraint and duress which has generally availed to impeach a contract, has proceeded from actual violence or a well-grounded fear of personal injury;[5] and that duress and coercion, to prevail as a defence against a mortgage executed by a wife upon her separate estate, to secure her husband's debt, must go to the extent of depriving her of free volition by reason of fear of personal injury.[6]

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[1] Osborn v. Robbins, 36 N. Y. 365 (1867); s. c. 4 Abb. (N. Y.) Pr. N. S. 15, 21. See Strong v. Grannis, 26 Barb. (N.Y.) 123 (1857); Richards v. Vanderpoel, 1 Daly (N. Y.) 71, 75, 76 (1859); Foshay v. Ferguson, 5 Hill (N. Y.) 154 (1843); Watkins v. Baird, 6 Mass. 510 (1810); s. c. 4 Am. Dec. 170; Severance v. Kimball, 8 N. H. 386 (1836); Richardson v. Duncan, 3 N. H. 508 (1826); Cumming v. Ince, 11 Ad. & E. N. S. 112, 119 (1847).

[2] Barry v. Equitable Life Assurance Society, 59 N. Y. 587 (1875); Jones v. Diederich, 3 Daly (N. Y.) 177 (1869); Wallach v. Hoexter, 3 How. (N. Y.) Pr. N. S. 196 (1886).

[3] Rexford v. Rexford, 7 Lans. (N. Y.) 6, 8 (1872).

[4] Eadie v. Slimmon, 26 N. Y. 9 (1862); Wallach v. Hoexter, 3 How. (N. Y.) Pr. N. S. 196, 198 (1886); Schoener v. Lissauer, 36 Hun (N. Y.) 100 (1885).

[5] Wallach v. Hoexter, 3 How. (N. Y.) Pr. N. S. 196 (1886). See Loomis v. Ruck, 56 N. Y. 462 (1874); Rexford v. Rexford, 7 Lans. (N. Y.) 6 (1872).

Where a husband, through the procurement of one of the payees of a note secured by mortgage, threatens that unless his wife signs such note he will poison himself, such threat, being made to induce her to sign the note, does not amount to personal duress and can not be pleaded as a defence in an action to foreclose the mortgage.[1] The same has been held to be true where the husband was a defaulter, and induced his wife to sign a mortgage to secure his sureties by threatening to commit suicide rather than to go to jail.[2] Where a mortgage was executed by a wife at the request of her husband, and she was impelled to such execution by his declaration that unless she signed the deed "she should not live with him in peace," this was held not sufficient coercion or duress to invalidate the mortgage deed.[3]

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[6] Wallach v. Hoexter, 3 How. (N. Y.) Pr. N. S. 196 (1886); Lord v. Lindsay, 18 Hun (N. Y.) 484 (1879).

[1] Wright v. Remington, 41 N. J. L. (12 Vr.) 48 (1879); s. c. 32 Am. Rep. 180; aff'd 43 N. J. L. (14 Vr.) 451 (1881).

[2] Lefebvre v. Dutruit, 51 Wis. 326 (1881); s. c. 37 Am. Rep. 833.

[3] Rexford v. Rexford, 7 Lans. (N. Y.) 6 (1872).

CHAPTER XVIII.

ANSWERS AND DEFENCES.

COUNTER-CLAIMS AND ESTOPPELS.

§ 376. Allegation of counter-claim or set-off.
377. Counter-claim on contract.
378. Who may plead a counter-claim or set-off.
379. Counter-claim against assignee of mortgage.
380. Requisites of counter-claim.
381. Counter-claim must be a debt due and payable.
382. What are proper counter-claims.
383. Other matters of proper counter-claim.
384. Counter-claim for damages.
385. Counter-claim for damages for fraud.
386. Counter-claim or set-off must be pleaded.
387. Estoppel *in pais* against the mortgagor.
388. Mortgagor estopped from denying his title.
389. Estoppel against the mortgagor by his acts, declarations and agreements.
390. Estoppel against married women.
391. Estoppel against title subsequently acquired by mortgagor.
392. Other matters as defence in estoppel—Agreement to release lots.
393. Estoppel by assenting to, or encouraging a sale.
394. Estoppel by silence at a sale.
395. Estoppel against purchaser of mortgaged premises subject to the mortgage.
396. When purchaser subject to mortgage not estopped.
397. Estoppel against purchaser subject to usurious mortgage.

§ 376. **Allegation of counter-claim or set-off.**—In an action to foreclose a mortgage, in a court of equity, the mortgagor is entitled to set off a debt due to him from the complainant in any case where a set-off would be allowed in an action at law,[1] and also in peculiar cases of equity not

[1] Hunt v. Chapman, 51 N. Y. 555 (1873); Real Estate Trust Co. v. Keech, 7 Hun (N. Y.) 253 (1876); Lathrop v. Godfrey, 3 Hun (N. Y.) 739 (1875); s. c. 6 T. & C. (N. Y.) 96; Holden v. Gilbert, 7 Paige Ch. (N. Y.) 208 (1838); Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627 (1837); s. c. 31 Am. Dec. 264; Gafford v. Proskauer, 59 Ala. 264 (1877); Spencer v. Almoney, 56 Md. 551 (1881); Lockwood v. Beckwith, 6 Mich. 168 (1858); s. c. 72 Am. Dec. 62; Allen v. Shackelton, 15 Ohio St. 145 (1864). It was formerly held in New York that a defendant could not set off a demand, but must resort to a cross-bill to accomplish

strictly within the rules of law;[1] as, in a case where an action is brought against the mortgagor and his surety on a note or bond secured by a mortgage, both obligors being made defendants and a judgment being demanded against both for the deficiency, a debt due to the mortgagor from the plaintiff, may be pleaded in answer by way of counter-claim.[2] The fact that a joint judgment may be rendered on a bond for any deficiency, will not exclude the allowance of a counter-claim in favor of one of the defendants.[3]

And where a mortgagor has overpaid the indebtedness secured by the mortgage, he will be entitled to plead the over-payment as a counter-claim and to demand judgment for the difference.[4] The debt which it is sought to set off must be one which is due and payable at the time of the commencement of the suit.[5] And to enable a defendant to avail himself of such set-off, if it is not liquidated by judgment, he must set up such defence by a cross-bill or an answer to the complaint.[6] But it seems that where junior incumbrancers are made parties defendant in a mortgage foreclosure, a cross-bill will be unnecessary, unless some affirmative relief other than a simple foreclosure is sought.[7]

A different rule prevails in New Jersey,[8] where, in an action of foreclosure, the mortgagor or his grantee is not permitted to set off any demand against the mortgage debt, except partial payments, which operate as a release *pro tanto*, or an agreement that the sum desired to be set off should be received and credited as a payment.[9]

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his object; Troup v. Haight, Hopk. Ch. (N. Y.) 239 (1824).

[1] Irving v. DeKay, 10 Paige Ch. (N. Y.) 319 (1843).

[2] Bathgate v. Haskin, 59 N. Y. 533 (1875).

[3] Bathgate v. Haskin, 59 N. Y. 533 (1875); Holbrook v. Receivers of American Fire Ins. Co., 6 Paige Ch. (N. Y.) 221 (1836); *Ex parte* Hanson, 12 Ves. 346 (1806).

[4] Conaway v. Carpenter, 58 Ind. 477 (1877).

[5] Holden v. Gilbert, 7 Paige Ch (N. Y.) 208 (1838).

[6] Holden v. Gilbert, 7 Paige Ch. (N. Y.) 208 (1838); Ward v. Seymour, 51 Vt. 320 (1878).

[7] Sales v. Sheppard, 99 Ill. 616 (1881).

[8] Parker v. Hartt, 32 N. J. Eq. (5 Stew.) 225 (1880). See Williamson v. Fox, 30 N. J. Eq. (3 Stew.) 488 (1879).

[9] Dudley v. Bergen, 23 N. J. Eq. (8 C. E. Gr.) 397 (1873); Williams

§ 377. **Counter-claim on contract.**—An action to foreclose a mortgage is, in law and in fact, an action to enforce the payment of its amount against the mortgagor or other persons liable for the debt, by a sale of the premises mortgaged and an application of the proceeds of such sale to such payment, and further, for a personal judgment against the persons liable for the deficiency, if any. Such an action, being against the mortgagor, or person liable upon the contract to pay the amount specified in the note or bond, is one against which an off-set might have been pleaded before the adoption of the New York Code of Civil Procedure, and is one in which under the Code[1] a separate judgment may be rendered against the person liable for the debt, and for that reason the suit is subject to a counter-claim for any other cause of action arising on a contract, which the person liable for the payment of the debt, or on whose property the mortgage is a lien, has against the plaintiff at the time of the commencement of the action to foreclose.[2]

§ 378. **Who may plead a counter-claim or set-off.**—In an action to foreclose a mortgage a defendant who is personally liable for the debt, or whose land is bound by the lien of the mortgage, may plead any off-set arising on a contract to reduce or extinguish the claim;[3] but in order to enable the defendant to set up a counter-claim and to demand judgment upon it, he must be personally liable to the plaintiff, or claim some interest in the mortgaged premises. Where such personal liability is not in question, and where the defendant disclaims all interest in the mortgaged premises, he will not be permitted to plead a counter-claim or set-off,[4] because his

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v. Doran, 23 N. J. Eq. (8 C. E. Gr.) 385 (1873); Bird v. Davis, 14 N. J. Eq. (1 McCart.) 467 (1862); Dolman v. Cook, 14 N. J. Eq. (1 McCart.) 56 (1861); White v. Williams, 3 N. J. Eq. (2 H. W. Gr.) 376 (1836). See Petat v. Ellis, 9 Ves. 562 (1804).

[1] N. Y. Code Civ. Proc. §§ 501, 507.

[2] Bathgate v. Haskin, 59 N. Y. 533 (1875); Hunt v. Chapman, 51 N. Y. 555 (1873); National Fire Ins. Co. v. McKay, 21 N. Y. 191 (1860); Holden v. Gilbert, 7 Paige Ch. (N. Y.) 208 (1838); Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627 (1837); s. c. 31 Am. Dec. 264. See Harrison v. Bray, 92 N. C. 488 (1885).

[3] Lathrop v. Godfrey, 3 Hun (N. Y.) 739 (1875); s. c. 6 T. & C. (N. Y.) 96.

[4] National Fire Ins. Co. v. McKay, 21 N. Y. 191, 196 (1860).

counter-claim must in some way tend to reduce or to defeat the plaintiff's demand in order to be admissible. And where a defendant is not personally liable for the mortgage debt, his right to plead a counter-claim is said to be limited to matters arising out of the subject of the action.[1] This rule does not apply, however, where a defendant owning the equity desires to set up a claim which he has against the plaintiff, in order that his demand may offset a portion of the mortgage lien upon his estate.

Where the complainant in an action to foreclose a mortgage is insolvent, and the respondent, who owns the equity of redemption, but who is not the original mortgagor, has a claim against him personally, such claim may be set off against the mortgage debt.[2] The insolvency of the complainant presents a case where "natural equity" is very strong. Insolvency will often raise an equity which will justify the interference of a court, even where the party desiring the set-off is himself the petitioner; and such insolvency will have greater force if the party opposing such equity is before a court seeking relief.[3]

In cases where a senior mortgagee is made a defendant in a suit to foreclose a junior mortgage, he may, by counter-claim, foreclose his senior mortgage.[4]

§ 379. **Counter-claim against assignee of mortgage.**— Where an action to foreclose a mortgage is brought in the name of a person other than the real owner of the mortgage, the mortgagor, or owner of the equity of redemption, may plead in answer any defence or set-off which he has against the real owner of the mortgage;[5] the defendant may also show

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[1] Agate v. King, 17 Abb. (N. Y.) Pr. 159 (1863). See Bennett v. Bates, 26 Hun (N. Y.) 364 (1882).

[2] Goodwin v. Keney, 49 Conn. 563 (1882).

[3] Lindsay v. Jackson, 2 Paige Ch. (N. Y.) 581 (1831). See Rowan v. Sharp's Rifle Manufacturing Co., 29 Conn. 282 (1860); s. c. 31 Conn. 1; Bowen v. Bowen, 20 Conn. 127 (1849); Pond v. Smith, 4 Conn. 297 (1822); Chamberlain v. Stewart, 6 Dana (Ky.) 32 (1837). Blake v. Langdon, 19 Vt. 485 (1847); s. c. 47 Am. Dec. 701; Foot v. Ketchum, 15 Vt. 258 (1843); s. c. 40 Am. Dec. 678.

[4] Ætna Life Ins. Co. v. Finch, 84 Ind. 301 (1882).

[5] Spear v. Hadden, 31 Mich. 265 (1875). See Chase v. Brown, 32 Mich. 225 (1875).

that the plaintiff has received only a colorable or fraudulent assignment of the mortgage, and that he holds it for the benefit of one against whom the set-off or counter-claim would be a valid defence.[1]

The assignee of a mortgage takes it subject to all equitable claims existing in favor of the mortgagor, or of his grantees, at the time of the assignment;[2] and where a party holds an executory contract for the conveyance to him of certain premises subject to a mortgage, it will be a good defence to an action of foreclosure brought by an assignee of the mortgage, that the defendant had, before the assignment of the mortgage, rendered services for the mortgagee which he had agreed to apply upon the mortgage in reduction of the amount due thereon.[3] But where services are rendered under a contract that they are to be applied in partial or complete payment and discharge of a mortgage, they will not constitute an absolute payment *pro tanto*, but will only give a claim in set-off, which will be subject to the bar of the statute of limitations, the same as any other counterclaim or set-off.[4]

§ 380. **Requisites of counter-claim.**—To entitle the defendant to a counter claim or set-off, under the New York Code of Civil Procedure, the claim must be one existing in favor of the defendant and against the plaintiff, tending in some way to diminish or defeat the plaintiff's recovery;[5] an independent claim of the defendant can not be pleaded in answer.[6] Thus, where an action is brought to foreclose a mortgage, in which the principal debtor and his sureties are made parties defendant, and a personal judgment for deficiency is asked against them, a claim due from the

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[1] Lathrop v. Godfrey, 3 Hun (N. Y.) 739 (1875); s. c. 6 T. & C. (N. Y.) 96.

[2] Hartley v. Tatham, 1 Robt. (N. Y.) 246 (1863); s. c. 24 How. (N. Y.) Pr. 505.

[3] Hartley v. Tatham, 1 Robt. (N. Y.) 246 (1863); s. c. 24 How. (N. Y.) Pr. 505.

[4] Ballow v. Taylor, 14 R. I. 27 277, 280 (1883). See Doody v. Pierce, 91 Mass. (9 Allen), 141 (1864).

[5] N. Y. Code Civ. Proc. § 501.

[6] National Fire Ins. Co. v. McKay, 21 N. Y. 191 (1860). See White v. Williams, 3 N. J. Eq. (2 H. W. Gr.) 376 (1836).

plaintiff to the principal debtor may be allowed to offset the amount due upon the mortgage.[1] It is said that the several judgment required by the Code may be a judgment for only a part of the relief sought, so as to extinguish the right of one of the defendants in the land, and that the fact that a joint judgment may also be given does not exclude the allowance of a counter-claim.[2]

It is held in some states, that to entitle the defendant to set off against the mortgage debt, any payment made by him upon the mortgage, he must plead and show that it was made in direct payment of part of the debt, or that it was agreed that the sum should be received and credited on account of the mortgage;[3] for it is a well settled principle, that where a partial payment is made by a person indebted on more than one account, if there is no actual application of the payment by the debtor at the time to a particular indebtedness, the creditor may apply it as he pleases.[4]

§ 381. Counter-claim must be a debt due and payable. —To entitle a defendant to offset a debt as a counter-claim, it must be due to him from the plaintiff at the time the foreclosure suit is commenced.[5] And where a claim sought to be set off is for damages not yet liquidated,[6] it will generally not be allowed, if the defendant has an adequate remedy at law.[7] Thus, in a suit to foreclose a mortgage securing a note given for part of the purchase price of real estate, an answer has been held insufficient which merely sets up a breach of a covenant of warranty in the deed by

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[1] Bathgate v. Haskin, 59 N. Y. 533 (1875). See Holbrook v. Receivers of Am. Fire Ins. Co., 6 Paige Ch. (N. Y.) 220 (1836); *Ex parte* Hanson, 12 Ves. 346 (1806).

[2] Bathgate v. Haskin, 59 N. Y. 533, 540 (1875).

[3] Dudley v. Bergen, 23 N. J. Eq. (8 C. E. Gr.) 397 (1873); Williams v. Doran, 23 N. J. Eq. (8 C. E. Gr.) 385 (1873); Bird v. Davis, 14 N. J. Eq. (1 McCart.) 467 (1862); Dolan v. Cook, 14 N. J. Eq. (1 McCart.) 56 (1861); White v. Williams, 3 N. J. Eq. (2 H. W. Gr.) 376 (1836).

[4] Bird v. Davis, 14 N. J. Eq. (1 McCart.) 467 (1862). See 1 Am. Lead. Cas. (5th ed.) 339, side paging 276.

[5] Knapp v. Birnham, 11 Paige Ch. (N. Y.) 330 (1844); Holden v. Gilbert, 7 Paige Ch. (N. Y.) 208 (1838).

[6] See Bennett v. Bates, 26 Hun (N. Y.) 364 (1882).

[7] Hattier v. Etinaud, 2 Desaus (S. C.) Eq. 570 (1808).

which the land was conveyed to the defendant, by reason of an alleged lien of a gravel road tax on the premises, and asks that the amount of such tax be deducted from the note, but which does not state that the defendant has paid such tax, or that he has been in any way damaged; and which fails, also, to allege facts showing that the tax set out is a valid and binding lien upon the property under the existing statutes providing for such a tax.[1] Under the code practice in some of the states, however, such a claim may be allowed.

Where there are several suits to foreclose different mortgages, the defendant can not be compelled to elect in which suit he will set up his counter-claim.[2]

§ 382. **What are proper counter-claims.**—A debt due from a complainant to a defendant at the time of filing a complaint for foreclosure, or when a subsequent installment of the mortgage becomes due and is attempted to be enforced, is a proper counter-claim or set-off.[3] Illegal interest paid upon a mortgage or included in it, is a valid set-off in an action to foreclose the mortgage;[4] and where the mortgagor has paid a bonus in addition to the lawful interest to procure an extension of time within which to pay the debt, the amount so paid in excess of the legal rate of interest, is a proper set-off in an action to foreclose the mortgage.[5]

Mere delay in foreclosing a mortgage, where there has been no request or notice to foreclose, and the interest has been kept up, is not enough to charge upon the mortgagee the loss occasioned by a depreciation in the value of the mortgaged premises; and such loss can not be set up as a defence by way of counter-claim.[6]

In an action brought to foreclose a mortgage for $25,000, the defendant alleged in his answer that at the time of its

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[1] Cook v. Fuson, 66 Ind. 521 (1879).

[2] McLane v. Geer, 3 Edw. Ch. (N. Y.) 245 (1838).

[3] Holden v. Gilbert, 7 Paige Ch. (N. Y.) 208 (1838).

[4] Harbison v. Houghton, 41 Ill. 522 (1866); Pond v. Causdell, 23 N. J. Eq. (8 C. E. Gr.) 181 (1872); Ward v. Sharp, 15 Vt. 115 (1843).

[5] Real Estate Trust Co. v. Keech, 7 Hun (N. Y.) 253 (1876); Dunlap's Adm'r v. Mueller, 1 Cin. Supr. Ct. Rep. (Ohio), 486 (1871).

execution, he, being desirous of purchasing certain real estate, borrowed $38,000 of the plaintiff, to be secured by mortgage on the premises to be purchased; that subsequently, at the plaintiff's request, he executed the mortgage sought to be foreclosed upon half of the premises, and an absolute deed of the other half, which it was agreed should be in fact a mortgage to secure the remaining $13,000; and that the plaintiff never claimed that the deed was an absolute conveyance. The defendant then prayed to be allowed to pay the $38,000 and all interest due thereon, and to have the deed canceled and the mortgage satisfied of record. The court held that the cause of action alleged in the answer arose out of the contract or transaction set forth in the complaint and constituted a proper counter-claim.[1]

§ 383. **Other matters of proper counter-claim.**—In an action on one of a series of notes secured by mortgage, the defendant answered, setting up the invalidity of the foreclosure proceedings upon another note of the same series, and asked that he might be allowed to redeem; the court held that the matter set out in the answer constituted a good counter-claim, and that the defendant was entitled to the relief asked.[2] Where in an action to foreclose a mortgage, the answer alleged, "as a separate defence and counter-claim," that the mortgagee had been in possession of the premises under an agreement to apply the profits to the payment of the mortgage debt, and stated the amount of profits received by the plaintiff, the court held that whether such facts constituted a counter-claim or not, evidence thereof was admissible under the answer as showing payment *pro tanto*.[3] The reason for this would seem to be, that a payment of money made on account of a mortgage is not a cause of action which must be pleaded by the defendant as a counter-claim in order to enable him to prove it in a suit to foreclose the mortgage.[4]

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[6] Merchants' Ins. Co. v. Hinman, 34 Barb. (N. Y.) 410 (1861); s. c. 13 Abb. (N. Y.) Pr. 110.

[1] Bernheimer v. Willis, 11 Hun (N. Y.) 16 (1877).

[2] Fouts v. Mann, 15 Neb. 172 (1883).

[3] Ford v. Smith, 60 Wis. 222 (1884).

[4] Hendrix v. Gore, 8 Oreg. 406 (1880).

It has been said that where the plaintiff in a mortgage foreclosure suit is insolvent, and the defendant who owns the equity of redemption, but is not the original mortgagor, has a claim against him personally, such claim may be set off against the mortgage debt.[1]

When an answer sets up facts tending to show that a mortgage sought to be enforced is invalid, such facts do not constitute a counter-claim which calls for a reply.[2] Thus, where an answer sets up facts tending to show that a bond or note and mortgage sued upon are void for usury and asks that they be delivered up to be canceled, without explicitly stating that such facts are alleged as a counter-claim, such an allegation will not constitute a counter-claim, but merely a defence to the action, and no reply will be required.[3]

To entitle the defendant to set up a counter-claim it must be based upon a legal obligation, and not merely upon an equitable or supposed right. Thus, in an an action to foreclose a mortgage executed by a gas light company, another gas light company, which had succeeded to the rights of the mortgagor, set up a counter-claim in substance, that A., the real principal for whom plaintiff acted, and certain associates of his, who were stockholders of defendant, and also of certain other gas light companies, all of whom were interested in certain patents, requested and instigated defendant to make experiments to test the value of such patents, and that by the aid of such services the other corporations were enabled to sell the rights owned by them for a large price; defendant did not allege an express agreement or promise to pay for such services, but claimed an implied promise from the fact of the request and the benefits derived. The court held the claim untenable, and that the facts did not constitute a counter-claim.[4]

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[1] Goodwin v. Keney, 49 Conn. 563 (1882).

[2] Vasser v. Livingstone, 13 N. Y. 248 (1855). See Bates v. Rosekans, 37 N. Y. 409(1867); Agate v. Keen, 17 Abb. (N. Y.) Pr. 159 (1862); Caryl v. Williams, 7 Lans. (N. Y.) 416 (1873).

[3] Barthett v. Elias, 2 Abb. (N. Y.) Pr. N. C. 364 (1877); Equitable Life Association v. Cuyler, 12 Hun (N. Y.) 247 (1877); aff'd 75 N. Y. 511.

[4] Davidson v. W. G. L. Co., 99 N. Y. 558 (1885).

The New York Code of Civil Procedure requires that where a defendant deems himself entitled to an affirmative judgment against the plaintiff, he must demand such judgment in his answer.[1] The same rule, it seems, prevails in New Jersey.[2]

§ 384. **Counter-claim for damages.** — In an action brought by a vendor to foreclose a mortgage given for the purchase money of real estate conveyed by a deed of general warranty, the vendee and mortgagor may set up as a defence and counter-claim for damages, failure of title to the property;[3] but if the defendant has been in possession of the premises, he will not be entitled to interest in estimating the damages sustained because of such failure of his title, although a judgment in ejectment may have been recovered against him.[4] In such an action, the mortgagor, as a defence, may set up a counter-claim for damages by reason of the fraud of the mortgagee and vendor in concealing from him material facts as to the situation and extent of the premises.[5] And in an action against a mortgagor upon a purchase money mortgage, he will be entitled to set up as a defence a counter-claim for any excess of the agreed price paid through the vendor's misrepresentations of the extent of the property, whether such misrepresentations were willful or innocent.[6]

Where a grantor of lands by fraud induces a mortgagor to purchase a defective title, and to execute a mortgage securing part of the purchase money, the mortgagor will be entitled, in an action to foreclose such mortgage, to recoupment to the extent of his actual damages; and if such damages are equal to or exceed the amount of the mortgage, they will constitute an entire defence to the foreclosure.[7] Where

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[1] N. Y. Code Civ. Proc. § 509.

[2] See Emley v. Mount, 32 N. J. Eq. (5 Stew.) 470 (1880).

[3] Chambers v. Cox, 23 Kan. 393 (1880); Wacker v. Straub, 88 Pa. St. 32 (1878). See *post* §§ 435, 436.

[4] Wacker v. Straub, 88 Pa. St. 32 (1878).

[5] Pierce v. Tiersch, 40 Ohio St. 168 (1883); Allen v. Shackelton, 15 Ohio St. 145 (1864). See *post* § 435.

[6] Baughman v. Gould, 45 Mich. 481 (1881); Pierce v. Tiersch, 40 Ohio St. 168, 172 (1883). See *post* §§ 435, 436.

[7] Greene v. Tallman, 20 N. Y. 191

the defect of title extends only to a part of the lands, it will constitute a breach of the covenant of seizin, if not also of the covenant of warranty, and a counter-claim for damages for such breach will be a proper defence in an action to foreclose a purchase money mortgage thereon.[1]

§ 385. **Counter-claim for damages for fraud.**—Where a mortgage is given for a portion of the purchase money of lands, a subsequent grantee who has assumed the payment of such mortgage may interpose a counter-claim for damages for fraud and misrepresentation in the sale of the property to the mortgagor, made to induce him to purchase.[2] But where there is no allegation of fraud, and no personal claim is made against the grantee of the mortgagor, he can not set up, by way of answer, that he purchased the premises of the plaintiff's grantee and was the assignee of the plaintiff's covenants of warranty and against incumbrances, and had been evicted by a paramount title acquired under a sale for certain taxes which were incumbrances at the time of the plaintiff's grant. In such a case the grantee will be confined to his remedy by an action at law.[3] And a purchaser from a mortgagor can not set up as a counter-claim the fraud practiced upon him by a person other than the plaintiff after the execution of the mortgage, where there is nothing to connect the plaintiff with the fraud of the mortgagor.[4]

A mortgage executed as security for advances is valid only for the amount of the advances actually made, and the mortgage will be a lien to the extent of the amount actually due

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(1859); s. c. 75 Am. Dec. 384; Ludington v. Slauson, 38 N. Y. Supr. Ct. (6 J. & S.) 81 (1874); Lathrop v. Godfrey, 3 Hun (N. Y.) 739 (1875); s. c. 6 T. & C. 96; Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817); s. c. 7 Am. Dec. 554; Parker v. Hartt, 32 N. J. Eq. (5 Stew.) 225 (1880).

[1] Tallmage v. Wallace, 25 Wend. (N. Y.) 107 (1840); Rice v. Goddard, 31 Mass. (14 Pick.) 293 (1833); Latham v. McCann, 2 Neb. 276 (1872).

[2] See Reed v. Latson, 15 Barb. (N. Y.) 9 (1853).

[3] National Fire Ins. Co. v. McKay, 21 N. Y. 191 (1860); Greene v. Tallman, 20 N. Y. 191 (1859); Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817).

[4] Reed v. Latson, 15 Barb. (N. Y.) 9 (1853).

upon the mortgage; and the mortgagee's failure to complete the contemplated advances, will afford ground for merely nominal damages by way of set-off, although the mortgagor may be seriously injured by the failure of the mortgagee to advance the stipulated amount,[1] except in cases where there is an express agreement by the mortgagee to make an advancement of the full amount stipulated.

But where the mortgage contains a covenant on the part of the mortgagee to release portions of the premises on sales thereof made by the mortgagor, he will be entitled, on breach of such covenant, to damages sustained by reason of such refusal, which damages will constitute an equitable set-off in an action to foreclose the mortgage.[2]

§ 386. **Counter-claim or set-off must be pleaded.**—Where a grantor brings an action to foreclose a mortgage executed to secure purchase money, to enable the defendant to avail himself of a set-off or counter-claim not liquidated by judgment, he must set up such defence by answer to the complaint.[3] Thus, where one of the grantors of land sued on bonds for the purchase money, of which he was the sole owner, an objection to a counter-claim for breach of covenants on the ground that the other grantor was not a party, must be taken by answer or demurrer or it will be waived.[4]

§ 387. **Estoppel in pais against the mortgagor.**—In an action to foreclose a mortgage the defendant is estopped by his deed from denying the validity of his title to the mortgaged property, and an answer setting up the defence that the mortgage is of no effect and constitutes no lien upon the premises described in the complaint, is unavailing because it pleads no facts; it is merely a statement of a conclusion of law.[5] And where a mortgage of land purports to

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[1] Dart v. McAdam, 27 Barb. (N. Y.) 187 (1858). See *ante* §§ 340, 341.

[2] Warner v. Gouverneur's Ex'rs, 1 Barb. (N. Y.) 36 (1847).

[3] Holden v. Gilbert, 7 Paige Ch. (N. Y.) 208 (1838).

[4] Ackerly v. Villas, 21 Wis. 88, 110 (1866). See also Cummings v. Morris, 25 N. Y. 625 (1862), Schubert v. Harteau, 34 Barb. (N. Y.) 449 (1861); Briggs v. Briggs, 20 Barb. (N. Y.) 477 (1855).

[5] Caryl v. Williams, 7 Lans. (N. Y.) 416 (1873).

convey the fee, any title afterwards acquired by the mortgagor will strengthen the mortgage and inure to the benefit of the mortgagee. This is true, although the title to the property was in the government of the United States when the mortgage was executed, and was acquired by the mortgagor after a foreclosure of the mortgage.[1] And it has been held that a mortgage upon real property containing the usual covenants of warranty, executed by a person who subsequently becomes entitled to an estate in remainder therein, will attach to and may be enforced against such after-acquired estate; but such mortgage can not affect the rights of a party holding an estate for life in the property, and who was in the actual possession thereof when the mortgage was executed.[2]

It has been held that a mortgagor is estopped from alleging in his answer by way of defence, that the notes and mortgage, while executed to the plaintiff, were as a matter of fact given for goods purchased of a mercantile firm, of which he was a member, and were the property of such firm, and that the partners of such firm had made no assignment of their interest therein to the plaintiff.[3]

In an action to foreclose a mortgage, the mortgagor can not be heard to complain of an indefinite description of the mortgaged property, whatever may be the effect of a sale under such a description.[4] A mortgagor is estopped from denying that his mortgage in fact covers all that it was supposed to cover, or all that the parties believed or intended that it should cover.[5] And one who deals with a foreign corporation by borrowing its money and executing a mortgage as security therefor, will be estopped from answering that the plaintiff had no authority to loan money where the mortgaged premises were situated, unless he shows that the corporation violated its charter or that some law prohibited

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[1] Orr v. Stewart, 67 Cal. 275 (1885).

[2] Iowa Loan & Trust Co. v. King, 58 Iowa, 598 (1882).

[3] French v. Blanchard, 16 Ind. 143 (1861); Trumble v. The State, 4 Blackf. (Ind.) 435 (1837). See Breeding v. Stamper, 18 B. Mon. (Ky.) 175 (1857).

[4] Graham v. Stewart, 68 Cal. 374 (1886).

[5] Madaris v. Edwards, 32 Kan. 284 (1884).

the loan.[1] But the holder of one of two notes secured by a mortgage will not be estopped from contesting the validity of the other note, where the notes were executed to different persons upon different considerations.[2]

A mortgagor is estopped from denying the recitals contained in his mortgage;[3] but it was held in a case where the mortgage recited that it was a purchase money mortgage, when in fact it was not for purchase money, that the wife's right of dower was not affected by such a recital.[4]

§ 388. **Mortgagor estopped from denying his title.**—A party who mortgages his property with covenants of title is estopped from pleading in defence to a foreclosure, that at the time of the execution of the mortgage he had no title to,[5] nor interest in,[6] the mortgaged premises, or any part thereof; neither can he set up as a defence a defect in his title,[7] or the existence of an outstanding paramount title in a third person, because he is estopped therefrom by his deed and will not be permitted to claim adversely to it.[8] Thus, a mortgagor is estopped from pleading in defence that the property mortgaged is trust property and that he had no right to mortgage it.[9] And where upon a conveyance of land to an executor as such, he gives back a purchase money mortgage as executor, the mortgagor, his grantees and all persons claiming

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[1] Pancoast v. Travelers' Ins. Co., 79 Ind. 172 (1881).

[2] Coleman v. Witherspoon, 76 Ind. 285 (1881).

[3] Neal v. Perkerson, 61 Ga. 345 (1878).

[4] Taylor v. Post, 30 Hun (N. Y.) 446 (1883).

[5] Strong v. Waddell, 56 Ala. 471 (1876); Boone v. Armstrong, 87 Ind. 168 (1882); Pancoast v. Travelers' Insurance Co., 79 Ind. 172 (1881). See *post* § 437.

[6] Sutlive v. Jones, 61 Ga. 679 (1878); Usina v. Wilder, 58 Ga. 178 (1877); Allen v. Lathrop, 46 Ga. 133 (1872); Boisclair v. Jones, 36 Ga. 499 (1867).

[7] Dime Sav. Bank v. Crook, 29 Hun (N. Y.) 671 (1883).

[8] Tefft v. Munson, 57 N. Y. 97 (1874); Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 567 (1848); Jackson v. Bull, 1 Johns. Cas. (N. Y.) 81, 90 (1799); Strong v. Waddell, 56 Ala. 471 (1876); Usina v. Wilder, 58 Ga. 178 (1877); Pike v. Galvin, 29 Me. 183 (1848); White v. Patten, 41 Mass. (24 Pick.) 324 (1837); Somes v. Skinner, 20 Mass. (3 Pick.) 52 (1825); Wark v. Willard, 13 N. H. 389 (1843); Kimball v. Blaisdell, 5 N. H. 533 (1831); Macloon v. Smith, 49 Wis. 200 (1880).

[9] Boisclair v. Jones, 36 Ga. 499 (1867).

under him or them, will be estopped from denying his appointment and authority as such executor.[1]

§ 389. **Estoppel against the mortgagor by his acts, declarations and agreements.**—A mortgagor may be estopped by his acts, declarations and agreements from setting up defences which would otherwise be valid; as where he induces the plaintiff to take an assignment of a mortgage against him.[2] And where a mortgagee sells a bond and mortgage, which have been delivered to him to be held for the benefit of the mortgagor, at a usurious discount, and represents to the purchaser that the bond and mortgage are good and valid securities in his hands, in an action brought by the purchaser of the mortgage to foreclose the same, the mortgagor will be estopped from showing that it is void for usury.[3] And where a mortgagor, at the time of executing a mortgage, delivers to the mortgagee a certificate that there is no defence against it, in an action brought by the purchaser of the mortgage for foreclosure, the mortgagor can not plead the defence, that there was fraud in obtaining the mortgage, or a misappropriation by the mortgagee of the moneys raised by its sale.[4]

And where the owner of a tract of land, covered by a mortgage given prior to his purchase, influenced a third person to purchase the mortgage by stating to him that it was all right and valid, and a lien upon the premises, and that he would pay the same, he will be estopped afterward from pleading a failure of consideration as a defence against a foreclosure brought by such third person.[5] Thus, where the plaintiff, being about to purchase a second mortgage, inquired of the defendant with regard to his personal liability for its payment, and the latter, with full knowledge that the inquiry was made with reference to a purchase of

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[1] Skelton v. Scott, 18 Hun (N. Y.) 375 (1879).

[2] Johnson v. Parmely, 14 Hun (N. Y.) 398 (1878); Norris v. Wood, 14 Hun (N. Y.) 196 (1878).

[3] Platt v. Newcomb, 27 Hun (N. Y.) 186 (1882).

[4] Hutchison v. Gill, 91 Pa. St. 253 (1879).

[5] Smith v. Newton, 38 Ill. 230 (1865). See Bassett v. Bradley, 48 Conn. 224 (1880).

the mortgage, replied that "he had assumed and agreed to pay the debt, as his deed would show," it was held that he was equitably estopped from denying his liability on the contract of assumption.[1]

§ 390. **Estoppel against married women.**—A married woman is bound by an estoppel the same as any other person;[2] and this estoppel may extend to the conveyance of land by deed or by mortgage.[3] But there can be no estoppel where there is no fraud; yet there may be fraud without a preconceived design to mislead or deceive. The fraud may consist merely in a denial of what had previously been affirmed.[4] Thus, where a married woman makes a representation by affidavit that a loan is for her benefit, which is relied on in good faith and believed to be true, she will be estopped, in a suit to foreclose a mortgage executed upon her lands to secure the loan, from denying the truth of such representation by asserting that the mortgage was given for a debt contracted by her husband.[5]

§ 391. **Estoppel against title subsequently acquired by mortgagor.**—Where a mortgage of land purports to convey the fee, any title subsequently acquired by the mortgagor, will strengthen the mortgage and inure to the benefit of the mortgagee in the absence of intervening equities;[6] and the rights of the mortgagee in such land can not be

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[1] Bassett v. Bradley, 48 Conn. 224 (1880).

[2] Orr v. White, 106 Ind. 344 (1885); s. c. 4 West. Rep. 482; Cupp v. Campbell, 103 Ind. 213 (1885); s. c. 1 West. Rep. 255; Vogel v. Leichner, 102 Ind. 55 (1885).

[3] Ward v. Berkshire L. Ins. Co., 108 Ind. 301 (1886); s. c. 6 West. Rep. 596. In this case it was held that it is immaterial to whom the check for the money loaned was made payable, for if the loan was made to the wife the mortgage is valid.

[4] Ward v. Berkshire Life Ins. Co. 108 Ind. 301 (1886); s. c. 6 West. Rep. 596, 598. See Blair v. Wait, 69 N. Y. 113 (1877); Continental Nat. Bank v. Nat. Bank of Com., 50 N. Y. 575 (1872); Pitcher v. Dove, 99 Ind. 175 (1884); Anderson v. Hubble, 93 Ind. 570 (1883).

[5] Ward v. Berkshire L. Ins. Co., 108 Ind. 301 (1886); s. c. 6 West. Rep. 596.

[6] Orr v. Stewart, 67 Cal. 275 (1885); Camp v. Grider, 62 Cal. 20 (1882); Sherman v. McCarthy, 57 Cal. 507 (1881); Rice v. Kelso, 57 Iowa, 115 (1881).

divested or rendered subservient to the lien of a subsequent judgment or incumbrance.[1] The reason for this rule is that the mortgagor will be estopped, after the execution of a mortgage, from setting up the defence that he has acquired some new and independent title not covered by the mortgage.[2]

In a case where a mortgage containing the usual covenants, was executed upon real property by a person who had no title at the time, but who subsequently became entitled to an estate in remainder therein, it was held that the subsequently acquired title inured to the benefit of the mortgagee and that he could enforce his mortgage against such after-acquired estate.[3] But it has been held, where a grantor receives a mortgage for part of the purchase money of a conveyance, that the covenants in the mortgage will affect only the estate acquired from the mortgagee and not an after-acquired title.[4] It is said, however, that, under the law as it now prevails in Missouri, a mortgagor occupies no such subservient relation to the mortgagee as will prevent him from acquiring an outstanding title and holding it against the mortgagee.[5]

§ 392. **Other matters as defence in estoppel—Agreement to release lots.**—In an action to foreclose a mortgage the defendant may plead in estoppel any fraud which will have the effect of avoiding a title otherwise valid, as an unfair representation or concealment on the part of the mortgagee;[6] but

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[1] Rice v. Kelso, 57 Iowa, 115 (1881).

[2] Madaris v. Edwards, 32 Kan. 284 (1884).

[3] Iowa Loan and Trust Co. v. King, 58 Iowa, 598 (1882).

[4] Randal v. Lower, 98 Ind. 255 (1884). See Bradford v. Russell, 79 Ind. 64 (1881).

[5] Bush v. White, 85 Mo. 339 (1884).

[6] Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166 (1822); Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 344 (1815); Niven v. Belknap, 2 Johns. (N. Y.) 573 (1807); L'Amoureux v. Vandenburgh, 7 Paige Ch. (N. Y.) 316 (1838); s. c. 32 Am. Dec. 635; Lasselle v. Barnett, 1 Blackf. (Ind.) 150 (1821); s. c. 41 Am. Dec. 217; Dewey v. Field, 45 Mass. (4 Metc.) 381 (1842); s. c. 38 Am. Dec. 376; Spear v. Hubbard, 21 Mass. (4 Pick.) 143 (1826); Carter v. Longworth, 4 Ohio, 384 (1831); Hoffman v. Lee, 3 Watts (Pa.) 352 (1834); Napier v. Elam, 6 Yerg. (Tenn.) 108 (1834); Peter v. Russell, 2 Vern, 726 (1716); Evans v. Bicknell, 6 Ves. 173, 182 (1801). For modifications of the general rule, see Patterson v. Esterling, 27 Ga. 205 (1859); Rangeley v. Spring, 21 Me.

mere knowledge on the part of the mortgagee, that the mortgagor has conveyed an absolute estate in the mortgaged premises to a third party, will not estop him from asserting his legal rights against such third party at any time.[1] But it seems that a foreclosure can not be defeated by mere presumption in favor of an issue raised by a subsequent incumbrancer as assignee of the mortgage, if such incumbrancer has not relied upon the records nor upon inquiry before taking the incumbrance.[2]

It has been said that an agreement by a mortgagee, that the mortgagor might subdivide the mortgaged premises into town lots, and that, on the request of the mortgagor, he would release any one or more of such lots on the payment to him of a stipulated price per foot front thereof, will be treated also as an agreement, to release his mortgage on the parcels of land adjacent to the lots and designated on the plat as streets and alleys.[3] And where a mortgage expressly provides for subdividing the premises into lots, whenever the mortgagor may deem it advisable, the consent of the mortgagee to lay out the usual streets and alleys, will be implied, and when they are so laid out he will be bound by the plat.[4] In such a case, when the mortgagee adopted the plat by acting upon it and by making releases of the lots by their numbers, this, after the sale of lots to others, would estop any objection on his part that the mortgaged premises were not subdivided according to his express written assent, and would amount to a ratification of the subdivision as actually made; and parties purchasing would have the right to rely on admissions thus shown by his conduct and acts.[5] In a case where a person holding a mortgage upon a tract of land

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130 (1842); Carpenter v. Cummings, 40 N. H. 158 (1860); Buswell v. Davis, 10 N. H. 413 (1839); Marston v. Brackett, 9 N. H. 337 (1838); Wade v. Green, 3 Humph. (Tenn.) 547 (1842); Meux v. Bell, 1 Hare, 73 (1841); Jones v. Smith, 1 Hare, 43 (1841).

[1] Parker v. Banks, 79 N. C. 480 (1878).

[2] Jakway v. Jenison, 46 Mich. 521 (1881).

[3] Smith v. Heath, 102 Ill. 130 (1882).

[4] Smith v. Heath, 102 Ill. 130 (1882).

[5] Smith v. Heath, 102 Ill. 130 (1882).

agreed with a party purchasing the land that he would release his mortgage lien, if such purchaser would sell certain chattels and deliver the proceeds thereof to a person designated, he will be estopped from foreclosing his mortgage on performance by the purchaser of his part of the contract.[1]

§ 393. **Estoppel by assenting to, or encouraging a sale.**—It is well established that a mortgagee may, by mere silence or failure to act, as well as by his declarations and conduct, estop himself from claiming rights in opposition to those of a party who acted upon his tacit encouragement;[2] because it is only natural justice that a party who claims an interest in property, and is privy to the fact that another is dealing with it as his own, and by his conduct influences a third person to act on the belief that he has no interest therein, or implies that it will not be asserted, will not be permitted to assert his claim against a title or a lien created by such other person to his prejudice, although he may derive no benefit from the transaction.[3] Thus, where a mortgagee stands by and advises or encourages a purchase of premises by a third person, who is ignorant of the claim of such mortgagee, he will be estopped from asserting such mortgage as against such purchaser,[4] for if a man suppresses facts which he is in duty bound to communicate, or by acts or words suggests a falsehood to the prejudice of a person who had a right to a full and correct statement of the facts in the case, his claim or lien will be postponed to that of the person who may be prejudiced by its enforcement.[5]

But it is said that a fraudulent intent is necessary to constitute an estoppel affecting the legal title to land;[6] yet

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[1] Burke v. Grant, 116 Ill. 124 (1886).

[2] See Trenton Banking Co. v. Duncan, 86 N. Y. 221 (1881); s. c. 24 Alb. L. J. 390; Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 344 (1814).

[3] See McGovern v. Knox, 21 Ohio St. 547 (1871); s. c. 8 Am. Rep. 83; Nicholson v. Hooper, 4 Myl. & Cr., 179 (1838).

[4] Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166 (1822). See Trenton Banking Co. v. Duncan, 86 N. Y. 221 (1881); s. c. 24 Alb. L. J. 390; Skirving v. Neufville, 2 Desaus (S. C.) Eq. 194 (1803); Nicholson v. Hooper, 4 Myl. & Cr. 186 (1838).

[5] See Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166 (1822); Danley v. Rector, 10 Ark. (5 Eng.) 211 (1849); s. c. 50 Am. Dec. 245.

if the declarations or conduct of a party were intended to deceive generally, or occurred under circumstances likely to deceive, they will be sufficient to establish the fraud.[1] And it is deemed an act of fraud for a party, cognizant at the time of his own rights, to suffer another, ignorant of those rights, to proceed under such ignorance in the purchase of the property, or in the improvement of it.[2]

It is well settled that prior to default in the payment of a debt secured by mortgage, the mortgagee has no right to forbid the mortgagor or his licensee from using the mortgaged premises in any manner which will not impair their value as a security. But after default he may, and under some circumstances equity requires that he should, interfere. Thus, where a mortgagee has notice of the fact that a railroad company is building its road across the mortgaged premises under a parol license or an unrecorded deed given by the mortgagor prior to his default, it is the duty of the mortgagee to notify the company of his rights and to forbid the further prosecution of the work. In case he fails to do this, and the company afterwards makes expenditures upon the work and improvements upon the mortgaged property, the licensee of the mortgagor will be held to be the licensee of the mortgagee also, and his interests will be fully protected on a foreclosure of the mortgage.[3]

§ 394. **Estoppel by silence at a sale.**—Where a person owns or has an interest in property and stands by and permits it to be sold without giving notice of his title or asserting his rights, he will be estopped from setting up his claim or title against the purchaser,[4] because it is his duty at the time of the sale to disclose his claim or title to the property, and

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[1] Wendell v. VanRensselaer, 1 Johns. Ch. (N. Y.) 344 (1814).

[1] See Dezell v. Odell, 3 Hill (N. Y.) 221 (1842); Mitchell v. Reed, 9 Cal. 204 (1858); Quirk v. Thomas, 6 Mich. 76 (1858); Horn v. Cole, 51 N. H. 297 (1868); Adams v. Brown, 16 Ohio St. 78 (1865).

[2] Guffey v. O'Reiley, 88 Mo. 418 (1885); s. c. 5 West. Rep. 336.

[3] Masterson v. West End N. G. R. R. Co., 72 Mo. 342 (1880).

[4] See Wendell v. VanRensselaer, 1 Johns. Ch. (N. Y.) 344 (1814); McPherson v. Walters, 16 Ala. 714 (1849); Trapnall v. Burton, 24 Ark. 399 (1866); Danley v. Rector, 10 Ark. (5 Eng.) 211 (1849); s. c. 50 Am. Dec. 245; Shall v. Biscoe, 18 Ark. 142 (1856); Markham v. O'Connor, 52

if he fails to do so, an innocent purchaser, without knowledge of such title or claim, will not be made to suffer because of the owner's laches.[1]

Thus, where a mortgagee is present at a public sale of the mortgaged property and it is announced that the title is unincumbered, and a purchaser buys under the belief that he is obtaining an unincumbered title, the mortgagee will be estopped from enforcing his mortgage against the purchaser, even though the mortgage was duly recorded at the time of the sale,[2] if he fails to make a correction of the announcement, because it would be a fraud to permit a party to assert a claim which his previous conduct had denied, especially if others had acted upon the fair interpretation of his conduct.[3] But it has been said that where the right, title and interest of a bankrupt in certain real estate is publicly sold by his assignee, and there is a mortgage on record against the premises at the time of the sale, the mortgagee will not be estopped from enforcing his mortgage because he was present at the sale and neglected to state his lien on the lands, especially if no inquiry was made of him.[4]

Ga. 198 (1874); Corbett v. Norcross, 35 N. H. 99 (1857).

[1] Thompson v. Blanchard, 4 N. Y. 303 (1850). See Brown v. Owen, 30 N. Y. 541 (1864); Baldwin v. Brown, 16 N. Y. 359 (1857); Corkhill v. Landers, 44 Barb. (N. Y.) 228 (1865); Guthrie v. Quinn, 43 Ala. 568 (1869); Trapnall v. Burton, 24 Ark. 399 (1866); Shall v. Biscoe, 18 Ark. 142 (1856); Markham v. O'Connor, 52 Ga. 198 (1874); Anderson v. Hubble, 93 Ind. 570 (1883); Breeding v. Stamper, 18 B. Mon. (Ky.) 175 (1857); Corbett v. Norcross, 35 N. H. 99 (1857); Buckingham v. Smith, 10 Ohio, 288 (1840); Hill v. Epley, 31 Pa. St. 334 (1858); Boston & P. R. R. Corp. v. New York & N. E. R. R. Co., 13 R. I. 265 (1881); First National Bank v. Hammond, 51 Vt. 215 (1878); Sturm v. Parish, 1 W. Va. 135 (1865); Smith v. Ford, 48 Wis. 115, 145 (1879); Morgan v. Chicago & A. R. R. Co., 96 U. S. (6 Otto), 716; bk. 24 L. ed. 743 (1877).

[2] Markham v. O'Connor, 52 Ga. 183 (1874); s. c. 21 Am. Rep. 249. See Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166 (1822); Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 344 (1815); Rice v. Bunce, 49 Mo. 231 (1872); s. c. 8 Am. Rep. 129; Blackwood v. Jones, 4 Jones (N. C.) Eq. 54 (1858).

[3] Rice v. Bunce, 49 Mo. 231 (1872); s. c. 8 Am. Rep. 129. See Campbell v. Johnson, 44 Mo. 247 (1869); Chouteau v. Goddin, 39 Mo. 229 (1866); Newman v. Hook, 37 Mo. 207 (1866); Taylor v. Zepp, 14 Mo. 482 (1851); s. c. 55 Am. Dec. 113.

§ 395. **Estoppel against purchaser of mortgaged premises subject to the mortgage.**—Where a person buys lands, which the vendor had encumbered by mortgage to secure a debt to a third person, expressly agreeing with the vendor and the mortgagee to pay such debt, which is deducted from the purchase price, his title will be made subordinate to the mortgage, and he will be estopped from denying its validity;[1] a purchaser of the lands at a sale on execution against the vendee, merely succeeds to his rights, and will also be bound by the estoppel, the mortgage having been duly recorded.[2]

It is a general rule that a purchaser, whose conveyance is by its terms made subject to a prior mortgage, the amount of which is deducted as part of the consideration of the purchase, whether he expressly assumes it as a part of the purchase money or not, can not plead usury as a defence to the foreclosure of such mortgage;[3] neither

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[4] Mason v. Philbrook, 69 Me. 57 (1879).

[1] Kennedy v. Brown, 61 Ala. 296 (1878). See Simpson v. Del Hoyo, 94 N. Y. 189 (1883); Real Estate Trust Co. v. Balch, 45 N. Y. Supr. Ct. (13 J. & S.) 528 (1877); Root v. Wright, 21 Hun (N. Y.) 344 (1880).

[2] Kennedy v. Brown, 61 Ala. 296 (1878).

[3] Hartley v. Harrison, 24 N. Y. 170 (1861); Sands v. Church, 6 N. Y. 347 (1852); Hardin v. Hyde, 40 Barb. (N. Y.) 435 (1863); Morris v. Floyd, 5 Barb. (N. Y.) 130 (1849); Chamberlain v. Dempsey, 9 Bosw. (N. Y.) 212 (1862); Post v. Dart, 8 Paige Ch. (N. Y.) 639 (1841); Stein v. Indianapolis, &c., Assoc., 18 Ind. 237 (1862); Butler v. Myer, 17 Ind. 77 (1861); Wright v. Bundy, 11 Ind. 398 (1858); Huston v. Stringham, 21 Iowa, 36 (1866); Greither v. Alexander, 15 Iowa, 470 (1863); Perry v. Kearns, 13 Iowa, 174 (1862); Hough v. Horsey, 36 Md. 181 (1872); s. c. 11 Am. Rep. 484; Sellers v. Botsford, 11 Mich. 59 (1862); Conover v. Hobart, 24 N. J. Eq. (9 C. E. Gr.) 120 (1873); Cramer v. Lepper, 26 Ohio St. 59 (1875); s. c. 20 Am. Rep. 756; Reed v. Eastman, 50 Vt. 67 (1877); Thomas v. Mitchell, 27 Wis. 414 (1871); DeWolf v. Johnson, 23 U. S. (10 Wheat.) 367 (1825); bk. 6 L. ed. 343. See Merchants' Exchange Nat. Bank v. Commercial Warehouse Co., 49 N. Y. 635, 643 (1872); Freeman v. Auld, 44 N. Y. 50 (1870); Mason v. Lord, 40 N. Y. 764 (1869). But where A. B. & C., partners, having executed a promissory note to D., embracing usurious interest, and having also executed to him a mortgage on real estate to secure the note, A. conveyed to B. & C. his interest in the partnership property including the real estate mortgaged, B. & C. agreeing, in consideration thereof, to pay the firm debts, including the debt to D., it was held that B. & C. were not estopped

can he plead a failure or want of consideration in the mortgage as between the parties to it,[1] nor that it was defectively executed,[2] nor that the mortgage is not a valid lien upon the land,[3] nor that the mortgagee has other collateral security for the same debt,[4] nor that the debt is different in its terms from that set out in the complaint, nor that it is payable in a manner different from that stipulated;[5] neither can he urge any defence whatever against the mortgage.[6] And the same rule applies as against a second mortgagee, where his mortgage is made expressly subject to a prior incumbrance;[7] it has also been applied to a case where the recital was

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from asserting such usury in an action by D. for the sale of the mortgaged premises, and that the assignee in bankruptcy of B. & C. was not precluded from making such defence, although B. & C. in the bankrupt proceedings, reported D.'s debt at the full amount claimed by him; Beals v. Lewis, 43 Ohio St. 220 (1885).

[1] Parkinson v. Sherman, 74 N. Y. 88 (1878); s. c. 30 Am. Rep. 263; Ritter v. Phillips, 53 N. Y. 586 (1873); Horton v. Davis, 26 N. Y. 495 (1863); Lester v. Barron, 40 Barb. (N. Y.) 297 (1863); Hartley v. Tatham, 26 How. (N. Y.) Pr. 158 (1863); Haile v. Nichols, 16 Hun (N. Y.) 37 (1878); Russell v. Kinney, 1 Sandf. Ch. (N. Y.) 34 (1843). See Jewell v. Harrington, 19 Wend. (N. Y.) 471 (1838); Barker v. International Bank of Chicago, 80 Ill. 96 (1875); Price v. Pollock, 47 Ind. 362 (1874); Crawford v. Edwards, 33 Mich. 354 (1876); Miller v. Thompson, 34 Mich. 10 (1876).

[2] Pidgeon v. Trustees of Schools, 44 Ill. 501 (1867); Greither v. Alexander, 15 Iowa, 470 (1863); Riley v. Rice, 40 Ohio St. 441 (1884). However, it was held in Goodman v. Randall, 44 Conn. 321 (1877), that a purchaser who had expressly assumed a mortgage for a certain amount in his deed of conveyance, was not estopped from showing that the incumbrance had no existence in fact, because the mortgage was fatally defective, having been witnessed, delivered and recorded without having been signed by the mortgagor.

[3] Ritter v. Phillips, 53 N. Y. 586 (1873); Johnson v. Parmaly, 14 Hun (N. Y.) 398 (1878); Kennedy v. Brown, 61 Ala. 296 (1878); Scarry v. Eldridge, 63 Ind. 44 (1878); s. c. 7 Cent. L. J. 418; Green v. Houston, 22 Kan. 35 (1879).

[4] Ferris v. Crawford, 2 Den. (N. Y.) 595 (1845).

[5] Klein v. Isaacs, 8 Mo. App. 568 (1881).

[6] Freeman v. Auld, 44 N. Y. 50 (1870); Holden v. Rison, 77 Ala. 515 (1884); McDonald v. Mobile Life Ins. Co., 65 Ala. 358 (1880); Delaware & H. Canal Co. v. Bonnell, 46 Conn. 9 (1878); Losey v. Bond, 94 Ind. 67 (1883); Hill v. Minor, 79 Ind. 48 (1881); Smith v. Graham, 34 Mich. 302 (1876).

[7] Bronson v. Lacrosse & M. R. Co., 69 U. S. (2 Wall.) 283 (1863); bk. 17 L. ed. 725.

erroneous in fact, the prior mortgage being on an entirely different parcel of land from that covered by the second mortgage.[1]

§ 396. When purchaser subject to mortgage not estopped.—The fact, that in a conveyance of mortgaged premises with full covenants, the mortgage was excepted from the covenant against incumbrances, does not show that the grantee took the land subject to the mortgage, nor will it prevent him from making any defence against the mortgage which the mortgagor might have made;[2] but a purchaser of land on which there is a mortgage, of which he had notice, will be bound by all the information which he could presumably obtain upon inquiry from the mortgagee in regard to his claim to a lien on said land.[3]

Where a purchaser has bought not merely the equity of redemption, but the whole title, paying the full price therefor with no deduction on account of a mortgage, he may set up the defence of usury in the original contract between the parties.[4] A purchaser under the foreclosure of a second mortgage, will not be precluded by a clause in the deed of the sheriff, reciting that the conveyance is subject to the lien of the prior mortgage, from pleading the defence of usury, where the second mortgagee could have set up such defence against the first mortgage.[5]

In order to estop a mortgagee from asserting his mortgage against a subsequent purchaser of the premises, the proof of the facts from which the estoppel *in pais* is claimed must be clear and satisfactory.[6] Where the statement of a mortgagee as to the amount due him is a mere matter of opinion and no effort was used to induce the purchase, and the purchaser relied upon the assurance of the mortgagor from whom he purchased, when he could, by the use of reasonable

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[1] Sweetzer v. Jones, 35 Vt. 317 (1862).

[2] Bennett v. Keehn, 67 Wis. 154 (1886).

[3] Martin v. Cauble, 72 Ind. 67 (1880). See Central Trust Company v. Sloan, 65 Iowa, 655 (1885).

[4] Lilienthal v. Champion, 58 Ga. 158 (1877); Maher v. Lanfare, 86 Ill. 513 (1877).

[5] Pinnell v. Boyd, 33 N. J. Eq. (6 Stew.) 600 (1881).

[6] Preble v. Conger, 66 Ill. 370 (1872).

diligence on his part, have ascertained the amount of the incumbrance, the mortgagee will not be estopped from enforcing his mortgage against such purchaser.[1] It is a general principle that the party setting up an estoppel must be free from the imputation of laches in the premises.[2]

§ 397. **Estoppel against purchaser subject to usurious mortgage.**—The doctrine is well established that where property covered by a usurious mortgage is conveyed by a deed containing a clause expressly making the conveyance subject to the mortgage lien, such clause in the deed will operate as a waiver of the defence of usury, and will be regarded as a provision made by the mortgagor for the payment of the usurious debt which the grantee can not afterwards question;[3] and the grantee under such a deed can not compel the application of the usurious bonus paid by his grantor to the reduction of the mortgage debt.[4] But it is held, where the property is reconveyed to the grantor by a deed in which nothing is said regarding the mortgage, that he will be entitled to set up the defence of usury in an action to foreclose the mortgage.[5]

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[1] Preble v. Conger, 66 Ill. 370 (1872).

[2] Trenton Banking Co. v. Duncan, 86 N. Y. 221 (1881).

[3] Hartley v. Harrison, 24 N. Y. 170 (1861); Smith v. Cross, 16 Hun (N. Y.) 487 (1879); Baskins v. Calhoun, 45 Ala. 582 (1871); Loomis v. Eaton, 32 Conn. 550 (1865); Studabaker v. Marquardt, 55 Ind. 341 (1876); Pinnell v. Boyd, 33 N. J. Eq. (6 Stew.) 190 (1880); Jones v. Ins. Co., 40 Ohio St. 583 (1884); Cramer v. Lepper, 26 Ohio St. 59 (1875); Austin v. Chittenden, 33 Vt. 553 (1861).

[4] Root v. Wright, 21 Hun (N. Y.) 344 (1880).

[5] Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137 (1879); s. c. 7 Abb. (N. Y.) N. C. 170, aff'g 13 Hun (N. Y.) 321 (1878). See Bennett v. Bates, 94 N. Y. 354, 371 (1884).

CHAPTER XIX.

ANSWERS AND DEFENCES.

RIGHT OF ACTION NOT ACCRUED—MORTGAGE DEBT NOT DUE—PAYMENT AND DISCHARGE—DENIAL OF PERSONAL LIABILITY—RELEASE OF PART OF MORTGAGED PREMISES.

§ 398. Denial of right of action accrued—Nothing due.
399. Alleging condition precedent as a defence.
400. Breach of an independent or collateral covenant as a defence.
401. Allegation that mortgage is for indemnity only.
402. Extension of time of payment as a defence.
403. Consideration for extension of time.
404. Payment as a defence.
405. What amounts to a payment.
406. Attorney's fees and taxes to be paid as part of mortgage debt.
407. Payment of condemnation money to mortgagor instead of to mortgagee.
408. Payment by deposit of collateral security or assumption of prior mortgage.
§ 409. Application of payments—How to be made.
410. Payments by mortgagor after conveyance.
411. Payments — How pleaded—Inability to find mortgagee.
412. Payment — How proved in defence.
413. Alleging discharge and satisfaction of mortgage in defence.
414. Allegation of release of part of mortgaged premises.
415. Alleging release of part of mortgaged premises in defence.
416. Application of proceeds on release of part of mortgaged premises.
417. Denial of personal liability on contract of assumption.

§ 398. Denial of right of action accrued—Nothing due.—A defendant in an action to foreclose a mortgage may show in defence, while admitting the validity of the mortgage, that by its terms nothing is due thereon, and that a cause of action has not accrued. Thus, an answer showing an agreement between the parties, contemporaneous with the execution of the mortgage, to the effect that the mortgage should become due and payable only on the occurrence of an event which never happened, pleads a good defence to an action to foreclose the mortgage.[1] Where such a defence is

[1] Lucas v. Hendrix, 92 Ind. 54 (1883).

set up, if the plaintiff fails to establish the fact that a portion of the debt is due, or that a cause of action has accrued, his complaint will be dismissed;[1] but where the condition of the mortgage is other than for the payment of money, and there is a breach of it, the mortgagor can not set up as a defence to an action for foreclosure the fact that nothing is due.

Where the condition of the defeasance in a mortgage is, that the note secured thereby shall be paid within sixty days after demand, and a demand is made by a person claiming to act as agent for the owner, but whose agency is denied, the mere possession of the note by the person making the demand will not be sufficient proof of his agency.[2]

§ 399. **Alleging condition precedent as a defence.**— Where the title of the vendor to certain premises is known to be defective at the time of conveyance, and a note and mortgage given to secure the whole or a part of the purchase price of the property, contain a stipulation that nothing shall be deemed to be due upon the note until the vendor shall have perfected the title to the premises, the mortgagor may set up the non-performance of this condition as a defence to an action to foreclose such mortgage.[3] This proposition has been supported where a vendor covenanted to pay all existing incumbrances;[4] also, where a stipulation executed with the mortgage provided that it should not be enforced, until a quit-claim deed of an outstanding title had been obtained by the vendor.[5]

But where the mortgagor sets up as a defence failure of title to the whole or a part of the premises conveyed, he must also release to the vendor whatever title he may have acquired by his deed to that part of the property, to which the title failed or was defective; and in case of the failure

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[1] See Hall v. Davis, 73 Ga. 101 (1885); Lucas v. Hendrix, 92 Ind. 54 (1883).

[2] Union Central Life Insurance Co. v. Jones, 35 Ohio St. 351 (1880).

[3] Weaver v. Wilson, 48 Ill. 125 (1868). See Ryerson v. Willis, 81 N. Y. 277 (1880). See *post* § 400.

[4] Stewart v. Clark, 8 Kan. 210 (1871).

[5] Ryerson v. Willis, 81 N. Y. 277 (1880).

of the title to the whole property he must offer to rescind the contract,[1] because one who seeks equitable relief must first do equity.[2]

§ 400. **Breach of an independent or collateral covenant as a defence.**—A mortgagor can not set up the breach of an independent or collateral covenant as a defence in an action to foreclose a mortgage, where the payment of the debt secured is not made to depend upon the performance of such independent covenant.[3] Thus, where a mortgage is given to secure part of the purchase price of land, the title to which is defective, or upon which there is a prior incumbrance, and such title is to be perfected or the incumbrance removed by the mortgagee, an answer in an action to foreclose the mortgage, alleging that the title has not been perfected, nor the incumbrance removed, will be unavailing, unless the payment of the mortgage is made dependent upon the perfection of the title or the removal of the incumbrance.[4]

And where a complaint sets forth the conditions of a bond, and avers the execution of the mortgage as collateral thereto with the same conditions, an answer merely repeating the words of the conditions as stated in the complaint and alleging that such conditions are not contained in the mortgage, is not a denial that they are in substance the conditions of the mortgage; to raise an issue upon that question, the defendant should either deny the debt or plead the conditions *verbatim* from the bond and mortgage.[5] In an action to foreclose a purchase money mortgage, if the answer attempts to show a failure of title, but does not set forth the deed or

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[1] Ryerson v. Willis, 81 N. Y. 277 (1880); Baker v. Robbins, 2 Den. (N. Y.) 136 (1846); Rosebaum v. Gunter, 3 E. D. Smith, (N. Y.) 203 (1854); Fisher v. Conant, 3 E. D. Smith, (N. Y.) 199 (1854); Weaver v. Wilson, 48 Ill. 125 (1868).

[2] Ryerson v. Willis, 81 N. Y. 277 (1880).

[3] Duryea v. Linsheimer, 27 N. J. Eq. (12 C. E. Gr.) 366 (1876); Courson v. VanSyckle, 21 N. J. Eq. (6 C. E. Gr.) 92 (1870).

[4] Courson v. VanSyckle, 21 N. J. Eq. (6 C. E. Gr.) 92 (1870). See Duryea v. Linsheimer, 27 N. J. Eq. (12 C. E. Gr.) 366 (1876). See *ante* § 399.

[5] Dimond v. Dunn, 15 N. Y. 498 (1857), reversing 8 How. (N. Y.) Pr. 16.

any covenants therein, nor allege fraud, it will be bad on demurrer.[1]

§ 401. **Allegation that mortgage is for indemnity only.**—The defendant may set up by way of defence and show by parol evidence, that the mortgage sought to be foreclosed was given simply to indemnify the plaintiff as a surety,[2] that the obligation has been paid and satisfied, and that the plaintiff has not been injured in any way, because where there has not been a breach of the conditions of the mortgage, an action for foreclosure can not be maintained.[3] The effect of parol evidence in showing that a mortgage given for the payment of money was in reality to indemnify the plaintiff, is not to counteract or to vary the mortgage, but to identify the demand to which it refers; and such evidence is always competent.[4]

§ 402. **Extension of time of payment as a defence.**—A mortgage can not be foreclosed until the debt which it was given to secure has become due and payable, even though the security may be impaired and rendered precarious

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[1] Cornwell v. Clifford, 45 Ind. 392 (1873); Church v. Fisher, 40 Ind. 145 (1872); McClerkin v. Sutton, 29 Ind. 407 (1868). See Ryerson v. Willis, 81 N. Y. 277 (1880); Platt v. Graham, 3 Sandf. (N. Y.) 118 (1849); Wilbur v. Buchanan, 85 Ind. 42 (1882); Jenkinson v. Ewing, 17 Ind. 505 (1861); Woodforth v. Leavenworth, 14 Ind. 311 (1860); Laughery v. McLean, 14 Ind. 106 (1860); Chambers v. Cox, 23 Kan. 393 (1880); Mendenhall v. Steckel, 47 Md. 453 (1877); s. c. 28 Am. Rep. 481; Key v. Jennings, 66 Mo. 356, 368 (1877); Wheeler v. Standley, 50 Mo. 509 (1872); Glenn v. Whipple, 12 N. J. Eq. (1 Beas.) 50 (1858); Hill v. Butler, 6 Ohio St. 207 (1856); Darling v. Osborne, 51 Vt. 148 (1878); Booth v. Ryan, 31 Wis. 45 (1872); Hall v. Gale, 14 Wis. 54 (1861).

[2] On a recognizance of bail, see Colman v. Past, 10 Mich. 422 (1862), or on a note, Kimball v. Myers, 21 Mich. 276 (1870); s. c. 4 Am. Rep. 487; Ide v. Spencer, 50 Vt. 293 (1877).

[3] Ide v. Spencer, 50 Vt. 293 (1877).

[4] Kimball v. Myers, 21 Mich. 276, 285 (1870); s. c. 4 Am. Rep. 487. Judge Cooley said, in delivering the opinion of the court: "We understand also that evidence of the satisfaction of a demand actually received, though in a manner varying from that agreed, is always competent, notwithstanding it may have been received with some contemporaneous agreement," citing Crosman v. Fuller, 34 Mass. (17 Pick.) 171, 174 (1835); Hagood v. Swords, 2 Bail (S. C.) L. 305 (1831); Bradley v. Bentley, 8 Vt. 245 (1836).

by delay.[1] And the time within which a mortgage debt is to be paid may be extended upon a valid consideration, and such extension will be a bar to an action to foreclose the mortgage until after the period of extension has expired. An extension of the time for the payment of a mortgage affects the right to foreclose, but does not in any way affect the mortgage lien; for neither an extension of time nor a change in the indebtedness secured by a mortgage will impair or in any way affect the validity of the mortgage.[2]

Where the obligation is under seal and an agreement for its extension is made before maturity, it must be in writing and of equal legal formality as the original instrument;[3] but where there has been a breach of the conditions of a sealed instrument, the time for payment may be extended by parol, if founded upon a sufficient consideration.[4] Thus, where the holder of a mortgage which was past due was about to enforce it by an action, and a third person for a valid consideration agreed by parol with the plaintiff's testator, who had assumed the payment thereof, to purchase said mortgage and to refrain from collecting the principal for five years, the court held in an action to foreclose the mortgage that this agreement, having been executed by the taking of the assignment of the mortgage, operated as effectually to extend the time of payment as if it had been under seal.[5]

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[1] Campbell v. Macomb, 4 Johns. Ch. (N. Y.) 534 (1820). See Building Association v. Platt, 5 Duer (N. Y.) 675 (1856).

[2] Shuey v. Latta, 90 Ind. 136 (1883).

[3] Dodge v. Crandall, 30 N. Y. 306 (1864); Eddy v. Graves, 23 Wend. (N. Y.) 84 (1840); Allen v. Jacquish, 21 Wend. (N. Y.) 628 (1839).

[4] Dodge v. Crandall, 30 N. Y. 306 (1864); Stone v. Sprague, 20 Barb. (N. Y.) 509 (1855); Clark v. Dales, 20 Barb. (N. Y.) 42 (1855); Esmond v. Vanbenschoten, 12 Barb. (N. Y.) 369 (1851); Dearborn v. Cross, 7 Cow. (N. Y.) 48 (1827); Townsend v. Empire Stone Dressing Co., 6 Duer (N. Y.) 208 (1856); Flynn v. McKeon, 6 Duer (N. Y.) 203 (1856); Fish v. Hayward, 28 Hun (N. Y.) 456 (1882); Burt v. Saxton, 1 Hun (N. Y.) 551 (1874); s. c. 4 T. & C. 109; Lattimore v. Harsen, 14 Johns. (N. Y.) 330 (1817); Fleming v. Gilbert, 3 Johns. (N. Y.) 528 (1808); Keating v. Price, 1 Johns. Cas. (N. Y.) 22 (1799); Newton v. Wales, 3 Robt. (N. Y.) 453 (1865); Delacroix v. Bulkley, 13 Wend. (N. Y.) 71 (1834).

[5] Dodge v. Crandall, 30 N. Y. 294

While an executory parol agreement is not technically sufficient to alter the terms of a contract under seal, yet when made before a breach of the conditions of such contract and upon a sufficient consideration, it may operate for a limited time as a waiver of a right to enforce the obligation of such contract;[1] and where such parol agreement for an extension of time has been entered into, and the consideration paid, no court will enforce the contract at the time of its maturity merely on the ground that such agreement was not in writing.[2] To enforce a mortgage in opposition to an agreement founded upon a valuable consideration for an extension of time would be against conscience and good faith, and a fraud upon the rights of the mortgagor.[3] An agreement to extend the time for the payment of a mortgage debt must be made after the execution and delivery of the mortgage; and both the mortgagor and the mortgagee must be parties to the contract in order to be entitled to rights under it.[4]

§ 403. **Consideration for extension of time.**—In order to constitute a valid defence to an action to foreclose a mortgage, the contract for an extension of time must be founded upon a valuable new consideration.[5] But it has

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(1864); Burt v. Saxton, 1 Hun (N. Y.) 551 (1874); s. c. 4 T. & C. (N. Y.) 109.

[1] Trayser v. The Trustees of Indiana Asbury University, 39 Ind. 556 (1872); Van Houten v. McCarty, 4 N. J. Eq. (3 H. W. Gr.) 141 (1842); King v. Morford, 1 N. J. Eq. (Saxt.) 274, 280 (1831); Tompkins v. Tompkins, 21 N. J. Eq. (6 C. E. Gr.) 338 (1871); Cox v. Bennet, 13 N. J. L. (1 J. S. Gr.) 165, 171 (1832).

[2] Scott v. Frink, 53 Barb. (N. Y.) 533 (1868); Burt v. Saxton, 1 Hun (N. Y.) 551 (1874); s. c. 4 T. & C. (N. Y.) 109. *In re* Betts, 4 Dill C. C. 93 (1877); s. c. 7 Rep. 225. See Albert v. Grosvenor Investment Co., L. R. 3 Q. B. 123, 127 (1867).

[3] Trayser v. Trustees of Indiana Asbury University, 39 Ind. 556, 567 (1872). See Fowler v. Brooks, 13 N. H. 240 (1842); Bailey v. Adams, 10 N. H. 162 (1839); Wheat v. Kendall, 6 N. H. 504 (1834); McComb v. Kittridge, 14 Ohio, 348 (1846); Austin v. Dorwin, 21 Vt. 38 (1846).

[4] Lee v. West Jersey Land Co., 29 N. J. Eq. (2 Stew.) 377 (1878).

[5] Pabodie v. King, 12 Johns. (N. Y.) 426 (1815); Hall v. Constant, 2 Hall (N. Y.) 185 (1829); Gibson v. Renne, 19 Wend. (N. Y.) 389 (1838); Patchin v. Peirce, 12 Wend. (N. Y.) 61, 63 (1834); Reynolds v. Ward, 5 Wend. (N. Y.) 501 (1830); Miller v. Holbrook, 1 Wend. (N. Y.) 317 (1828), Harris v. Boone, 69 Ind. 300 (1879).

been said that mutual promises, on the one hand, to waive payment of an installment at the time when it matures, and to accept it at a later date, and, on the other hand, to pay the whole principal and the interest, at the expiration of the extended time, furnishes a sufficient consideration to sustain an extension of time.[1]

An agreement between a mortgagor and a mortgagee to raise the interest upon a bond and mortgage from six per centum to the highest rate allowed by law, in consideration of an extension of the time of payment, will constitute a valid consideration;[2] so, also, will the payment of interest[3] or of an installment of the principal in advance,[4] because payment before the day on which a debt matures, being a benefit to the creditor, is a good consideration for a promise.[5] The giving of additional security,[6] the assuming of the mortgage debt by a purchaser who relies upon an agreement of extension,[7] or the payment of an installment of interest by a grantee of the mortgagor not personally obliged to make such payment,[8] form sufficient considerations to support a promise for the extension of the time of payment.

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[1] Pierce v. Goldesberry, 31 Ind. 52 (1869). See Wakefield Bank v. Truesdell, 55 Barb. (N. Y.) 602 (1864); Clark v. Dales, 20 Barb. (N. Y.) 42 (1855); Burt v. Saxton, 1 Hun (N. Y.) 551 (1874); s. c. 4 T. & C. (N. Y.) 109; Preston v. Henning, 6 Bush (Ky.) 556 (1869); Bailey v. Adams, 10 N. H. 162 (1839).

[2] Haggarty v. Allaire, 5 Sandf. (N. Y.) 230 (1851). See Crosby v. Wiatt, 10 N. H. 318 (1839); Bailey v. Adams, 10 N. H. 162 (1839).

[3] Wakefield Bank v. Truesdell, 55 Barb. (N. Y.) 602 (1864); Maher v. Lanfrom, 86 Ill. 513 (1877); Pierce v. Goldesberry, 31 Ind. 52 (1869); Preston v. Henning, 6 Bush (Ky.) 556 (1869).

[4] Newsam v. Finch, 25 Barb. (N. Y.) 175 (1857). *In re* Betts, 4 Dill. C. C. 93 (1877); s. c. 7 Rep. 225.

But it has been said that the payment of the portion of a debt due is not a sufficient consideration to support a promise to give further time for the payment of the balance. Hall v. Constant, 2 Hall (N. Y.) 185 (1829).

[5] Austin v. Dorwin, 21 Vt. 38, 44 (1848); Pinnel's Case, 5 Coke, 117 (1591).

[6] Trayser v. Trustees of Indiana Asbury University, 39 Ind. 556 (1872). See Jester v. Sterling, 25 Hun (N. Y.) 344 (1881); Gibson v. Renne, 19 Wend. (N. Y.) 389 (1838).

[7] Jester v. Sterling, 25 Hun (N. Y.) 344 (1881); Burt v. Saxton, 1 Hun (N. Y.) 551 (1874); s. c. 4 T. & C. 109.

[8] See Grinnan v. Platt, 31 Barb. (N. Y.) 328 (1860); Jester v. Sterling, 25 Hun (N. Y.) 344 (1881).

§ 404. **Payment as a defence.**—The existence and continuance of the debt is essential to the life of a mortgage given to secure it; whenever the debt is paid, discharged, released or barred by the statute of limitations, the mortgage ceases and can no longer have any legal effect.[1] The mortgagor or other person liable for the payment of any deficiency that may arise on the sale of the mortgaged premises, as well as the owner of the equity of redemption, has a right to answer that the mortgage debt has been paid in whole or in part, and this will plead a good defence to a foreclosure.[2] And where an action is brought to foreclose a mortgage for an unpaid installment, the payment of the amount due with costs will terminate the suit;[3] while payment in whole or in part, when properly alleged and proved, is a good defence for either a mortgagor or a junior incumbrancer,[4] yet where payment is set up as a defence, it must be clearly established.[5] Whenever a defendant pleads payment, it will be for the trial court to decide whether a proper defence is made justifying the suspension of judgment for the plaintiff, whose legal right of possession is not denied, until the determination of the question whether the mortgage debt has or has not been paid.[6]

The equitable assignee of a mortgage, in order to protect his rights against the payment of the debt by the mortgagor to the mortgagee, should give actual or constructive notice of his assignment, either by placing the assignment on record or by giving notice thereof to the mortgagor personally. If

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[1] Emory v. Keighan, 94 Ill. 543 (1880).

[2] Prouty v. Price, 50 Barb. (N. Y.) 344 (1867). See Lawson v. Barron, 18 Hun (N. Y.) 414 (1879).

[3] Brown v. Thompson, 29 Mich. 72 (1874). See Dow v. Moor, 59 Me. 118 (1871).

[4] Prouty v. Price, 50 Barb. (N. Y.) 344 (1867); Prouty v. Eaton, 41 Barb. (N. Y.) 409 (1863); Edwards v. Thompson, 71 N. C. 177 (1874); Hendrix v. Gore, 8 Oreg. 406 (1880). But a mortgagor who has not paid the mortgage debt can not set up a release executed by one who had no authority to execute it at the time. Cornog v. Fuller, 30 Iowa, 212 (1870).

[5] Suhr v. Ellsworth, 29 Mich. 57 (1874). See Finlayson v. Lipscomb, 16 Fla. 751 (1878); Cameron v. Culkins, 44 Mich. 531 (1880); Richardson v. Tolman, 44 Mich. 379 (1880).

[6] Edwards v. Thompson, 71 N. C. 177 (1874).

he does neither, and there are no attending circumstances to put the mortgagor on inquiry as to the fact of the assignment, a payment of the debt to the mortgagee will satisfy the mortgage and defeat an action to foreclose.

But payment to the mortgagee after the legal transfer of the note and mortgage before maturity will not satisfy the note, and the mortgage may be enforced.[1] It has been held that a mortgagor has a right to rely, where he does so in good faith, upon the statement of the mortgagee's administrator as to the ownership of the mortgage, and if he makes payments to the person who the administrator says owns the note and mortgage, they will be valid and may be set up as a defence in an action brought by the rightful owner to foreclose.[2] It has been said, however, that a mortgage may be kept alive even after payment in full, if such was the intention of the parties, or if there are interests which require it for their protection; but where a mortgagor causes a first mortgage to be paid with his own money, his payment will extinguish such mortgage in law and in equity, as between the rights attaching to it and those attaching to a second mortgage.[3]

The payment of a mortgage debt before it becomes due will operate as a discharge of the lien, and will constitute a good defence to a foreclosure;[4] a tender or payment at maturity[5] will also discharge the lien, and is a valid defence.[6] The title to the property will rest in the mortgagor free from the incumbrance.[7]

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[1] Towner v. McClelland, 110 Ill. 542 (1884).

[2] Reynolds v. Smith, 57 Mich. 194 (1885).

[3] Loverin v. Humboldt Safe Deposit & Trust Co., 113 Pa. St. 6 (1886).

[4] Holman v. Bailey, 44 Mass. (3 Metc.) 55 (1841).

[5] Kortright v. Cady, 21 N. Y. 343 (1860); s. c. 78 Am. Dec. 145; Crain v. McGoon, 86 Ill. 431 (1877); s. c. 18 Am. L. Reg. N. S. 178, and notes 182 to 186.

[6] Merrill v. Chase, 85 Mass. (3 Allen), 339 (1862); Richardson v. Cambridge, 84 Mass. (2 Allen), 118 (1861); s. c. 79 Am. Dec. 767; Shields v. Lozear, 34 N. J. L. (5 Vr.) 496 (1869); s. c. 3 Am. Rep. 256. See Grover v. Flye, 87 Mass. (5 Allen), 543 (1863).

[7] Shields v. Lozear, 34 N. J. L. (5 Vr.) 496 (1869); s. c. 3 Am. Rep. 256.

Payment by a third person will discharge the lien of a mortgage, although it may have been made without authority, if it was subsequently ratified by the mortgagor, in which case the payment by an agent will become equivalent to an original authorization to make it.[1]

§ 405. **What amounts to a payment.**—To constitute a payment there must be a full liquidation of the debt; hence, a mere change in the form of indebtedness will not operate as a payment. Thus, it has been held that the fact, that the original notes secured by a mortgage have been surrendered and other forms of indebtedness taken in their stead, will not, as between the parties, while the original indebtedness still continues, deprive the creditor of the security afforded by his mortgage;[2] and a mortgage debt will not be satisfied by the mere giving of other notes in renewal, because it is the debt and not the mere evidence of it which is secured, and so long as the debt exists in any form, the mortgage will remain unsatisfied.[3]

The acceptance of a mortgagor's note for interest due on a mortgage, will not pay the debts nor discharge the lien of the mortgage for such interest.[4] Payment by a mortgagor to the next of kin of his deceased mortgagee is no defence to an action by the administrator for foreclosure;[5] and the payment of part of a mortgage debt after the commencement of proceedings to foreclose the mortgage, but before their termination, will not necessarily delay or prevent the continuance of the foreclosure.[6]

In a case where the amount of a mortgage was reduced by the court on an appeal by the mortgagor on a bill to set it aside, the complainant was allowed costs of both courts and was permitted to apply them, with taxes, as a payment *pro*

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[1] Heermans v. Clarkson, 64 N. Y. 171 (1876); Commercial Bank of Buffalo v. Warren, 15 N. Y. 577 (1857); Hayes v. Kedzie, 11 Hun (N. Y.) 577, 581 (1877).

[2] Heively v. Matteson, 54 Iowa, 505 (1880).

[3] Bodkin v. Merit, 86 Ind. 560 (1882).

[4] Hutchinson v. Swartzweller, 31 N. J. Eq. (4 Stew.) 205 (1879).

[5] Mitchell v. Moorman, 1 Young & J. 21 (1826). See Story v. Kemp, 51 Ga. 399 (1874).

[6] Welch v. Stearns, 74 Me. 71 (1882).

tanto on the mortgage.[1] In a case where the maker of a note, secured by mortgage, on the day of its maturity sent checks to the mortgagee for the amount thereof with the intention of paying it, and requested the same to be applied in payment of the note, the mortgagee objected to such application and requested that the checks should be applied towards the payment of an open account, stating that if insisted upon, the application would be made in payment of the note as required but that in such case the open account would be closed and payment required, and that further credit would not be given. The mortgagor did not expressly assent to this, though no further directions were given by him as to the application of the check and he did not make a demand for the note; the mortgagee credited the checks on the open account and delivered receipted vouchers therefor showing such application, and the mortgagor continued to purchase and the mortagagee to sell to him on credit. In an action brought to foreclose the mortgage, it was held that the checks were not a payment on the note, because the above facts showed the acquiescence of the mortgagor in the application as made on the open account.[2]

§ 406. **Attorney's fees and taxes to be paid as part of mortgage debt.**—Where a mortgage provided for the payment of an attorney's fee, "to become payable on filing the complaint for foreclosure," and after the commencement of an action to foreclose, the mortgagor paid the principal and interest, together with the court costs, but not the attorney's fee, and was informed by the plaintiff that by the terms of the mortgage there was an attorney's fee due, which would have to be paid before the mortgage would be discharged or the action dismissed, it was held that the plaintiff was entitled to proceed with the action to enforce the payment of the attorney's fee.[3] And it has been held that the payment of the debt secured by a mortgage does not extinguish

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[1] Bowe v. Bowe, 42 Mich. 195 (1879).

[2] Pennsylvania Coal Co. v. Blake, 85 N. Y. 226 (1881). See *post* § 409.

[3] Stockton Saving and Loan Soc. v. Donnelly, 60 Cal. 481 (1882).

the lien of the mortgage as a security for taxes properly paid by the mortgagee to protect his mortgage security.[1]

§ 407. **Payment of condemnation money to mortgagor instead of to mortgagee.**—A mortgagee will not be barred of his right to foreclose by the payment to the mortgagor, instead of to him, of the condemnation money found to be due to the owner of the property, where such property is taken by the right of eminent domain.[2] Thus, where a railroad company, in the exercise of the power of eminent domain, seeks to appropriate private property to its own use for the purpose of a right of way, by condemnation and appraisement, all persons having an interest in the property, including the mortgagees, should be made parties to the proceeding by proper notice; and if such company fails so to do and pays the money to a person not entitled thereto, the proceeding and payment will be void as to all persons not parties to it and therefore not binding upon a mortgagee, who may foreclose his mortgage as against the railroad company.[3] Where the entire mortgaged premises are taken, the question as to whether, by the condemnation proceedings, the railroad company acquired the fee to the land or only an easement, is not material; the whole of the property being taken, the effect upon the mortgagee's security is the same.[4]

§ 408. **Payment by deposit of collateral security or assumption of prior mortgage.**—In a recent case[5] a party purchased certain premises in reliance upon representations of the vendor that they were free and clear from all incumbrances, there being in fact a mortgage thereon at the time. Upon discovery of the fraud by the purchaser an oral agreement was made between him and his grantor, that he would assume the old mortgage and that the amount thereof should be

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[1] Horrigan v. Wellmuth, 77 Mo. 542 (1883).

[2] Dodge v. Omaha & S. W. R. R. Co., 20 Neb. 276 (1886).

[3] Dodge v. Omaha & S. W. R. R. Co., 20 Neb. 276 (1886).

[4] Dodge v. Omaha & S. W. R. R. Co., 20 Neb. 276 (1886).

[5] Green v. Fry, 93 N. Y. 353 (1883).

credited as a payment upon a mortgage given by him to secure part of the purchase money. The vendor subsequently assigned his mortgage to parties who had no knowledge of the agreement. After the assignment, for the purpose of carrying out the oral agreement, the vendor executed to the purchaser a receipt for the amount of the old mortgage to be applied upon the purchase money mortgage. The mortgagor at that time had knowledge of the assignment. In an action to foreclose, it was held that the oral agreement was valid and effectual as a payment, and that its effect was not impaired by taking the receipt.

Where the attorney of a mortgagee refused to receive from the mortgagor a partial payment on the mortgage to stop the interest, but consented to receive it as a deposit, with the understanding that if the mortgagee would take the same as a payment and allow interest, it should be indorsed on the mortgage, and the mortgagee refused to receive the money unless the whole debt was paid, but subsequently accepted the money from his attorney with the understanding that he was not to allow interest thereon until the residue was paid; the court held that the mortgagor was equitably entitled to have the money applied as a payment on the day it was made, and that it was *pro tanto* a defence to an action to foreclose.[1]

§ 409. Application of payments—How to be made.—A debtor has a right to direct the application of his payments to any one of several debts owing by him to a creditor,[2]

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[1] Toll v. Hiller, 11 Paige Ch. (N. Y.) 228 (1844).

[2] See Bank of California v. Webb, 94 N. Y. 467 (1884); National Bank of Newburgh v. Bigler, 83 N. Y. 51 (1880); Harding v. Tifft, 75 N. Y. 461 (1878); Sheppard v. Steele, 43 N. Y. 53 (1870); Butler v. American P. L. Ins. Co., 42 N. Y. Supr. Ct. (10 J. & S.) 342 (1877); Seymour v. Marvin, 11 Barb. (N. Y.) 80 (1851); Mann v. Marsh, 2 Cai. (N. Y.) 99 (1804); Baker v. Stackpoole, 9 Cow. (N. Y.) 420 (1827); Van Rensselaer v. Roberts, 5 Den. (N. Y.) 470 (1848); Allen v. Culver, 3 Den. (N. Y.) 284 (1846); Hall v Constant, 2 Hall (N. Y.) 185 (1829); Patty v. Milne, 16 Wend. (N. Y.) 557 (1837); Stone v. Seymour, 15 Wend. (N. Y.) 19 (1835); Webb v. Dickinson, 11 Wend. (N. Y.) 62 (1833); Seymour v. VanSlyck, 8 Wend. (N. Y.) 403 (1832); King v. Andrews, 30 Ind. 429 (1868); Bacon v. Brown, 1 Bibb (Ky.) 334 (1809);

and such application by the creditor may be implied from attending circumstances.[1] Where the debtor fails to direct a specific application at the time of the payment, the creditor may make such application as he chooses.[2] Where neither party makes an application of the payment at the time it is made, the court may subsequently direct how it shall be made.[3]

If the application of payments is made by a court, it will be made according to the equitable rights of all interested parties.[4] Where a debtor owes his creditor upon various debts, a portion of which are secured, the application of payments, if made by a court, will usually be made upon those that are secured, in order to release the securities.[5]

Champenois v. Fort, 45 Miss. 355 (1871); Leef v. Goodwin, Tan. C. C. 460 (1841). See *ante* § 405.

[1] Seymour v. VanSlyck, 8 Wend. (N. Y.) 403 (1832). See Truscott v. King, 6 N. Y. 147 (1852); Robert v. Garnie, 3 Cai. (N. Y.) 14 (1805); Allen v. Culver, 3 Den. (N. Y.) 284 (1846); Stone v. Seymour, 15 Wend. (N. Y.) 19 (1835); Webb v. Dickinson, 11 Wend. (N. Y.) 62 (1833).

[2] National Bank of Newburgh v. Bigler, 83 N. Y. 51 (1880). See Feldman v. Beier, 78 N. Y. 293 (1879); Harding v. Tifft, 75 N. Y. 461 (1878); Shipsey v. Bowery Nat. Bank, 59 N. Y. 485 (1875); Bank of California v. Webb, 48 N. Y. Supr. Ct. (16 J. & S.) 175 (1882); Seymour v. Marvin, 11 Barb. (N. Y.) 80 (1851); Mann v. Marsh, 2 Cai. (N. Y.) 99 (1804); Baker v. Stackpoole, 9 Cow. (N. Y.) 420 (1827); VanRensselaer v. Roberts, 5 Den. (N. Y.) 470 (1848); Allen v. Culver, 3 Den. (N. Y.) 284 (1846); Hall v. Constant, 2 Hall (N. Y.) 185 (1829); Godfrey v. Warner, Hill & Den. (N. Y.) 32 (1842); Webb v. Dickinson, 11 Wend. (N. Y.) 62 (1833); Trotter v. Grant, 2 Wend. (N. Y.) 413 (1829); Waterman v. Younger, 49 Mo. 413 (1872); Howard v. McCall, 21 Gratt. (Va.) 205 (1871); Mayor v. Patten, 8 U. S. (4 Cr.) 317 (1808); bk. 2 L. ed. 632.

[3] Allen v. Culver, 3 Den. (N. Y.) 284 (1846); Stone v. Seymour, 15 Wend. (N. Y.) 19 (1835); Righter v. Stall, 3 Sandf. Ch. (N. Y.) 608 (1846); Hargroves v. Cooke, 15 Ga. 321 (1854); Nutall v. Brannin, 5 Bush (Ky.) 11 (1868); Calvert v. Carter, 18 Md. 73 (1861).

[4] Jones v. Benedict, 83 N. Y. 79 (1880). See Griswold v. Onondaga Co. &c. Bank, 93 N. Y. 301 (1883); Truscott v. King, 6 N. Y. 147 (1852); Dows v. Morewood, 10 Barb. (N. Y.) 183 (1850); Baker v. Stackpoole, 9 Cow. (N. Y.) 420 (1827); Allen v. Culver, 3 Den. (N. Y.) 284 (1846); Stone v. Seymour, 15 Wend. (N. Y.) 19 (1835); Chester v. Wheelwright, 15 Conn. 562 (1843); Bacon v. Brown, 1 Bibb (Ky.) 334 (1809); Harker v. Conrad, 12 Serg. & R. (Pa.) 301 (1825); Ayer v. Hawkins, 19 Vt. 26 (1846); Emery v. Titchout, 13 Vt. 15 (1841); Leef v. Goodwin, Tan. C. C. 460 (1841).

But it is questionable whether in all cases, as between a mortgage and an open account, the court will apply a general payment upon the mortgage instead of upon the open account.[1] Some of the cases hold that such an application of general payments should be made as will be most beneficial to the debtor, and that generally such payments should be applied to extinguish the debts first due.[2]

Where payments are made by a party upon a mortgage debt in pursuance of the discharge of a duty, in the proper performance of which others are interested, such payments must be applied and allowed in satisfaction of the mortgage, and can not be used by such party as a mere consideration for the assignment of the mortgage and debt to a third person.[3] And money once paid and appropriated by the parties to a note secured by a mortgage, and indorsed upon it, can not by a subsequent agreement be transferred to the credit of another debt, and such satisfied mortgage thereby become re-instated and made good as against a second mortgage.[4]

Where a mortgagee, subsequent to the execution of the mortgage, has become indebted to the mortgagor upon a book account, the owner of the equity of redemption or a junior mortgagee has a right to have such indebtedness, due from the prior mortgagee to the mortgagor, applied in satisfaction of the senior mortgage.[5] But it has been held,

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[5] Jones v. Benedict, 83 N. Y. 79 (1880); Thomas v. Kelsey, 30 Barb. (N. Y.) 268 (1859); Dows v. Morewood, 10 Barb. (N. Y.) 183 (1850); Wright v. Wright, 7 Daly (N. Y.) 55 (1877); Jackson v. Johnson, 11 Hun (N. Y.) 509 (1877); Callahan v. Boazman, 21 Ala. 246 (1852); Stamford Bank v. Benedict, 15 Conn. 437 (1843); Langdon v. Bowen, 46 Vt. 512 (1874); Vance v. Monroe, 4 Gratt. (Va.) 53 (1847). But see Field v. Holland, 10 U. S. (6 Cr.) 8 (1810); bk. 3 L. ed 136.

[1] Griswold v. Onondaga Co. &c. Bank, 93 N. Y. 301 (1883).

[2] Dows v. Morewood, 10 Barb. (N. Y.) 183 (1850). See Hunter v. Osterhoudt, 11 Barb. (N. Y.) 33 (1851); Allen v. Culver, 3 Den. (N. Y.) 284 (1846); Wheeler v. Cropsey, 5 How. (N. Y.) Pr. 288 (1850); Fairchild v. Holly, 10 Conn. 176 (1834); Sprague v. Hazenwinkle, 53 Ill. 419 (1870); Crompton v. Pratt, 105 Mass. 255 (1870); Langdon v. Bowen, 46 Vt. 512 (1874).

[3] Burnham v. Dorr, 72 Me. 198 (1881).

[4] York Co. Savings Bank v. Roberts, 70 Me. 384 (1879).

[5] Prouty v. Price, 50 Barb. (N. Y.)

that the question, whether a balance on account in transactions between a mortgagee and a mortgagor after the execution of the mortgage, which is equal to the amount of the mortgage, is to be applied upon the payment of such mortgage, and to be regarded as a discharge thereof, depends upon the intention of the parties and is purely a question of fact;[1] if it was the intention and agreement of the parties, that the money secured by the mortgage should remain unpaid, irrespective of the current balance of accounts, the mortgagor will not be entitled, as against an assignee of the mortgage, to apply such balance to the satisfaction of the mortgage debt, or as a payment thereon *pro tanto*.[2] Where the mortgagor of land performs labor for the mortgagee, under an agreement that his wages shall be applied upon the mortgage debt, and earns more than enough to satisfy the same, the debt will nevertheless remain undischarged until the actual application of the amount to such payment; yet if such application is not made, and the condition of the mortgage is broken, the mortgagor may maintain an action to redeem.[3]

§ 410. **Payments by mortgagor after conveyance.**—A mortgage is valid and may be foreclosed as long as the debt which it secures is not barred by the statute of limitations; and a partial payment or an acknowledgment of the debt, which would prevent the statute from running against it, will also prevent the statute from running against the remedy on the security. Thus, it has been held that where a purchaser from the mortgagor has either actual notice of the mortgage at the time of his purchase, or constructive notice by means of public records, he will be bound by a previous acknowledgment of the debt made by his grantor within twenty years.[4]

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344 (1867); Rosevelt v. Bank of Niagara, Hopk. Ch. (N. Y.) 579 (1825); aff'd 9 Cow. (N. Y.) 409 (1827).

[1] Peck v. Minot, 3 Abb. Ct. App. Dec. (N. Y.) 465 (1867). See Bocks v. Hathorn, 20 Hun (N. Y.) 503 (1880); Toll v. Hiller, 11 Paige Ch. (N. Y.) 228 (1844).

[2] Peck v. Minot, 3 Abb. Ct. App Dec. (N. Y.) 465 (1867).

[3] Doody v. Pierce, 91 Mass. (9 Allen), 141 (1864).

[4] See Heyer v. Pruyn, 7 Paige Ch.

It has been said that a grantee of mortgaged premises will be bound by the acts of the mortgagor, or other person under whom he claims, made subsequently to the vesting of his estate, as well as by those prior thereto; and that a payment or a new promise made by such person after the transfer of the property to the grantee, will keep the debt and security alive against the estate.[1] And it has been held that a payment of interest by a tenant for life, will keep the mortgage alive as against a person entitled to the mortgaged premises in remainder.[2] But it is also held that, where the mortgagor conveys the equity of redemption and ceases to pay interest on the mortgage note, the regular payment of interest by the grantee will not operate to prevent the running of the statute of limitations against the liability of the mortgagor on the mortgage and the note.[3] The doctrine, however, that a payment made by the mortgagor or other party liable for the debt after he has parted with all interest in the property, will keep alive the debt and the lien on the property, is repudiated in California,[4] Kansas,[5] Massachusetts[6] and Texas.[7]

§ 411. Payments—How pleaded—Inability to find mortgagee.—Payment may be pleaded by answer and need not be set up as a counter-claim to be available. Thus, the defence that the mortgagee has received a conveyance of property or payments in money, which should be applied on the mortgage debt, may be taken by answer without filing a cross-bill.[8] And where a defendant in his answer to a complaint to foreclose a mortgage alleges that the debt has been fully

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(N. Y.) 465 (1839); s. c. 34 Am. Dec. 355; Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 (1824); bk. 6 L. ed. 142. See *ante* chap. iv.

[1] N. Y. Life Ins. & Trust Co. v. Covert, 6 Abb. (N. Y.) Pr. N. S. 154 (1867); s. c. 3 Abb. App. Dec. (N. Y.) 350, reversing 29 Barb. (N. Y.) 435; Barrett v. Prentiss, 57 Vt. 297 (1885).

[2] Roddam v. Morley, 1 De G. & J. 1 (1856).

[3] Trustees of old Alms House Farm v. Smith, 52 Conn. 434 (1884).

[4] Low v. Allen, 26 Cal. 141 (1864).

[5] Schmucker v. Seibert, 18 Kan. 104 (1877); s. c. 26 Am. Rep. 765.

[6] Butler v. Price, 115 Mass. 578 (1874); Pike v. Goodnow, 94 Mass. (12 Allen), 472 (1866).

[7] Cason v. Chambers, 62 Tex. 305 (1884).

[8] Edgerton v. Young, 43 Ill. 464 (1867).

paid, he will be entitled to prove on the trial that the plaintiff received money at different times, to be applied as payments on the mortgage, although he did not plead such payments as a counter-claim.[1] Where a mortgage contains a stipulation that the mortgagor may make payments before the debt falls due, at his option, he must distinctly and affirmatively elect to do so in order to make a valid tender of the whole amount secured; and if he relies upon such election and a tender thereunder as a defence against a foreclosure, he must not only allege it in his answer, but prove it.[2]

In an action brought to foreclose a mortgage, containing a clause making the principal due in case of default in paying the interest after a certain number of days, it is not a valid defence or ground of relief that the defendant could not find the holder of the mortgage until after the time for the payment of the interest had expired, where the answer does not set out a trick or fraud on the part of the plaintiff to prevent the payment of the interest.[3]

§ 412. **Payment—How proved in defence.**—Where the defendant sets up satisfaction of the debt as a defence, the only question being one of fact,[4] payment may be proved by parol,[5] or inferred from attending circumstances.[6] Thus, in an action to foreclose a mortgage, which, by its terms, was given to secure the payment of moneys according to the conditions of a bond, where the defence of payment is interposed, the failure of the plaintiff to produce the bond will be evidence of the satisfaction of the mortgage debt, and, if unexplained, will be conclusive against the plaintiff's right

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[1] Hendrix v. Gore, 8 Oreg. 406 (1880).

[2] Post v. Springsted, 49 Mich. 90 (1882).

[3] Dwight v. Webster, 32 Barb. (N. Y.) 47 (1860); s. c. 10 Abb. (N. Y.) Pr. 128. See Ferris v. Ferris, 16 How. (N. Y.) Pr. 102 (1858).

[4] See Wells v. Lawrence, 65 Iowa, 373 (1884).

[5] Thornton v. Wood, 42 Me. 282 (1856); Ackla v. Ackla, 6 Pa. St. 228 (1847); McDaniels v. Lapham, 21 Vt. 222 (1849).

[6] Waugh v. Riley, 49 Mass. (8 Metc.) 290 (1844); Morgan v. Davis, 2 Har. & McH. (Md.) 9 (1781); Deming v. Comings, 11 N. H. 474 (1841).

to recover.[1] But the presumption of payment arising from the possession of the notes and mortgage by the mortgagor may be rebutted,[2] as may also the entry of discharge on the record by the mortgagee,[3] even where such discharge was made under seal.[4]

§ 413. **Alleging discharge and satisfaction of mortgage in defence.**—What acts amount to a discharge of mortgage is a question of law for the court. The simple discharge of a mortgage of record is not necessarily a satisfaction of the debt, nor evidence of its payment, although it may be a complete bar to an action to foreclose.[5] Thus, innocent purchasers of land will take it discharged of a mortgage lien which has been satisfied of record, although the satisfaction was procured by fraud.[6]

Where a mortgage is given by a debtor to two persons to secure the payment of a sum of money owing to them jointly, a discharge by either on payment to him of the amount of the joint debt will be valid.[7] And where the holder of a note received a mortgage with the understanding that he was to retain it as security for the payment of the note, only until he could assure himself of the solvency of another party, who was offered as surety, and having satisfied himself on this point, he obtained the signature of the proposed surety to the note and thereafter kept the note without discharging the mortgage of record, it was held that this was an equitable discharge of the mortgage.[8] But where a mortgagee agreed to discharge a mortgage upon the consideration that the mortgagor would insure his life to secure the debt, which insurance was never obtained, and a power of attorney was written upon the mortgage authorizing the recorder to

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[1] Bergen v. Urbahn, 83 N. Y. 49 (1880).

[2] Crocker v. Thompson, 44 Mass. (3 Metc.) 224 (1841); Smith v. Smith, 15 N. H. 55 (1844).

[3] Robbinson v. Sampson, 23 Me. 388 (1844); Trenton Banking Co. v. Woodruff, 2 N. J. Eq. (1 H. W. Gr.) 117 (1838).

[4] Fleming v. Perry, 24 Pa. St. 47 (1854).

[5] Mason v. Beach, 55 Wis. 607 (1882).

[6] Burton v. Reagan, 75 Ind. 77 (1881).

[7] Lyman v. Gedney, 114 Ill. 388 (1885).

[8] Baile v. St. Joseph's Fire & Marine Ins. Co., 73 Mo. 371 (1881).

enter satisfaction thereof, which was never delivered, but was retained by the mortgagee, and a new note was taken and the old one was marked canceled, but was not surrendered, it was held that such authorization was not sufficient to show a discharge of the mortgage.[1]

Where the owner of the equity of redemption pays off a mortgage with his own funds for the purpose of re-pledging the land, such payment will constitute a satisfaction of the mortgage lien;[2] but it will be otherwise, if the owner of the equity of redemption pays off the mortgage with the funds of a third person, for the purpose of purchasing the mortgage for such third person. Under such circumstances the mortgage will not be considered satisfied nor the lien discharged, either as to the owner or as to subsequent incumbrancers.[3] Where a mortgagee, after a foreclosure sale for an installment due and an entry on the premises, conveyed the land by warranty deed, it was held that such deed discharged the mortgage lien and released the indorsers of such notes as were secured by subsequent installments.[4]

Where a party holding a mortgage discharges it of record solely for the purpose of giving priority to a second mortgage held by another person, the first mortgage will still subsist as between the parties thereto and may be foreclosed against the mortgagor, the same as though no discharge had been made.[5] And where a mortgage is given to secure a debt, and the debt subsequently becomes merged in a judgment, the mortgage lien will not be thereby discharged, but will stand as security for the judgment. So, where a settlement is had between a mortgagor and a mortgagee and a new note is given for the balance due, upon which a judgment is subsequently taken by confession, the new note and judgment will not operate as a discharge of the mortgage.[6]

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[1] National Bank v. Dayton, 116 Ill. 257 (1886).

[2] Denton v. Cole, 30 N. J. Eq. (3 Stew.) 244 (1878).

[3] Denton v. Cole, 30 N. J. Eq. (3 Stew.) 244 (1878).

[4] Bridgman v. Johnson, 44 Mich. 491 (1880).

[5] Wood v. Wood, 61 Iowa, 56 (1883).

[6] Darst v. Bates, 95 Ill. 493 (1880).

§ 414. Allegation of release of part of mortgaged premises.—A proper release of a mortgage discharges the released portion of the mortgaged premises from the lien of the mortgage debt, and is a good defence to a foreclosure; but a fraudulent release, or a release by a party having no authority to execute the same, will, of course, be void.[1]

And a release by a mortgagee, with notice of subsequent incumbrances, will not give priority to a fourth mortgage over the lien of the intermediate incumbrances;[2] but where the holder of a mortgage takes a new mortgage as a substitute for an existing mortgage in ignorance of an intervening lien, equity will restore the lien of the first mortgage,[3] because a court will always keep an incumbrance alive to subserve the purposes of justice and to give effect to the actual intention of the parties.[4] Thus, the payee of a note has no authority after its transfer to release a mortgage executed to secure it.[5] And where notes and a mortgage were left with an attorney with power to cancel the original mortgage upon the receipt of a new mortgage, and the attorney canceled the original mortgage without receiving such new mortgage, it was held that such cancellation was without authority.[6] A release of mortgaged lands at the instance of

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[1] Kendall v. Woodruff, 87 N. Y. 1 (1881); Kendall v. Niebuhr, 58 How. (N. Y.) Pr. 156 (1879); VanSlyke v. VanLoan, 26 Hun (N. Y.) 344 (1882); Darst v. Bates, 95 Ill. 493 (1880); Meacham v. Steele, 93 Ill. 135 (1879); Hawhe v. Snydaker, 86 Ill. 197 (1877); Dewey v. Ingersoll, 42 Mich. 17 (1879); Benton v. Nicoll, 24 Minn. 221 (1877); Mount v. Potts, 23 N. J. Eq. (8 C. E. Gr.) 188 (1872); Stillman v. Stillman, 21 N. J. Eq. (6 C. E. Gr.) 126 (1870); Hoy v. Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 563 (1868); Gaskill v. Sine, 13 N. J. Eq. (2 Beas.) 400 (1861); Johnson v. Olcott, 8 N. J. Eq. (4 Halst.) 561 (1851); McIlvain v. Mutual Assurance Co., 93 Pa. St. 30 (1880); Kelley v. Whitney, 45 Wis. 110 (1878).

As to a fraudulent entry of satisfaction of a mortgage and its effects, see Hays v. O'Connor, 1 N. Y. Leg. Obs. 505 (1843); Remann v. Buckmaster, 85 Ill. 403 (1877); Fine v. King, 33 N. J. Eq. (6 Stew.) 108 (1880); Wier v. Mosher, 19 Wis. 311 (1865).

[2] Taylor v. Wing, 84 N. Y. 471 (1881). See Bernhardt v. Lymburner, 85 N. Y. 172 (1881).

[3] Geib v. Reynolds, 35 Minn. 331 (1886).

[4] Sidener v. Pavey, 77 Ind. 241 (1881).

[5] Hagerman v. Sutton, 91 Mo. 512 (1887).

[6] Foster v. Paine, 63 Iowa, 85 (1884).

the mortgagor is not a good defence in an action to foreclose, where there is nothing to indicate that the release was against the rights of any of the defendants.[1]

If a release of a mortgage is relied upon as a defence in an action for foreclosure, the answer should either give a brief description of the release with averments of the facts connected therewith, or should set it out at length. An answer which merely alleges that the mortgage is of no binding effect and is not a lien upon the premises described, simply states a conclusion of law and is insufficient.[2] Where a mortgagee of land releases a portion thereof from the operation of his mortgage, with actual or constructive notice that any other part thereof has a right to exemption from contribution to the payment of his mortgage, such exemption may be pleaded as a defence to an action to foreclose, and the mortgagee will thereby be estopped from enforcing his mortgage against such exempt portion.[3]

§ 415. **Alleging release of part of mortgaged premises in defence.**—The general rule that the release of the part of mortgaged premises still owned by the mortgagor, will operate as a discharge of the part aliened by him does not apply, unless the releasor has knowledge of the fact of the alienation or notice sufficient to put him on inquiry.[4] A release of a part of mortgaged premises given with knowledge of a prior conveyance of another part is not a technical discharge of the part conveyed; nor will it amount to an equitable release or discharge, unless, upon the principles of natural equity and justice, it ought thus to operate against the mortgagee giving the release.[5] Where a release is made by the mortgagee of a portion of the premises, with full knowledge of a previous sale of the remaining portion, the payment of the purchase money and the fact that the vendee relied upon the transfer of the lien of the mortgage to the unsold

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[1] Botsford v. Botsford, 49 Mich. 29 (1882).

[2] Caryl v. Williams, 7 Lans. (N. Y.) 416 (1873).

[3] George v. Wood, 91 Mass. (9 Allen), 81 (1864).

[4] Kendall v. Niebuhr, 45 N. Y. Supr. Ct. (13 J. & S.) 542 (1879).

[5] Kendall v. Woodruff, 87 N. Y. 1 (1882); Schrack v. Shriner, 100 Pa. St. 451 (1882).

portion, will discharge the entire mortgaged premises from the lien of the mortgage.[1] If the part of the premises released is not sufficient in value to discharge the debt, such release will be a discharge *pro tanto* of the portion previously conveyed.[2]

In determining whether the release of the remaining portion discharges, *pro tanto*, the portion conveyed, the valuation of the part released must be taken at the time when the mortgage was given.[3]

A mortgagee may release a part or the whole of the mortgaged premises without inquiring whether a junior incumbrancer has intervened, because it is the duty of the latter, if he intends to claim an equity through the prior incumbrance, to give the holder thereof notice in order that he may act understandingly; and if he fails to do so, the consequence of his neglect must be visited upon himself.[4]

§ 416. Application of proceeds on release of part of mortgaged premises.—An agreement by a mortgagee with a mortgagor to release portions of the mortgaged premises, on the payment of specified sums, may be enforced. Thus, where an arrangement was made with a mortgagee by which he was to receive the proceeds of certain lots whenever sold, and to release one lot from the lien of his mortgage for every $1,000 paid to him, and a larger amount of such proceeds was received by him in bonds, it was held that the excess should be applied in discharge of the mortgage.[5] In a recent case in New York,[6] the facts were as follows: A mortgage originally covered several pieces of land, all of which, except two pieces, were released on sales thereof

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[1] Schrack v. Shriner, 100 Pa. St. 451 (1882).

[2] Martin's Appeal, 97 Pa. St. 85 (1881).

[3] Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425 (1815); Parkham v. Welch, 36 Mass. (19 Pick.) 231 (1837); Johnson v. Williams, 4 Minn. 260 (1860).

[4] McIlvain v. Assurance Co., 93 Pa. St. 30 (1880).

[5] Cook v. Woodruff, 97 Ind. 134 (1884). It was held in this case that the plaintiff was subject to an examination in regard to an indemnifying bond, executed by parties in interest to secure the payment of the bonds received on the sales of the lots, to ascertain what application he had made of the proceeds thereof.

[6] Griswold v. Onondaga Co. Savings Bank, 93 N. Y. 301 (1883).

made by the mortgagor, and the proceeds of such sales were applied upon the mortgage debt. Another parcel was sold and this also was released in accordance with the contract and a mortgage was taken for the purchase money, which was assigned to the original mortgagee. The original mortgagor was at this time indebted to the original mortgagee upon an unsecured account; no application of the assigned mortgage was made by either party. About ten years after such assignment the mortgagor conveyed the remaining parcel of land and requested the plaintiff to execute a discharge of the original mortgage on the ground that it was paid by the assignment of the purchase money mortgage. This the plaintiff declined to do, but for about seventeen years made no claim under his mortgage. In an action to foreclose such mortgage it was held, that equity required the proceeds of the assigned mortgage to be applied as a payment upon the original mortgage instead of upon the open account.[1]

§ 417. **Denial of personal liability on contract of assumption.**—A mortgagee has a right to proceed in equity against one who has assumed and agreed to pay his mortgage.[2] But where the mortgagee seeks to hold the grantee of the mortgaged premises personally liable, such grantee may deny on the foreclosure of the mortgage, that he assumed the payment of the mortgage debt or any part thereof, and that he is personally liable. And where the

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[1] Griswold v. Onondaga Co. Savings Bank, 93 N. Y. 301 (1883).

It is not settled whether the court will in all cases, as between a mortgage and an open account, apply a general payment upon the mortgage. See Dows v. Morewood, 10 Barb. (N. Y.) 183 (1850); Griswold v. Onondaga Co. Savings Bank, 93 N. Y. 301 (1883). See *ante* § 409.

[2] Burr v. Beers, 24 N. Y. 178 (1861). See Garnsey v. Rogers, 47 N. Y. 236 (1872); Trotter v. Hughes, 12 N. Y. 74 (1854); Russell v. Pistor, 7 N. Y. 171 (1852); Cornell v. Prescott, 2 Barb. (N. Y.) 16 (1847); Marsh v. Pike, 10 Paige Ch. (N. Y.) 597 (1844); King v. Whitely, 10 Paige Ch. (N. Y.) 465 (1843); Halsey v. Reed, 9 Paige Ch. (N. Y.) 446 (1842); Curtis v. Tyler, 9 Paige Ch. (N. Y.) 432 (1842).

But this right does not embrace a claim to the purchase money on a sale of the mortgaged premises or to the vendor's lien to secure it. Emley v. Mount, 32 N. J. Eq. (5 Stew.) 470 (1880).

deed makes the grantee liable for the mortgage debt, he may set up in defence and show by parol, that the deed under which he holds does not express the contract of the parties.[1]

Where the defendant has purchased the mortgaged premises and agreed to pay the mortgage debt or a portion thereof, his liability depends upon the nature of the dealing in which the assumption was made, and is subject to any condition or defeasance attached thereto.[2] If the consideration for the assumption fails, or there is a good defence to it, as between the parties, it is questionable whether it can be enforced by the mortgagee.[3] And a contemporaneous agreement by a separate instrument will qualify or control it even as to the mortgagee.[4] Hence, one who has purchased a part of the mortgaged lands and agreed with the mortgagor to assume and pay the whole mortgage, may discharge his land from the consequences of that assumption by an agreement made with the grantor while the latter was still the owner of the residue; and the grantee of such residue, after such discharge, can not claim the benefit of the assumption, because the grantee succeeds only to the equities of his grantor existing at the time of the conveyance, and that without regard to any question of notice.[5]

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[1] Selchow v. Stymus, 26 Hun (N. Y.) 145 (1881).

[2] Judson v. Dada, 79 N. Y. 373, 379 (1880); Garnsey v. Rogers, 47 N. Y. 233 (1872). See *ante* chap. xi.

[3] Judson v. Dada, 79 N. Y. 373, 379 (1880). See Wadsworth v. Nevin, 64 Iowa, 64 (1884).

[4] Judson v. Dada, 79 N. Y. 373, 379 (1880); Flagg v. Munger, 9 N. Y. 483 (1854).

[5] Judson v. Dada, 79 N. Y. 373, 379 (1880).

CHAPTER XX.

ANSWERS AND DEFENCES.

ADVERSE AND PARAMOUNT CLAIMS OF TITLE—DEFECTIVE TITLE—FIXTURES—EVICTION—OUTSTANDING TITLE—WANT OF TITLE.

§ 418. Adverse and paramount claims of title can not be litigated in a foreclosure.
419. Defective title of mortgagor can not be set up in defence.
420. Claim of paramount title can not be pleaded in answer.
421. Effect of making owner of paramount title a defendant.
422. Paramount title by widow's right of dower.
423. Answers by prior lien holders as defendants.
424. Pleading in defence paramount title subsequently acquired by mortgagor.
425. What claims as to priority may be set up in answer.
426. Pleading ownership of fixtures in answer.
427. Gas fixtures, burners, brackets and chandeliers.
428. Fixtures where land leased for a term of years.
429. Settlement of equities between mortgagees.
430. Demand in answer for sale in inverse order of alienation.
431. Allegation of outstanding title or incumbrance.
432. When purchaser may set up outstanding title as a defence.
433. Payment of an outstanding claim by purchaser as a defence.
434. Eviction as a defence.
435. Defence of want of title.
436. Allegation of failure of title.
437. Denial of title in mortgagor at the time of executing mortgage.

§ 418. Adverse and paramount claims of title can not be litigated in a foreclosure.—It is well settled, that the object of an action to foreclose a mortgage is to bar the mortgagor and all parties claiming under him, subsequent to the mortgage, and that in such an action the plaintiff can not be required to litigate questions of adverse or paramount title ;[1] neither can the legal title of the mortgagee be questioned.[2]

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[1] Hekla Fire Ins. Co. v. Morrison, 56 Wis. 133 (1883); Macloon v. Smith, 49 Wis. 200 (1880). See *ante* chap. ix.

[2] Skelton v. Scott, 18 Hun (N. Y.) 375 (1879); Cross v. Robinson, 21 Conn. 379 (1851); Palmer v. Mead, 7 Conn. 149 (1828); Broome v. Beers, 6 Conn. 198 (1826). See Holcomb v. Holcomb, 2 Barb. (N. Y.) 20 (1847); Eagle Fire Ins. Co. v. Lent, 6 Paige Ch. (N. Y.) 637 (1837); Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 206 (1833); Lange v. Jones, 5 Leigh (Va.) 192 (1834);

A foreclosure suit is not a proper proceeding in which to litigate the adverse and paramount title of a defendant who claims under the foreclosure of a prior mortgage, from which the complainant does not seek to redeem;[1] and in a suit to foreclose, the mortgagor, though in possession, can not defend merely on the ground that the lien of the mortgage has been divested by the foreclosure of a prior mortgage.[2] The reason for this would seem to be that in the usual form of mortgage, the mortgagor covenants to warrant and defend, and one who has covenanted to defend the title against all adverse claims, is estopped from alleging title paramount in a third person;[3] and where an action at law is brought to recover possession of the mortgaged premises, the mortgagor will be estopped by his deed from denying that he had title to the mortgaged premises at the time of making the mortgage.[4]

A mortgagor who is bound to pay the taxes upon the mortgaged premises can not acquire and hold a tax title as against his mortgagee; his purchase of the title at a tax sale will operate merely as a payment of the taxes.[5] A mortgagor can not set up a matter going behind the mortgage as a defence to an action of foreclosure, where there has been neither fraud nor misrepresentation.[6]

§ 419. Defective title of mortgagor can not be set up in defence.—In an action to foreclose a mortgage the mortgagor can not plead as a defence a defect in his title at the time of the execution and delivery of the mortgage;[7] and the court has no authority to determine a controversy, between defendants jointly liable on a note which the mortgage was given to secure, as to which of them was the principal debtor and which the surety.[8]

Stewart's Heirs v. Coalter, 4 Rand. (Va.) 74 (1826).

[1] Bell v. Pate, 47 Mich. 468 (1882).

[2] Herber v. Christopherson, 30 Minn. 395 (1883).

[3] Macloon v. Smith, 49 Wis. 200 (1880).

[4] Concord M. F. Ins. Co. v. Woodbury, 45 Me. 447 (1858).

[5] Renshaw v. Stafford, 30 La. An. 858 (1878); Dunn v. Snell, 74 Me. 22 (1882); Allison v. Armstrong, 28 Minn. 276 (1881).

[6] Northrop v. Sumney, 27 Barb. (N. Y.) 196 (1858).

[7] Dime Savings Bank of Brooklyn v. Crook, 29 Hun (N. Y.) 671 (1883).

[8] Hovenden v. Knott, 12 Oreg. 267

The foreclosure of a mortgage is not a proper action for the settlement of a disputed title, and there is no reason why the court should entertain a question concerning the title to the premises. Thus, a mortgagee seeking to foreclose his mortgage and having no interest in a litigation between the defendants on a cross-bill by one of them for the specific performance of an alleged contract for the sale of the equity of redemption, will not be compelled to wait for a decree of sale until such other litigation has been decided.[1] The purchaser at a sale, made under a decree of foreclosure, will acquire whatever interest the mortgagor had in the premises at the time of the execution of the mortgage.[2] A title, which was before defeasible, will become absolute upon sale; if there is a dispute respecting its nature and extent, it must be adjudicated in some form of action in which the pleadings and proceedings are adapted to that purpose.[3]

§ 420. **Claim of paramount title can not be pleaded in answer.**—The only questions that can be determined concerning a title upon the foreclosure of a mortgage are such as affect the equity of redemption; the plaintiff has no right to make a third person, who claims an adverse title not derived from either the mortgagor or the mortgagee and who can not be affected by the judgment, a defendant for the purpose of litigating his claim to a paramount title.[4]

(1885). See Handley v. Munsell, 109 Ill. 362 (1884).

[1] Handley v. Munsell, 109 Ill. 362 (1884). See N. Y. Code Civ. Proc. §§ 521, 1205.

[2] N. Y. Code Civ. Proc. § 1632.

[3] Dime Savings Bank of Brooklyn v. Crook, 29 Hun (N. Y.) 671 (1883).

[4] Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127 (1878); Rathbone v. Hooney, 58 N. Y. 463 (1874); Merchant's Bank v. Thomson, 55 N. Y. 7 (1873); Frost v. Koon, 30 N. Y. 428 (1864); Lewis v. Smith, 9 N. Y. 502 (1854); s. c. 61 Am. Dec. 706; Corning v. Smith, 6 N. Y. 82 (1851); Banks v. Walker, 3 Barb. Ch. (N. Y.) 438 (1848); Bank of Orleans v. Flagg, 3 Barb. Ch. (N. Y.) 316, 318 (1848); Brundage v. Domestic and Foreign Missionary Society, 60 Barb. (N. Y.) 204 (1871); Holcomb v. Holcomb, 2 Barb. (N. Y.) 20, 22 (1847); Meigs v. Willis, 66 How. (N. Y.) Pr. 466 (1884); Emigrant Industrial Savings Bank v. Clute, 33 Hun (N. Y.) 82 (1884); Eagle Fire Ins. Co. v. Lent, 6 Paige Ch. (N. Y.) 635 (1837); Jones v. St. John, 4 Sandf. Ch. (N. Y.) 208 (1846); City of San Francisco v. Lawton, 21 Cal. 589 (1863); s. c. 79 Am. Dec. 187; Bozarth v. Landers, 113 Ill. 181 (1885); Banning

The only proper parties to a foreclosure are the mortgagor and the mortgagee, and those who have acquired rights or interests under them subsequent to the execution and delivery of the mortgage, for they are the only persons who have any rights or obligations growing out of the mortgage, or who can be affected in any manner by the litigation. A stranger claiming adversely to the title of the mortgagor can in no way be affected by the foreclosure suit. It can make no difference to him whether the mortgage is valid or invalid, whether it is discharged or foreclosed, or whether the estate mortgaged, the only estate which can be affected by the decree, remains in the mortgagor, or is transferred to another. As such adverse claimant is a stranger to the mortgage and to the mortgaged estate, he can have no interest in the subject matter of the action; there is no privity between him and the plaintiff, and the plaintiff has no right to make him a party defendant to a foreclosure, for the purpose of trying his adverse title.[1]

§ 421. **Effect of making owner of paramount title a defendant.**—But where a person claiming a paramount title is made a party to a foreclosure, under an allegation that he

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v. Bradford, 21 Minn. 308 (1875); s. c. 18 Am. Rep. 398; Dorr v. Leach, 58 N. H. 18 (1878); Kinsley v. Scott, 58 Vt. 470 (1886); Hekla Fire Ins. Co. v. Morrison, 56 Wis. 133 (1882); Macloon v. Smith, 49 Wis. 200 (1880); Roberts v. Wood, 38 Wis. 60 (1875); Supervisors v. Mineral Point R. R. Co., 24 Wis. 93, 120, 121 (1869); Roche v. Knight, 21 Wis. 324 (1867); Palmer v. Yager, 20 Wis. 91 (1865); Pelton v. Farmin, 18 Wis. 222 (1864); Straight v. Harris, 14 Wis. 509 (1861); Strobe v. Downer, 13 Wis. 10 (1860); s. c. 80 Am. Dec. 709; Peters v. Bowman, 98 U. S. (8 Otto), 56 (1878); bk. 25 L. ed. 91; Dial v. Reynolds, 96 U. S. (6 Otto), 340 (1877); bk. 25 L. ed. 644. See *ante* chap. ix.

[1] Frost v. Koon, 30 N. Y. 428, 444 (1864); Lewis v. Smith, 9 N. Y. 502 (1854); s. c. 61 Am. Dec. 706; Corning v. Smith, 6 N. Y. 82 (1851); Holcomb v. Holcomb, 2 Barb. (N. Y.) 20 (1847); Eagle Fire Ins. Co. v. Lent, 6 Paige Ch. (N. Y.) 635 (1837); Hibernia S. & L. Co. v. Ordway, 38 Cal. 79 (1869); City of San Francisco v. Lawton, 21 Cal. 589 (1863); s. c. 79 Am. Dec. 187; Wright v. Dudley, 8 Mich. 74, 115 (1860); Chamberlain v. Lyell, 3 Mich. 448 (1855); Banning v. Bradford, 21 Minn. 308 (1875); Newman v. Home Ins. Co., 20 Minn. 422 (1874); Pelton v. Farmin, 18 Wis. 222 (1864); 1 Dan. Ch. Pr. (3d Am. ed.) 239, 330, 331, 582, 605; Story Eq. Pl. §§ 226, 227, 230, 231, 262, 513, 517, 519.

claims an interest in, title to, or a lien upon the property mortgaged subsequent to the plaintiff's mortgage, and such party answers by filing a general denial, the decree will be binding on him, if a judgment is rendered against all the defendants foreclosing their equity of redemption, and he will not be again entitled to litigate matters which he could have set up in the foreclosure.[1] And where in an action of foreclosure the defendants, claiming under a title paramount to the mortgage, set up their claim by answer, and the same was litigated without objection, and decided in their favor, the judgment should not be reversed on appeal on the ground that the question could not properly be litigated in the action. Both parties having appeared and having actually litigated the issue in this form, will be bound by the judgment.[2]

But where a party, who is made a defendant as a subsequent incumbrancer or purchaser, sets up in his answer a claim of title prior to the mortgage, such title can not properly be investigated, and the complaint of the plaintiff should be dismissed as to such defendant, unless the plaintiff is prepared to prove that such claim in fact arose subsequent to the mortgage. Where this is not done and a judgment in the usual form is entered against all the defendants, it will not bind his prior interest and will be reversed on appeal, even though made after a hearing on the pleadings and proofs,[3] because there can be no foundation in the complaint for a decree upon a question of paramount title.[4]

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[1] Wolfinger v. Betz, 66 Iowa, 594 (1885). See Newby v. Caldwell, 54 Iowa, 102 (1880); Mally v. Mally, 52 Iowa, 654 (1879); Patten v. Loughridge, 49 Iowa, 218 (1878); Painter v. Hogue, 48 Iowa, 426 (1878); Lawrence Savings Bank v. Stevens, 46 Iowa, 429 (1877); Hackworth v. Zollars, 30 Iowa, 433 (1870).

[2] Helck v. Reinheimer, 105 N. Y. 470 (1887). See Barnard v. Onderdonk, 98 N. Y. 158, 163 (1885); Jordon v. VanEpps, 85 N. Y. 427, 435 (1881).

[3] Corning v. Smith, 6 N. Y. 82 (1851). See Merchants' Bank v. Thomson, 55 N. Y. 7 (1873); Barker v. Burton, 67 Barb. (N. Y.) 458 (1877); Lee v. Parker, 43 Barb. (N. Y.) 611 (1865); Summers v. Bromley, 28 Mich. 125 (1873); Wurcherer v. Hewitt, 10 Mich. 433 (1862); Chamberlain v. Lyell, 3 Mich. 448 (1855).

[4] See cases cited above; also Moran

In an action to foreclose a mortgage the validity of a trust deed executed prior to the mortgage can not be tried, where there is no allegation of fraud.[1] The validity of such a deed is a paramount question of law and should be decided in an action for ejectment.[2] A foreclosure is not a proper proceeding in which to litigate the adverse and paramount title of a defendant who claims under the foreclosure of a previous mortgage, from which the plaintiff does not seek to redeem.[3]

A person who accepts a mortgage on real estate will be estopped from claiming title thereto.[4] And a mortgagee in

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v. Palmer, 13 Mich. 367 (1865); Wright v. Dudley, 8 Mich. 115 (1860).

[1] Helck v. Reinheimer, 105 N. Y. 470 (1887).

In this case the General Term, [see 23 N. Y. Week. Dig. 473; s. c. 40 Hun (N. Y.) 637 (1886)], on appeal from the judgment at Special Term, decided that the question of the validity and effect of the trust deed should not have been tried in this action; the interests of those claiming under that deed, not being subsequent to the mortgage, but being adverse to it, the complaint should have been dismissed with costs as to the two defendants whose interests were alleged to be adverse to the mortgagor. No decision was made on the merits, and as to the other defendants the usual decree of foreclosure was granted. Judgment was entered, in conformity with this decision, containing a provision that the judgment should not prejudice any parties who might be interested under the trust deed, nor involve its validity or effect. The Court of Appeals say: "We do not concur in the view taken by the court at General Term. If the defendants had claimed that they had been improperly made parties defendant, because their rights were paramount and not subsequent to the mortgage and could not properly be litigated in this action, it might, as before stated, have been proper to dismiss the complaint with costs, as to them, for that reason. But in this case, instead of taking any such ground, they themselves, in their answer, set up their claims under the trust deed, and asked that they be adjudicated upon, and demanded judgment that the mortgaged premises be freed from the mortgage, and that it be discharged of record, and on the trial both parties litigated the question, and the defendants obtained judgment in their own favor thereon. Under these circumstances we think that it was too late to take the ground that the dismissal of the complaint, as to them, should be sustained on the ground that the questions could not properly be litigated in this action." See Barnard v. Onderdonk, 98 N. Y. 158, 163 (1885); Jordan v. Van Epps, 85 N. Y. 427, 435, 436 (1881).

[2] Davison v. The Associates of the Jersey Co., 71 N. Y. 333, 340 (1877). See also Helck v. Reinheimer, 105 N. Y. 470 (1887).

[3] Bell v. Pate, 47 Mich. 468 (1882).

[4] Voss v. Eller, 109 Ind. 260

possession of lands, being required to pay taxes thereon, can not set up against the mortgagor a tax title acquired while thus in possession.[1]

§ 422. **Paramount title by widow's right of dower.**— Where a married woman was made a party to an action to foreclose a mortgage, under the general allegation that she had, or claimed to have, some interest in or lien upon the mortgaged premises, or some part thereof, which had accrued subsequently to the lien of the mortgage, and she answered, setting forth a statement of facts upon which she claimed a right of dower in the property superior to the mortgage, and upon a trial of the issues thus presented, introduced evidence having some tendency to establish the correctness of her answer, and the court directed a judgment in the usual form, barring and foreclosing the defendants of all right, claim, interest and equity of redemption in the mortgaged premises and every part thereof; it was held on appeal, that the complaint should have been dismissed as to her in so far as the action had a tendency to affect the paramount right claimed in her behalf, or else that her interest should have been protected by an express qualification in the judgment.[2]

§ 423. **Answers by prior lien holders as defendants.**— The holder of a mortgage, prior in record, but subsequent in fact, to a mortgage under foreclosure, may be made a defendant to the action; and it will be sufficient to allege that he has, or claims to have, some lien upon or interest in the mortgaged premises, or some part thereof, which lien or interest, if any, is subsequent to the plaintiff's mortgage; special allegations will not be necessary.[3]

(1886). Estoppel from asserting title under a prior mortgage should be set up under by amendment to the complaint in foreclosure. Connerton v. Millar, 41 Mich. 608 (1879).

[1] Schenck v. Kelley, 88 Ind. 444 (1882).

[2] Lanier v. Smith, 37 Hun (N. Y.) 529 (1885). See Barker v. Burton, 67 Barb. (N. Y.) 458 (1877); Elias v. Verdugo, 27 Cal. 418 (1865); City of San Francisco v. Lawton, 21 Cal. 589 (1863); s. c. 79 Am. Dec. 187. See *ante* §§ 134–139.

[3] Constant v. American Bap. &c. Soc., 53 N. Y. Supr. Ct. (21 J. & S.) 170 (1886).

A prior mortgagee or lien holder, who is made a party to a foreclosure, is not obliged to set up his rights by an answer in order to protect them.[1] But where in an action to foreclose a mortgage a person holding a subsequent mortgage is made a defendant, and such defendant is also the owner of mortgages prior to that of the plaintiff, he may answer in the action and ask to have such prior mortgages paid out of the proceeds of the sale, before any portion thereof is applied to the satisfaction of the plaintiff's claim.[2]

Where a prior mortgagee is made a party defendant and does not answer, the entrance of a decree of foreclosure will not exclude him from his interest in the equity of redemption. This rule applies to all holders of prior liens and interests as well as to prior mortgagees; thus, it applies to prior incumbrancers by judgment,[3] or mechanic's lien,[4] to a life estate not bound by the mortgage,[5] and to a claim to an inchoate right of dower by a wife who did not join her husband in the execution of a mortgage.[6]

§ 424. Pleading in defence paramount title subsequently acquired by mortgagor.—A sale under a decree of foreclosure can have no broader effect than to vest in the purchaser the title which the mortgagor held at the time of the execution of the mortgage.[7] It is held in some states that a purchaser at a tax sale, after the execution of a mortgage, may be made a defendant, and that his title will be barred under a foreclosure.[8]

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[1] Payn v. Grant, 23 Hun (N. Y.) 134 (1880).

[2] Doctor v. Smith, 16 Hun (N. Y.) 245 (1878). See *ante* § 190.

[3] Frost v. Koon, 30 N. Y. 428 (1864); Payn v. Grant, 23 Hun (N. Y.) 134 (1880).

[4] Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127 (1878).

[5] Rathbone v. Hooney, 58 N. Y. 463 (1874).

[6] Merchants' Bank v. Thomson, 55 N. Y. 7 (1873); Lewis v. Smith, 9 N. Y. 502 (1854); s. c. 61 Am. Dec. 706.

[7] City of San Francisco v. Lawton, 21 Cal. 589 (1863); Bozarth v. Landers, 113 Ill. 181 (1885). See N. Y. Code Civ. Proc. § 1632.

[8] Lyon v. Powell, 78 Ala. 351 (1884); Randle v. Boyd, 73 Ala. 282 (1882). On a bill in chancery to foreclose a mortgage, the complainant also sought to have a tax deed of the premises covered by the mortgage set aside, as an alleged cloud upon his title. The plaintiff

It has been stated as a general rule, that where a mortgagor has acquired a paramount title subsequently to the execution of a mortgage, that such title will not be affected by a foreclosure and sale.[1] There is an exception to this rule, however, where the mortgagor has, subsequently to the execution of the mortgage, acquired a title which inures by way of estoppel to the benefit of the mortgagee. In such a case a sale under foreclosure will pass the subsequently acquired title to the same extent as if originally held by the mortgagor.[2]

Thus, where a mortgagor in his mortgage warrants the title to lands which he really does not possess, and subsequently acquires title thereto, the title subsequently acquired will inure to the benefit of the mortgagee, the same as if the entire title had been originally possessed by the mortgagor,[3] and will estop such mortgagor,[4] and all persons claiming

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made the alleged owner of the tax deed a party defendant, averring that his claim of title was acquired under a tax sale which was void, and that whatever interest he had in the premises was subordinate to the rights of the mortgagee. For want of any answer by such defendant, the bill was taken as confessed against him, and a final decree was entered annulling and setting aside his tax deed as a cloud upon the complainant's title. Upon the question as to the right of the court below, to entertain the bill at all, in so far as it concerned the alleged claim under the tax deed, the appellate court said there seemed to be a misapprehension as to the true scope and effect of the decision in Gage v. Perry, 93 Ill. 176 (1879), where it was held that a court of equity had no right, upon a bill to foreclose a mortgage, to consider and pass upon an independent adverse claim of title, unconnected with that under which the mortgagee claimed, and alleged to be a cloud upon the mortgagee's title. In that case the owner of the tax title, which constituted the alleged cloud, appeared and answered, setting up his title as adverse to, and independent of the supposed title of the mortgagor or of the mortgagee. That decision should be limited to the facts so disclosed. In this case no such defence was set up, and the allegations of the bill were admitted by the default to be true; Chicago Theological Sem. v. Gage, 103 Ill. 175 (1882).

[1] Weil v. Uzzell, 92 N. C. 515 (1886).

[2] City of San Francisco v. Lawton, 21 Cal. 589 (1863).

[3] Vallejo Land Assoc. v. Viera, 48 Cal. 572, 579 (1874); City of San Francisco v. Lawton, 21 Cal. 589 (1863); s. c. 79 Am. Dec. 187; Clark v. Baker, 14 Cal. 612 (1860); Pancoast v. Travelers' Ins. Co., 79 Ind. 176, 177 (1881); Marrier v. Lee, 2 Utah, 262 (1880).

[4] Clark v. Baker, 14 Cal. 612

under him, from subsequently asserting any title against the mortgagee and those claiming under him.[1] The reason for this seems to be that the mortgagor will not be permitted to attack a title, the validity of which he has covenanted to maintain.[2]

The supreme court of the United States held, in the case of VanRensselaer v. Kearney,[3] that "whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument by way of recital or averment, that the grantor is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or what is the same thing, if the seizin or possession of the particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds the after acquired title as between parties and privies.

"The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have

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(1860). See also Jackson v. Hubble, 1 Cow. (N. Y.) 613 (1823); Edwards v. Varick, 5 Den. (N. Y.) 665 (1846); Jackson v. Wright, 14 Johns. (N. Y.) 193 (1817); Varick v. Edwards, 11 Paige Ch. (N. Y.) 289 (1844); Jackson v. Waldron, 13 Wend. (N. Y.) 178 (1834); Pelletreau v. Jackson, 11 Wend. (N. Y.) 110 (1833); Jackson v. Bradford, 4 Wend. 619 (1830); Dart v. Dart, 7 Conn. 250 (1828); Comstock v. Smith, 30 Mass. (13 Pick.) 116 (1832); s. c. 23 Am. Dec. 670; Some v. Skinner, 20 Mass. (3 Pick.) 52 (1825); Kimball v. Blaisdell, 5 N. H. 533 (1831); s. c. 22 Am. Dec. 476; Kinsman v. Loomis, 11 Ohio, 475 (1842); Doswell v. Buchanan, 3 Leigh (Va.) 365 (1831).

[1] See Camp v. Grider, 62 Cal. 20, 25 (1882); Sherman v. McCarthy, 57 Cal. 507 (1881); Vallejo Land Assoc. v. Viera, 48 Cal. 579 (1874); Christy v. Dana, 34 Cal. 548 (1868); s. c. 42 Cal. 179 (1871); Green v. Clark, 31 Cal. 593 (1867); Kirkaldie v. Larrabee, 31 Cal. 457 (1866); Lent v. Morrill, 25 Cal. 500 (1864); City of San Francisco v. Lawton, 21 Cal. 589 (1863); s. c. 79 Am. Dec. 187; Baxter v. Bradbury, 20 Me. 260 (1841); s. c. 37 Am. Dec. 49; Mc Williams v. Nisley, 2 Serg. & R. (Pa.) 507 (1816); s. c. 7 Am. Dec. 654; Marrier v. Lee, 2 Utah, 462 (1880).

[2] Hoppin v. Hoppin, 96 Ill. 272 (1880).

[3] 25 U. S. (11 How.) 297, 325 (1850); bk. 13 L. ed. 703.

influenced the grantee in making the purchase. And hence, the mortgagor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it."[1]

§ 425. **What claims as to priority may be set up in answer.**—The court may entertain questions which are necessary to be determined in order that complete justice may be done between the parties whose rights in the equity of redemption are to be barred by the decree of foreclosure. A party asserting a right under the mortgagor prior to the mortgage, is sometimes a proper party to an action to foreclose the mortgage, and the question of priority is then a proper one to be determined.[2] It is held that, in an action to foreclose a mortgage, defendants claiming under an attachment lien accruing after the mortgage was given, are entitled to prove the existence of their lien and to show that, in consequence of certain acts of the plaintiff set forth in their answer, their lien under the attachment is superior to the lien of the mortgage.[3] And it is said to be proper to determine in a foreclosure suit a controversy between the plaintiff and the grantee of the mortgagor, as to the right of the latter to remove a building erected by him on the land; and the court may, by a provision in the judgment, in case the right is established, protect it by authorizing the removal of the building before sale or by directing that the sale shall be made subject to such right.[4]

The holder of a mortgage, dated and recorded prior to a deed of the same property, is entitled to treat all subsequent rights under the deed as subordinate; and on a foreclosure of his mortgage such rights need not be brought into issue by him.[5] But where a person executes a mortgage upon premises which he had previously contracted to sell, and the

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[1] See also Crews v. Burcham, 66 U. S. (1 Black), 357 (1861); bk. 17 L. ed. 93.

[2] Brown v. Volkening, 64 N. Y. 76 (1876); Bank of Orleans v. Flagg, 3 Barb. Ch. (N. Y.) 316 (1848); Board of Supervisors of Iowa Co. v. Mineral Point R. R. Co., 24 Wis. 93 (1869). See *ante* §§ 188, 190.

[3] Scrivener v. Dietz, 68 Cal. 1 (1885).

[4] Brown v. Keeney Settlement Cheese Assoc., 59 N. Y. 242 (1874).

[5] Shelden v. Warner, 45 Mich. 638 (1881).

mortgagees file a complaint to foreclose such mortgage, making the purchaser a party thereto, if they claim to be entitled to a preference over such purchaser as *bona fide* mortgagees without notice, the complaint will not be sufficient, if it merely alleges generally that such purchaser has or claims to have some interest in the premises which is subsequent to their mortgage; it should state that such purchaser claims an interest under a contract to purchase, prior to the mortgage, and that if he had any such interest the complainants had no notice or knowledge thereof at the time they took their mortgage. The complaint should also show the other facts which are necessary to entitle the complainants to protection as *bona fide* mortgagees.[1]

§ 426. Pleading ownership of fixtures in answer.— Personal property attached to the land will be regarded as a fixture, where it is necessary to the full enjoyment of the freehold, and will pass under a foreclosure to the purchaser of the premises.[2] Thus, fencing material, accidentally or temporarily detached from the realty after having been used as a part of a fence,[3] or placed along the line of a contemplated fence,[4] machinery in a building fitted up as a manufactory by the owner and essential to the purposes thereof;[5] manure

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[1] Bank of Orleans v. Flagg, 3 Barb. Ch. (N. Y.) 316 (1848).

[2] Voorhees v. McGinnis, 48 N. Y. 278, 289 (1872). See Sisson v. Hibbard, 75 N. Y. 542, 544 (1879); Tifft v. Horton, 53 N. Y. 380 (1873); Sheldon v. Edwards, 35 N. Y. 283 (1866); Ford v. Cobb, 20 N. Y. 344 (1859); Main v. Schwarzwaelder, 4 E. D. Smith (N. Y.) 275 (1855); Eaves v. Estes, 10 Kan. 314 (1873); s. c. 15 Am. Rep. 345; Pierce v. George, 108 Mass. 78 (1871); s. c. 15 Am. Rep. 345; Richardson v. Borden, 42 Miss. 71 (1868); s. c. 2 Am. Rep. 595; Wadleigh v. Janvrin, 41 N. H. 503 (1860); s. c. 77 Am. Dec. 780; Potts v. New Jersey Arms & Ordinance Co., 17 N. J. Eq. (2 C. E. Gr.) 395 (1866); Hill v. Wentworth, 28 Vt. 428 (1856).

[3] Goodrich v. Jones, 2 Hill (N. Y.) 142 (1841).

[4] Conklin v. Parsons, 1 Chand. (Wis.) 240 (1849).

[5] Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa, 57 (1876); Farrar v. Stackpole, 6 Me. (6 Greenl.) 154 (1829); Green v. Phillips, 26 Gratt. (Va.) 752 (1875); s. c. 21 Am. Rep. 323; Longbottom v. Berry, L. R. 5 Q. B. 123 (1869); Reg. v. Inhabitants of the Parish of Lee, L. R. 1 Q. B. 241 (1866); Hubbard v. Bagshaw, 4 Sim. 326 (1831). See Stockwell v. Campbell, 39 Conn. 362 (1872); s. c. 12 Am. Rep. 393; McConnell v. Blood, 123 Mass. 47

produced upon a farm;[1] hop poles, although pulled up and piled upon the land at the time of the conveyance;[2] a bell hung upon a frame and fastened to it by a hasp, the frame being nailed to the cupola of a barn,[3] or otherwise permanently attached; platform scales bolted and fastened

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1877); Pierce v. George, 108 Mass. 78 (1871); s. c. 11 Am. Rep. 310, 314; McMillan v. Fish, 29 N. J. Eq. 610 (1878); s. c. 6 Rep. 661; Meigs' Appeal, 62 Pa. St. 28 (1869); Hill v. National Bank, 97 U. S. (7 Otto), 450 (1878); bk. 24 L. ed. 1051; Holland v. Hodgson, L. R. 7 C. P. 328 (1872); s. c. 41 L. J. C. P. (N. S.) 146; 20 W. R. 990; Boyd v. Shorrock, L. R. 5 Eq. 72 (1867); s. c. 16 W. R. 102; Hutchinson v. Kay, 23 Beav. 413 (1857); Wynne v. Ingleby, 1 D. & R. 247 (1822); Jenkins v. Gething, 2 Johns. & Hem. 520 (1862); Walmsley v. Milne, 7 C. B. N. S. 115 (1859); s. c. 6 Jur. N. S. 125; 29 L. J. C. P. 97; 1 L. T. N. S. 92; Mather v. Fraser, 2 K. & J. 536 (1856); s. c. 2 Jur. N. S. 900; 25 L. J. Ch. 361; *Ex parte* Reynal, 2 M. D. & DeG. 443 (1841). See also McRea v. Central National Bank, 66 N. Y. 489 (1876); Eaves v. Estes, 10 Kan. 314 (1872); s. c. 15 Am. Rep. 345.

If a part of a machine is an immovable fixture, and another part thereof is movable without any damage to the freehold, the latter must also be treated as realty. Mather v. Fraser, 2 K. & J. 536 (1856); s. c. 2 Jur. N. S. 900; 25 L. J. Ch. 361.

[1] Chase v. Wingate, 68 Me. 204 (1878); s. c. 28 Am. Rep. 36; Kittredge v. Woods, 3 N. H. 503 (1826); s. c. 14 Am. Dec. 393. See Goodrich v. Jones, 2 Hill (N. Y.) 142 (1841); Middlebrook v. Corwin, 15 Wend. (N. Y.) 169 (1836); Parsons v. Camp, 11 Conn. 525 (1836); Gallagher v. Shipley, 24 Md. 418, 427, 428 (1865); Fletcher v. Herring, 112 Mass. 382, 384 (1873); Strong v. Doyle, 110 Mass. 92 (1872); Perry v. Carr, 49 N. H. 65 (1869); Plumer v. Plumer, 30 N. H. 558 (1855). *Contra*, Ruckman v. Outwater, 28 N. J. L. (4 Dutch.) 581 (1860); Sanders v. Ellington, 77 N. C. 255 (1877); Smithwick v. Ellison, 2 Ired. (N. C.) L. 326 (1842); Lewis v. Jones, 17 Pa. St. 262, 264 (1851); Wing v. Gray, 36 Vt. 261, 267 (1863).

But where the manure is not made in the course of husbandry, it is personalty and does not pass with the estate. Proctor v. Gilson, 44 N. H. 118 (1862). See Lassell v. Reed, 6 Me. (6 Greenl.) 222 (1829); Daniels v. Pond, 38 Mass. (21 Pick.) 367 (1838).

[2] See Bishop v. Bishop, 11 N. Y. 123 (1854); Walker v. Sherman, 20 Wend. (N. Y.) 636, 655 (1839).

It is said in Noyes v. Terry, 1 Laus. (N. Y.) 222 (1869), that Bishop v. Bishop, *supra*, carried the rule to the extremest point and is only to be sustained on the ground that, as the hop root was perennial and would pass with a conveyance, so the pole, which is used exclusively in connection with the root and is indispensable to its cultivation, would pass also. The growing crop of hops upon the vines is regarded as personalty. Frank v. Harrington, 36 Barb. (N. Y.) 415 (1862).

[3] Weston v. Weston, 102 Mass. 514 (1869).

to sills laid upon a brick wall set in the ground, and intended for permanent use on a farm for weighing stock and grain;[1] a sugar mill on a plantation;[2] a hot air furnace in a house;[3] a cotton-gin and stand;[4] salt pans in use in salt works;[5] a threshing machine fastened in a barn by means of bolts and screws[6] and tapestry, pictures in panels, frames filled with satin and attached to the walls of a house, statues, figures, vases and stone garden seats,[7] as between a mortgagor and a mortgagee, have been held to be a part of the realty and to pass with the estate.[8]

§ 427. Gas fixtures, burners, brackets and chandeliers. —Regarding gas fixtures, such as burners, brackets, chandeliers and the like, there is a conflict in the decisions; but by the weight of American authority they are not regarded as fixtures, but as mere articles of furniture, and do not pass with a conveyance of the premises,[9] though as to gas fittings or pipes, to which the fixtures are attached, the rule is different.[10]

In Vaughen v. Haldeman[11] the supreme court of Pennsylvania, in holding that gas fixtures are personal property and

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[1] Arnold v. Crowder, 81 Ill. 56 (1875); s. c. 25 Am. Rep. 260. See Bliss v. Whitney, 91 Mass. (9 Allen), 114 (1864).

[2] Hutchins v. Masterson, 46 Tex. 551 (1877); s. c. 26 Am. Rep. 286.

[3] Jarechi v. Philharmonic Society, 79 Pa. St. 403 (1875); s. c. 21 Am. Rep. 78, 80 and note.

[4] Richardson v. Borden, 42 Miss. 71 (1868); s. c. 2 Am. Rep. 599.

[5] Lawton v. Salmon, 1 H. Bl. 259 (1782).

[6] Wiltshear v. Cottrell, 1 E. & Bl. 674 (1853).

[7] D'Eyncourt v. Gregory, L. R. 3 Eq. Cas. 382 (1866); s. c. 36 L. J. Ch. 107; 15 W. R. 186.

[8] Witmer's Appeal, 45 Pa. St. 462 (1863); Rogers v. Gilinger, 30 Pa. St. 189 (1858); Heaton v. Findlay, 12 Pa. St. 307 (1849); Covey v. Pittsburgh, F. W. & C. R. Co., 3 Phila. (Pa.) 173 (1858); Lemar v. Miles, 4 Watts. (Pa.) 332 (1835); Morgan v. Arthurs, 3 Watts. (Pa.) 140 (1834); Voorhis v. Freeman, 2 Watts. & S. (Pa.) 119 (1841).

[9] See Rogers v. Crow, 40 Mo. 91 (1867); Jarechi v. Philharmonic Society, 79 Pa. St. 404 (1875); Vaughen v. Haldeman, 33 Pa. St. 522 (1859); Montague v. Dent, 10 Rich. (S. C.) L. 135 (1856); Sewell v. Angerstein, 18 L. T. N. S. 300 (1868).

[10] Lawrence v. Kemp, 1 Duer (N. Y.) 363 (1852); Wall v. Hinds, 70 Mass. (4 Gray), 256 (1855); Rogers v. Crow, 40 Mo. 91 (1867); Montague v. Dent, 10 Rich. (S. C.) 135 (1856); Ewell on Fixtures, 299; Tyler on Fixtures, 396, *et seq;* Brown on Fixtures, appx. A.

[11] 33 Pa. St. 522 (1859).

do not pass with the land, said that there is "really nothing to distinguish this new apparatus from the old lamps, candle sticks and chandeliers, which have always been considered as personal chattels. Gas stoves are largely used for bath and other rooms, and are necessarily connected with the gas pipes in the same way, but no one would think of saying that they are fixtures which it would be waste to remove. It is, therefore, more simple to consider all these gas fixtures, whether stoves, chandeliers, hall and entry lamps, drop lights or table lamps, as governed by the same rules as the article for which they were substituted;" and this decision was approved by the same court in the later case of Jarechi v. Philharmonic Society.[1] The supreme court of Missouri,[2] following the Pennsylvania cases, has held that the fixtures of a church are movable chattels.[3]

The doctrine laid down in these cases is evidently too broad, because gas fixtures may or may not become attached to the realty, and pass by a conveyance of the land, according to the particular circumstances of each case and the intention of the parties.[4] In a late case in New Jersey,[5] which was a suit between the mortgagee of chattels on certain premises and a subsequent mortgagee of the realty on which the chattels were situated, it was held that the gas burners were fixtures. The court held that they were in no sense furniture, but mere accessories to the building.[6]

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[1] 79 Pa. St. 404 (1875).

[2] Rogers v. Crow, 40 Mo. 91 (1867).

[3] This decision is apparently based upon the additional cases of Lawrence v. Kemp, 1 Duer (N. Y.) 363 (1852), and Wall v. Hinds, 70 Mass. (4 Gray), 256 (1855); but the court seems to have overlooked the fact that these were cases between landlord and tenant.

[4] Sewell v. Angerstein, 18 L. T. N. S. 300 (1868).

[5] Keeler v. Keeler, 31 N. J. Eq. (4 Stew.) 191 (1879).

In Johnson's Ex'rs v. Wiseman, 4 Met. (Ky.) 361 (1863), the court held that, "the question whether chattels are to be regarded as fixtures depends less upon their manner of acquisition to the freehold, than upon their own nature and their adaptation to the purposes for which they are used." See, sustaining this doctrine, McRea v. Central National Bank, 66 N. Y. 494 (1876); Hoyle v. Pittsburgh & M. R. R. Co., 54 N. Y. 314, 324 (1873); Voorhees v. McGinnis, 48 N. Y. 278, 324 (1872); Potter v. Cromwell, 40 N. Y. 287 (1869); Quinby v. Manhattan C. & P. Co., 24 N. J. Eq. (9 C. E. Gr.) 260 (1873).

While it is true that personal property attached to the land will be regarded as fixtures, where such is the manifest intention of the parties,[1] yet under certain circumstances such chattels remain personal property and may be removed without the consent of the owner of the land or those claiming under him; thus, where rails are built into a fence by a tenant under an agreement that he may remove them from the land, they are, it seems, as between such tenant and the owner of the soil, personal property.[2] It is proper to determine in a foreclosure suit a controversy between a mortgagee and the grantee of the mortgagor, as to the right of the latter to remove an erection made by him on the land, and the court may, by a provision in the judgment, in case the right is established, protect it by authorizing the removal of the building before the sale, or by providing that the sale shall be subject to the right.[3]

§ 428. **Fixtures where land leased for a term of years.** —As between a mortgagor and a mortgagee, fixtures placed upon land leased for a term of years, become a part of the realty and will pass under a mortgage of the land.[4] The rule in respect to what fixtures shall be deemed a part of the realty, is more liberally construed in favor of a mortgagor than in favor of a tenant holding under the mortgagor. All fixtures attached to the land and which are habitually used and enjoyed therewith, whether for the purposes of trade and manufacture or not, pass with the freehold; and as between the mortgagee and a tenant of the mortgagor, they are a part of the realty.[5] But it has been held that machinery attached to a building for manufacturing purposes and connected with the motive power by leather belts, and not otherwise annexed

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[6] See Hutchinson v. Kay, 23 Beav. 414 (1857), where the gas light was said to be a necessary part of a mill.

[1] See authorities cited above in this section.

[2] Mott v. Palmer, 1 N. Y. 564 (1848). See Ford v. Cobb, 20 N. Y. 344 (1859).

[3] Brown v. Keeney Settlement Cheese Assoc., 59 N. Y. 242 (1874).

[4] Day v. Perkins, 2 Sandf. Ch. (N. Y.) 359 (1845).

[5] Breese v. Bange, 2 E. D. Smith (N. Y.) 474 (1854). See Sands v. Pfeiffer, 10 Cal. 258 (1858); Sparks v. State Bank, 7 Blackf. (Ind.) 469 (1845); Fullam v. Stearns, 30 Vt. 443 (1857).

to the building than by screws holding it to the floor, which keep it steady while working, and which can be removed without injury to the machinery or building, is a chattel and not a part of the realty, and does not pass with the land under a mortgage.[1]

While it is true that all the cases upon this subject can not be reconciled, and that no rule can be stated in exact terms, which will furnish a clear guide for every case, yet the true doctrine, as established in New York and in other states, seems to be that, where the chattel, as attached to the realty, is useful and necessary to its enjoyment, and adds value thereto, and when detached loses its character and usefulness, then the chattel becomes a fixture and passes with the freehold. Applying this principle to the case of a factory, the wheel or engine which furnishes the motive power, and all that part of the gearing and machinery which has special relation to the building with which it is connected, would belong to the freehold, while an independent machine, like a loom, which, if removed, still remains a loom, and can be used as such wherever it is wanted and power can be applied to it, will retain its character as a chattel. With the rule, as thus stated, a majority of the cases coincide.[2]

It is stated as a rule of law in respect to mills and manufactories, that in the absence of custom or agreement, anything that can be removed without injury to itself or to the freehold, is a chattel and does not pass with the conveyance of the realty.[3] Thus, machines and such articles as may be used in any other building, as well as in that in

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[1] Murdock v. Gifford, 18 N. Y. 28 (1858).

[2] Vanderpoel v. Van Allen, 10 Barb. (N. Y.) 157 (1850); Cresson v. Stout, 17 Johns. (N. Y.) 116, 117 (1819); Swift v. Thompson, 9 Conn. 63 (1831); Gale v. Ward, 14 Mass. 352 (1817); Teaff v. Hewitt, 1 Ohio St. 511 (1853); Powell v. Monson, 3 Mason C. C. 459 (1824).

[3] See Voorhees v. McGinnis, 48 N. Y. 283 (1872); Walker v. Sherman, 20 Wend. (N. Y.) 636, 657 (1839); Wade v. Johnston, 25 Ga. 331 (1858); Richardson v. Copeland, 72 Mass. (6 Gray), 536 (1856); Hill v. Sewald, 53 Pa. St. 274 (1866); Sweetzer v. Jones, 35 Vt. 317 (1862); Fullam v. Stearns, 30 Vt. 443 (1857); Hill v. Wentworth, 28 Vt. 436 (1856); Walmsley v. Milne, 7 C. B. N. S. 115 (1859).

which they are placed, are ordinarily deemed to be chattels, if they can be removed without injury to the freehold.[1]

§ 429. **Settlement of equities between mortgagees.**— In an action of foreclosure the court may adjust all rights and equities between incumbrancers. The rights and equities of the parties are sometimes as much affected by the order in which separately encumbered pieces of land are to be sold, as by the determination which is the primary and which the auxilliary security. Thus, it has been held that where one holds a mortgage on real estate to secure the payment of money owing to him, and before the payment of the money secured by the mortgage, such mortgagee becomes indebted to the mortgagor on a book account, a junior incumbrancer, whether general or specific, of the mortgaged premises, will have a right to have such indebtedness applied in extinguishing the mortgage debt.[2] This right of a junior incumbrancer is absolute, and can not be defeated by the parties to the mortgage in the absence of equities in favor of the mortgagee.[3]

And where a mortgagor makes general advances to his mortgagee, although such advances may not be applied upon the mortgage by the parties, yet if they are such that the mortgagee would have the right to apply them as a satisfaction of the mortgage debt, a judgment recovered against the mortgagor by a third person will determine the application, so far as to give the judgment creditor a right to demand such set-off, and to compel a reduction of the amount of the prior mortgage, which right the parties to the mortgage can not defeat.[4]

Where a mortgagee has a lien upon several distinct parcels of land, and some of the lands still belong to the person who in equity ought to pay and discharge the debt, and other parcels have been sold by him, the lands still belonging

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[1] Vanderpoel v. VanAllen, 10 Barb. (N. Y.) 157 (1850); Swift v. Thompson, 9 Conn. 63 (1831); Gale v. Ward, 14 Mass. 352 (1817).

[2] Prouty v. Price, 50 Barb. (N.Y.) 344 (1867).

[3] Rosevelt v. Bank of Niagara, Hopk. Ch. (N. Y.) 579 (1825); aff'd 9 Cow. (N. Y.) 409.

[4] Bank of Niagara v. Rosevelt, 9 Cow. (N. Y.) 409 (1827), aff'g Hopk. Ch. (N. Y.) 579 (1825).

to such person are in equity first chargeable with the payment of the debt. And if the person who ought to pay the mortgage has conveyed the several parcels of the land upon which it is a lien at different times to *bona fide* purchasers, the lands, as between the purchasers, will be chargeable with the payment of the debt in the inverse order of their alienation,[1] on the principle that as between equal equities, he who is prior in time is strongest in right.[2] The first purchaser from the mortgagor will have a prior equity, although his consideration may not actually be paid until after the other portion of the lands is sold and paid for.[3]

§ 430. **Demand in answer for sale in inverse order of alienation.**—The rule that the lands are to be sold to satisfy the mortgage debt in the inverse order of their alienation, is not confined to the original alienation of the mortgagor who is personally liable for the debt. It is equally applicable to the several conveyances of the separate parcels of the mortgaged premises made at different times by his grantees who convey with a warranty.[4] And where there are general liens upon the whole land, and subsequent mortgages upon parts of such land, the parts of the land not covered by the subsequent mortgages are primarily chargeable with the prior liens covering the whole land, and the property so mortgaged is chargeable in the inverse order of the mortgages.[5]

And where mortgaged premises are sold subsequent to the date of the mortgage to different purchasers in parcels, such parcels, upon the foreclosure of the mortgage, are to be

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[1] Crafts v. Aspinwall, 2 N. Y. 289 (1849); Skeel v. Spraker, 8 Paige Ch. (N. Y.) 182 (1840). See Clowes v. Dickenson, 5 Johns. Ch. (N. Y.) 235 (1821); Gill v. Lyon, 1 Johns. Ch. (N. Y.) 447 (1815); Rathbone v. Clark, 9 Paige Ch. (N. Y.) 648 (1842); Schryver v. Teller, 9 Paige Ch. (N. Y.) 173 (1841); Guion v. Knapp, 6 Paige Ch. (N. Y.) 35 (1836); Gouverneur v. Lynch, 2 Paige Ch. (N. Y.) 300 (1830).

[2] Skeel v. Spraker, 8 Paige Ch. (N. Y.) 182 (1840). *Qui prior est tempore, potior est jure.* See James v. Morey, 2 Cow. (N. Y.) 246, 316 (1823); s. c. 14 Am. Dec. 475; Berry v. Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603 (1817).

[3] Gouverneur v. Lynch, 2 Paige Ch. (N. Y.) 300 (1830).

[4] Guion v. Knapp, 6 Paige Ch. (N. Y.) 35 (1836).

[5] Schryver v. Teller, 9 Paige Ch. (N. Y.) 173 (1841).

sold in the inverse order of their alienation, so as to protect the equitable rights of the defendants respectively, as between themselves, in reference to the payment of the mortgage which is a lien upon the equity of redemption in all the parcels.[1] This principle is also applicable to subsequent incumbrancers upon different parcels of the mortgaged premises either by mortgage, judgment or otherwise.[2]

The right of the subsequent grantee of a part of mortgaged premises, to have the different parcels charged with the debt in the inverse order of their alienation, is an equitable and not a strictly legal right, and is governed by the same principles upon which a court of equity protects the rights of sureties or those standing in the situation of sureties.[3]

The duties of the party who holds the incumbrance will not be affected, unless he is informed of the existence of facts upon which the right depends, or he has a sufficient notice of the probable existence of such a right, to make it his duty to inquire for the purpose of ascertaining whether any equities in fact exist.[4] Thus, the recording of a subsequent deed given by a mortgagor, is not constructive notice to the mortgagee of the equitable right of the grantee to have the residue of the mortgaged premises, not embraced in his deed, first charged with the payment of the amount due upon the mortgage.[5]

§ 431. Allegation of outstanding title or incumbrance. —In an action to foreclose a mortgage, the defendant will not be permitted to allege, by way of defence, that there is an outstanding title or incumbrance prior to the mortgage,[6] for it is a well settled principle that, where no fraud is

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[1] Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847); New York Ins. & Trust Co. v. Milnor, 1 Barb. Ch. (N. Y.) 353 (1846); Guion v. Knapp, 6 Paige Ch. (N. Y.) 35 (1836).

[2] Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847).

[3] Guion v. Knapp, 6 Paige Ch. (N. Y.) 35, 42 (1836). See Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151, 158 (1847).

[4] Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151, 159 (1847).

[5] Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151, 159 (1847); Guion v. Knapp, 6 Paige Ch. (N. Y.) 35, 42 (1836).

[6] Parkinson v. Sherman, 74 N. Y. 88 (1878); s. c. 30 Am. Rep. 268; Glenn v. Whipple, 12 N. J. Eq. (1 Beas.) 50 (1858); Van Waggoner v. McEwen, 2 N. J. Eq. (1 H. W. Gr.)

alleged, and where the grantee or the person claiming under him entered into possession on receiving the conveyance and continued in possession without disturbance, and the deed conveying the premises contains covenants of seizin and warranty,[1] in an action to foreclose a mortgage given to secure a part of the purchase money, the defendant can not have relief against the mortgage on the ground of an outstanding incumbrance or of a failure of title.[2] The defendant will be left to his remedy on the covenants in the deed.[3] The reason for this rule is that the incumbrance, if let alone, may never be asserted against the property, as it may be paid off or satisfied in some other way; it would then be inequitable that any part of the purchase money should be retained.[4]

§ 432. **When purchaser may set up outstanding title as a defence.**—Where there has been an imposition or fraud upon the purchaser by the vendor, through any willful

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412 (1841); Shannon v. Marselis, 1 N. J. Eq. (Saxt.) 413, 426 (1831). See Odell v. Wilson, 63 Cal. 159 (1883); Doss v. Ditmars, 70 Ind. 451 (1880).

[1] Edwards v. Bodine, 26 Wend. (N. Y.) 109 (1841).

But it seems that the rule will be otherwise, if the deed does not contain a covenant of warranty. Grant v. Tallman, 20 N. Y. 191 (1859); s. c. 75 Am. Dec. 374; Tallmage v. Wallis, 25 Wend. (N. Y.) 107 (1840).

[2] Parkinson v. Sherman, 74 N. Y. 88 (1878); s. c. *sub nom.* Parkinson v. Jacobson, 13 Hun (N. Y.) 317; York v. Allen, 30 N. Y. 104 (1864); Curtiss v. Bush, 39 Barb. 661 (1863); Burke v. Nichols, 34 Barb. (N. Y.) 430 (1861); s. c. 21 How. (N. Y.) Pr. 459; aff'd 2 Keyes (N. Y.) 670; Sandford v. Travers, 7 Bosw. (N. Y.) 498 (1860); Leggett v. McCarty, 3 Edw. Ch. (N. Y.) 124 (1837); Denston v. Morris, 2 Edw. Ch. (N. Y.) 37 (1833); Gouverneur v. Elmendorf, 5 Johns. Ch. (N. Y.) 79 (1821); Chesterman v. Gardner, 5 Johns. Ch. (N. Y.) 29 (1820); s. c. 9 Am. Dec. 265; Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817); s. c. 7 Am. Dec. 554; Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 213, 218 (1814); Banks v. Walker, 2 Sandf. Ch. (N. Y.) 344 (1845); Stahl v. Hammontree, 72 Ind. 103 (1880); Mahoney v. Robbins, 49 Ind. 146 (1874); Hulfish v. O'Brien, 20 N. J. Eq. (5 C. E. Gr.) 230 (1869); Hill v. Butler, 6 Ohio St. 207 (1856).

[3] Parkinson v. Sherman, 74 N. Y. 88, 92 (1878); s. c. 30 Am. Rep. 268; York v. Allen, 30 N. Y. 104 (1864); Curtiss v. Bush, 39 Barb. (N. Y.) 661 (1864). See Withers v. Morrell, 3 Edw. Ch. (N. Y.) 560 (1842); Glenn v. Whipple, 12 N. J. Eq. (1 Beas.) 50 (1858); Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817); s. c. 7 Am. Dec. 554; Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 213 (1814).

[4] Grant v. Tallman, 20 N. Y. 191, 195 (1859); s. c. 75 Am. Dec. 374.

misrepresentation or concealment, it will take the case out of the general rule and entitle the purchaser to redress in equity in addition to and beyond his covenants.[1] Where a tax deed is set up in an action to foreclose a mortgage, with a view to extinguishing the mortgage lien, the mortgagee will have a right to litigate the validity of the tax deed; and in such case a tender of the taxes paid will not be necessary.[2] And where the mortgagor has been evicted,[3] or an ejectment suit has been commenced against him on an outstanding title,[4] or the defendant has paid or discharged the incumbrance, or a part thereof,[5] the court will interfere,[6] and will enjoin a foreclosure until the action

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[1] Denston v. Morris, 2 Edw. Ch (N. Y.) 37 (1833). See Gouverneur v. Elmendorf, 5 Johns. Ch. (N. Y.) 79 (1821); Chesterman v. Gardner, 5 Johns. Ch. (N. Y.) 29 (1820); s. c. 8 Am. Dec. 265; Johnson v. Gere, 2 Johns. Ch. (N. Y.) 546 (1817); Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817); s. c. 7 Am. Dec. 554; Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 213 (1814). See also Legge v. Croaker, 1 Bal. & B. 506, 514 (1811).

[2] Hoffman v. Groll, 35 Kan. 652 (1886).

[3] Ryerson v. Willis, 81 N. Y. 277 (1880); Tallmage v. Wallis, 25 Wend. (N. Y.) 107 (1840); Price v. Lawton, 27 N. J. Eq. (12 C. E. Gr.) 325 (1876); Hile v. Davison, 20 N. J. Eq. (5 C. E. Gr.) 228 (1869); Glenn v. Whipple, 12 N. J. Eq. (1 Beas.) 50 (1858); VanWaggoner v. McEwen, 2 N. J. Eq. (1 H. W. Gr.) 412 (1841); Shannon v. Marselis, 1 N. J. Eq. (Saxt.) 413 (1831). Where there has been an eviction, and the purchaser is liable to the true owner for mesne profits to an amount equal to the sum demanded by his vendor, he may plead such facts in bar of an action for the breach as showing a total failure of consideration; whether a total or a partial failure of consideration by reason of defective title can be shown where the conveyance was with warranty and there has not been an eviction, *quære*. Tallmage v. Wallis, 25 Wend. (N. Y.) 107 (1840).

[4] Price v. Lawton, 27 N. J. Eq. (12 C. E. Gr.) 325 (1876); Hile v. Davison, 20 N. J. Eq. (5 C. E. Gr.) 228 (1869); Glenn v. Whipple, 12 N. J. Eq. (1 Beas.) 50 (1858); Van Waggoner v. McEwen, 2 N. J. Eq. (1 H. W. Gr.) 412 (1841).

[5] Grant v. Tallman, 20 N. Y. 191 (1859); s. c. 75 Am. Dec. 384; Coy v. Downie, 14 Fla. 544 (1874). It has been said that the court will not relieve against a mortgage, on the ground of any outstanding claim which the mortgagor for greater security to his title has paid off, without any judicial investigation or decision on such claim in a proceeding in which all proper persons were made parties and were called on to bring forward their title. Lee v. Porter, 5 Johns. Ch. (N. Y.) 268 (1821).

[6] It was held in Coy v. Downie, 14 Fla. 544 (1874), that the defendant, in an action to foreclose a mortgage,

in ejectment has been determined, even though the mortgage contains a power of sale not requiring a foreclosure by action.[1]

§ 433. **Payment of an outstanding claim by a purchaser as a defence.**—Where a defendant has paid and caused an incumbrance to be discharged to protect his title, he must show, in order to avail himself of such defence, either that what he paid was actually due, or that he had given notice to his vendor requiring him to satisfy the incumbrance within a limited time. Some of the authorities establish the rule, without any qualification, that the purchaser may set off or recover the amount paid by him to protect his title; but it seems reasonable that a vendor who has been innocent of any fraud should have an opportunity to correct the mistake, before being obliged to pay more than the amount actually due on the incumbrance.[2]

Thus, where the grantee of land was allowed to withhold part of the consideration for a specified time in order to take up an outstanding title, and, as a security for the money withheld, gave a mortgage to the vendor, in an action to foreclose the mortgage it was held, that it was no defence that in order to perfect his title he had paid the amount withheld to a person who claimed to have obtained a quit claim of the outstanding title, where it was neither averred in the answer nor shown by the proof that the claim on which the money was paid was valid or enforceable.[3]

§ 434. **Eviction as a defence.**—In an action to foreclose a mortgage given to secure part of the purchase money,

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may resist the foreclosure by recoupment or off-set of damages for a breach of the covenant to the extent of the damages sustained for the failure or partial failure of the title. But it has been questioned in Indiana whether there can be any defence by way of recoupment before an actual eviction. Church v. Fisher, 40 Ind. 145 (1872).

[1] Johnson v. Gere, 2 Johns. Ch. (N. Y.) 546 (1817); Edwards v Bodine, 26 Wend. (N. Y.) 109 (1841); Peters v. Bowman, 98 U. S. (8 Otto), 56 (1878); bk. 25 L. ed. 84. *Contra*, Platt v. Gilchrist, 3 Sandf. (N. Y.) 118 (1849).

[2] Grant v. Tallman, 20 N. Y. 191 (1859); s. c. 75 Am. Dec. 384; Richardson v. Tolman, 44 Mich. 379 (1880).

[3] Richardson v. Tolman, 44 Mich. 379 (1880).

where the defendant has been evicted from the premises under a paramount title, such eviction will afford a complete bar to the foreclosure.[1] To constitute an eviction, a forcible dispossession of the premises, or an actual physical expulsion, is not necessary.[2] An eviction can not be more than an ouster, and a constructive eviction will be as effective as an actual eviction.[3]

The peaceable surrender of property under and in pursuance of a judgment directing the delivery of possession in an action, which the mortgagor is unable to resist, constitutes an eviction,[4] and this may be accomplished without suffering an actual change of possession, as by the purchase of the property under the foreclosure of a prior incumbrance,[5] or by being compelled to purchase an outstanding paramount title in order to protect his interest.[6]

It was held at one time that to constitute an eviction "there must be a disturbance of the premises by legal process," but such is not now the rule; possession, without a struggle to maintain it, may be surrendered to persons holding a paramount title;[7] in such a case the burden will be

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[1] Coudrey v. Coit, 44 N. Y. 382 (1871); Curtiss v. Bush, 39 Barb. (N. Y.) 661 (1863); Banks v. Walker, 2 Sandf. Ch. (N. Y.) 344 (1845).

[2] Coudrey v. Coit, 44 N. Y. 382, 386 (1871); Dyett v. Pendleton, 8 Cow. (N. Y.) 727 (1826).

[3] Dyett v. Pendleton, 8 Cow. (N. Y.) 727, 731 (1826); Whitney v. Dinsmore, 60 Mass. (6 Cush.) 124, 126 (1850); Whitney v. Whiting, 44 Mass. (3 Metc.) 81 (1841); Sprague v. Baker, 17 Mass. 586 (1822); Hamilton v. Cutts, 4 Mass. 349 (1808); s. c. 3 Am. Dec. 222.

Lord Mansfield says: "Some ambiguity seems to have arisen from the term 'actual ouster,' as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary; but this is not so." Fisher v. Prosser, Cowp. 217 (1774).

[4] Coudrey v. Coit, 44 N. Y. 382 (1871).

[5] Coudrey v. Coit, 44 N. Y. 382 (1871). Tucker v. Cooney, 34 Hun (N. Y.) 227 (1884).

[6] Whitney v. Dinsmore, 60 Mass. (6 Cush.) 124 (1850). See Coudrey v. Coit, 44 N. Y. 382 (1871); Tucker v. Cooney, 34 Hun (N. Y.) 227 (1884); Loomis v. Bedell, 11 N. H. 74 (1840); Foote v. Burnet, 10 Ohio, 330 (1840); King v. Kerr, 5 Ohio, 158 (1831); Brown v. Dickerson, 12 Pa. St. 372 (1849); Stewart v. Drake, 8 N J. L. (4 Halst.) 139 (1827); Davenport v. Bartlett, 9 Ala. 179 (1846). See Bender v. Fromberger, 4 U. S. (4 Dall.) 436; bk. 1 L. ed. 898.

[7] Coudrey v. Coit, 44 N. Y. 382, 386 (1871); Simers v. Saltus, 3 Den. (N. Y.) 214, 217 (1846); Greenvault v. Davis, 4 Hill (N. Y.) 643, 645, 646 (1843).

on the defendant to show that the title to which he yielded possession was paramount. He can not voluntarily surrender the possession to one having no title and then set up the defence of an eviction.[1] And it has been held that an eviction may be established by proof that at the time of the purchase, the lands sold were actually occupied under a valid hostile title, so that the purchaser could not obtain possession of them, and that in consequence he never obtained actual possession.[2]

§ 435. **Defence of want of title.**—A defendant may plead as a defence to the foreclosure of a mortgage a want of or a defect in the title. Thus, where a person purchases land and gives his note secured by a mortgage for the whole or a part of the purchase price, but really acquires no interest in the land because of defects in the title of his vendor, in an action on the note and mortgage the defendant may set up such defects in his vendor's title as a bar to the action,[3] if the property was conveyed with covenants of warranty; but if the conveyance was made without covenants with regard to the title, the failure thereof is said to be no defence to an action upon the note given for the purchase money.[4]

Where a mortgage was given upon one tract of land to secure the purchase money of another tract, which latter tract the mortgagee covenanted by his bond to convey with covenants of warranty, in an action to foreclose such mortgage, the failure of the title of the vendor was said to be a good defence, upon the ground that the mortgagor undertook to pay the mortgage, only on condition that the mortgagee had a good title to the tract he agreed to convey.[5] It has been said, that upon principles of natural justice the

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[1] York v. Allen, 30 N. Y. 104 (1864).

[2] Withers v. Powers, 2 Sandf. Ch. (N. Y.) 350, note, (1842); Banks v. Walter, 2 Sandf. Ch. (N. Y.) 344 (1845).

[3] Frisbee v. Hoffnagle, 11 Johns. (N. Y.) 50 (1814); Tyler v. Young, 3 Ill. (2 Scam.) 444, 447 (1840); s. c. 35 Am. Dec. 116. See Dickinson v. Hall, 31 Mass. (14 Pick.) 217 (1833); Hunt v. Livermore, 22 Mass. (5 Pick.) 395 (1827). See *ante* § 431.

[4] Owinger v. Thompson, 4 Ill. (3 Scam.) 502, 508 (1842).

[5] Smith v. Newton, 38 Ill. 230 (1865).

defendant can not be required under such circumstances to pay for lands which can never be conveyed to him by the party contracting to convey.[1]

Where a note secured by a mortgage is negotiable in form, title to it may be passed by indorsement and delivery. In an action brought by an assignee of such a note to foreclose the mortgage, failure of title to a portion of the premises for which the note was given as a part of the purchase price, constitutes no defence if such assignee had no notice of such failure of title.[2]

§ 436. **Allegation of failure of title.**—Failure of title may be pleaded as a defence to an action to foreclose a mortgage, whether the failure is as to the whole or only as to a part of the property purchased;[3] and a failure of title may be shown although the deed contains covenants of warranty.[4] Where there is only a partial failure of title it will be a defence *pro tanto*.[5]

It has been held that in a suit upon a promissory note and and to foreclose a mortgage given for the purchase money of real estate, an answer attempting to set up a failure of title, but which does not set out a deed or any covenants therein, or allege fraud, is insufficient.[6] It is a general rule that a purchaser who has paid part of the purchase money, and given notes secured by a mortgage for the residue, will not be relieved against an action to foreclose such mortgage, on the ground of defect of title where there is no allegation

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[1] Tyler v. Young, 3 Ill. (2 Scam.) 444, 447 (1840); s. c. 35 Am. Dec. 116.

[2] Dutton v. Ives, 5 Mich. 515 (1858). See Stillwell v. Kellogg, 14 Wis. 461 (1861); Cornell v. Hichens, 11 Wis. 353 (1860); Croft v. Bunster, 9 Wis. 503 (1859).

[3] See Banks v. Walker, 2 Sandf. Ch. (N. Y.) 344 (1845); Pacific Iron Works v. Newhall, 34 Conn. 67, 77, 78 (1867); Robinson v. Wilson, 19 Ga. 505 (1856); Smith v. Newton, 38 Ill. 230 (1865); Conway v. Case, 22 Ill. 127 (1859); Tyler v. Young, 2 Scam. (3 Ill.) 444 (1840); s. c. 35 Am. Dec. 116.

[4] Banks v. Walker, 2 Sandf. Ch. (N. Y.) 344 (1845). See *ante* § 431.

[5] Pacific Iron Works v. Newhall, 34 Conn. 67, 77, 78 (1867); Avery v. Brown, 31 Conn. 398 (1863).

[6] Church v. Fisher, 40 Ind. 145 (1872). See McClerkin v. Sutton, 29 Ind. 407 (1868); Jenkinson v. Ewing, 17 Ind. 505 (1861); Woodford v. Leavenworth, 14 Ind. 311 (1860); Laughery v. McLean, 14 Ind. 106 (1860).

of fraud in the sale, and he has not been evicted.[1] In such cases the purchaser will be confined to his remedy at law upon the covenants contained in his deed.[2]

If there is an entire failure of title to the land conveyed and the purchaser is unable to obtain possession under it, such failure to obtain possession will constitute a defence to an action to foreclose a mortgage, given for the purchase price, and no personal judgment can be rendered in such action because of the failure of consideration, even in the absence of covenants of title in the deed of conveyance;[3] but it would seem that where the vendee acquires any title whatever under his purchase, or even possession, if there is no fraud, he can not have such relief.[4] And the fact that a purchaser who has obtained possession, has been sued by persons claiming title paramount to his deed, for the purpose of recovering such possession, will not constitute a defence to an action to foreclose a purchase money mortgage.[5]

§ 437. **Denial of title in mortgagor at time of executing mortgage.**—Generally a mortgagor in possession can not set up an outstanding title in a third person as a bar to a bill for the foreclosure of a mortgage; nor can a purchaser

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[1] Ryerson v. Willis, 81 N. Y. 277 (1880). See Platt v. Gilchrist, 3 Sandf. (N. Y.) 118 (1849); Conwell v. Clifford, 45 Ind. 392 (1873); Key v. Jennings, 66 Mo. 356, 368 (1877); Wheeler v. Standley, 50 Mo. 509 (1832); Glenn v. Whipple, 12 N. J. Eq. (1 Beas.) 50 (1858); Hill v. Butler, 6 Ohio St. 207 (1856); Darling v. Osborne, 51 Vt. 148 (1878); Booth v. Ryan, 31 Wis. 45 (1872). But compare Wilber v. Buchanan, 85 Ind. 42 (1882); Chambers v. Cox, 23 Kan. 393 (1880); Mendenhall v. Steckel, 47 Md. 453 (1877); Hall v. Gale, 14 Wis. 54 (1861).

[2] Ryerson v. Willis, 81 N. Y. 277, 280 (1880); Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817); s. c. 7 Am. Dec. 554; Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 213, 218 (1814); Patton v. Taylor, 48 U. S. (7 How.) 132 (1849); bk. 12 L. ed. 637.

[3] Shattuck v. Lamb, 65 N. Y. 499 (1875); Sandford v. Travers, 40 N. Y. 140 (1869); Banks v. Walker, 2 Sandf. Ch. (N. Y.) 344 (1845); aff'd 3 Barb. Ch. (N. Y.) 438; Withers v. Powers, 2 Sandf. Ch. (N. Y.) 350, note, (1842).

[4] Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519 (1817); s. c. 7 Am. Dec. 554.

[5] Miller v. Avery, 2 Barb. Ch. (N. Y.) 582 (1848). See Banks v. Walker, 2 Sandf. Ch. (N. Y.) 344 (1845); aff'd 3 Barb. Ch. (N. Y.) 438; Platt v. Gilchrist, 3 Sandf. (N. Y.) 118 (1849). *Contra*, Johnson v. Gere, 2 Johns. Ch. (N. Y.) 546 (1817).

in possession set up such outstanding title as a defence to a bill to enforce the vendor's lien for the purchase money, because each is alike estopped from denying the title asserted against him.[1] A mortgagor who has covenanted to defend the title against all adverse claims, is estopped from alleging title paramount in a third person.[2]

It would seem that in an action to foreclose a mortgage, the defendant may deny any title to the premises covered by the mortgage at the time it was executed,[3] especially where there is no recital of a particular fact forming an inducement for the contract, general words not being sufficient to create an estoppel. When the mortgagor conveys without title, but with covenants of warranty, he will be concluded, and an after acquired estate will pass to the mortgagee, not because the mortgagor had a title at the time of the execution of the mortgage, but because his deed will raise an equitable estoppel.[4]

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[1] Strong v. Waddell, 56 Ala. 471 (1876).

[2] Macloon v. Smith, 49 Wis. 200 (1880).

[3] See Sparrow v. Kingman, 1 N. Y. 242, 246 (1848); National Fire Ins. Co. v. McKay, 43 N. Y. Supr. Ct. (1 Sheld.) 138 (1867); Van Amburgh v. Cramer, 16 Hun (N. Y.) 205 (1878).

[4] Sparrow v. Kingman, 1 N. Y. 242, 246 (1848).

CHAPTER XXI.

PRACTICE ON FAILURE TO ANSWER—DEFAULT—PRACTICE ON TRIAL AFTER ISSUE JOINED.

REFERENCE TO COMPUTE AMOUNT DUE—POWERS AND DUTIES OF REFEREE—REPORT OF REFEREE—DECREE OF FORECLOSURE AND SALE—PROCEEDINGS ON TRIAL.

§ 438. Introductory.
439. When notice of motion for order of reference not necessary.
440. When such notice is necessary.
441. Upon what papers motion made.
442. What must be shown by the motion papers.
443. Reference to compute amount due—Who may be referee.
444. Contents of order—Whole amount due, and not due.
445. Contents of order—When infant and absentee defendants.
446. Miscellaneous matters in order of reference—Changing referee.
447. Proceedings on reference—General rules.
448. Who to prosecute reference—Service of order.
449. Examination on reference—Evidence.
450. Computing amount due—Statement of items—Allowance for repairs and payment of prior liens.
451. Computing amount on building and loan association mortgage—Fines and dues.
452. Allowance on reference of taxes and assessments paid by mortgagee.
453. Computing amount due on failure to pay taxes and assessments.
§ 454. Allowance of insurance premiums paid by mortgagee.
455. Powers and duties of referees—Generally.
456. Finding as to how property should be sold.
457. Conduct of reference—Discretion and authority of referee—Where reference to to be held.
458. Report of referee.
459. Filing and confirming referee's report—Exceptions thereto—New hearing.
460. Application for judgment—What must be shown.
461. Notice of application for judgment.
462. Decree of foreclosure and sale—Variations from referee's report.
463. Extent of relief granted by decree of sale.
464. Opening default—Power of court.
465. Proceedings on trial after issue joined—General rules.
466. Proceedings after issue joined—Where part only of the defendants have answered.
467. Proceedings after default or issue joined—Where some of the defendants are infants or absentees.
468. Proceedings where the bill is taken as confessed.

§ 438. **Introductory.**—In an action to foreclose a mortgage, if the defendants fail to answer within the time allowed

by law for that purpose, or the rights of the plaintiff, as stated in the complaint, are admitted by the answer, the plaintiff may apply for an order of reference to some suitable person to compute the amount due to him, and to such of of the defendants as are prior incumbrancers, and, where the whole amount secured by the mortgage is not due, to ascertain whether the mortgaged premises can be sold in parcels. If any of the defendants are infants who have put in a general answer by their guardian *ad litem*, or are absentees, the order of reference must direct the person to whom the cause is referred to take proof of the facts and circumstances stated in the complaint, to examine the plaintiff or his agent on oath as to any payments which have been made, and to compute the amount due upon the mortgage, preparatory to the application for a decree of foreclosure and sale of the premises.[1]

In an action to foreclose a mortgage, a judgment by default against one who was properly made a party to the action, and duly served with process, and required to answer as to any interest he might have or claim in the premises, will be conclusive as to any prior claim of interest or title adverse to the plaintiff.[2]

§ 439. When notice of motion for order of reference not necessary.—The order of reference, in an action for the foreclosure of a mortgage, generally known as the interlocutory order to compute the amount due upon default, is made *ex parte* and without notice to any one, if it appears from the papers presented to the court that no appearance has been made by any defendant.[3] A notice of motion for an order of reference can be dispensed with only in case no appearance has been made by any defendant; the motion is generally governed by the rules applicable to *ex parte* motions in other actions. It has been the practice for many years, according to the rule handed down from the court of chancery, in case a notice of motion is made for

[1] N. Y. Supreme Court Rule 60. See *post* § 445.

[2] Barton v. Anderson, 104 Ind. 578 (1885); s. c. 2 West. Rep. 679.

[3] N. Y. Supreme Court Rule 60.

the relief demanded in the complaint, or for judgment, to dispense with a separate notice of motion for an order of reference to compute the amount due on the mortgage.[1]

§ 440. **When such notice is necessary.**—A notice of motion for an order of reference must be served upon such of the defendants as have appeared in the action, at least eight days before the hearing of the motion. Failure to serve such notice is an irregularity for which the court may subsequently cause the order to be set aside, if objected to.[2] The motion is generally made without placing the cause on the calendar.[3] It must be made at a term of the court, and not before a judge at chambers; it must also be made in the district in which the property is located and in which the action is triable, or in an adjoining county.[4]

§ 441. **Upon what papers motion made.**—The motion for an order of reference is always based upon the pleadings, and upon an affidavit stating the facts, by reason of which the plaintiff claims to be entitled to the order of reference. The affidavit may be verified by the plaintiff or by any person who has a knowledge of the facts. The steps which have been taken in the action may be shown by the affidavit of the plaintiff's attorney or of the attorney's clerk.[5] If it is desired upon the motion to show the time of filing the complaint and the *lis pendens*, it may be done by affidavit or by the certificate of the county clerk.[6]

The affidavits of the persons who served the summons on the different defendants should accompany these papers. If service has been made by publication, or without the state, or by any form of substituted service, all of the papers showing

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[1] Kelly v. Searing, 4 Abb. (N. Y.) Pr. 354 (1857). This case reviews the history of the present N. Y. Supreme Court Rule 60, as transmitted from the rules of the court of chancery in force in 1844, being a substitute for rule 134 of that year; it also states the best practice upon default in foreclosure cases. But see Citizens' Savings Bank v. Bauer, 14 Civ. Proc. Rep. (N. Y.) 340, 343 (1888), holding that a separate notice of motion for judgment is necessary.

[2] N. Y. Supreme Court Rule 60; N. Y. Code Civ. Proc. § 780.

[3] N. Y. Supreme Court Rule 60.

[4] N. Y. Code Civ. Proc. § 769.

[5] N. Y. Supreme Court Rule 60.

[6] N. Y. Supreme Court Rule 60.

such service to be regular and complete, should accompany the motion papers, or at least be referred to therein as on file with the clerk of the court. All papers used upon the motion should be filed at the time of making the motion.

§ 442. **What must be shown by the motion papers.**—Upon an application for a reference to compute the amount due and for judgment of foreclosure and sale, it must appear that proper and complete service of the summons has been made upon each of the defendants,[1] or that they have appeared, and that the time allowed by law for serving an answer or demurrer has expired, and that the attorney of the plaintiff has not been served with a copy of an answer or of a demurrer. The affidavits should show that the bill is taken as confessed, and that the money secured by the mortgage is due and payable; also that a *lis pendens* with the complaint was filed at least twenty days prior to the application.[2] The affidavit of regularity,[3] which was required to be made by the solicitor of the complainant, under the chancery practice prior to the Code, is not necessary under the present practice.[4]

§ 443. **Reference to compute amount due—Who may be referee.**—Where a defendant interposes an answer raising a material issue, but fails to appear at the trial, the plaintiff can not have an order of reference to compute the amount due as upon default.[5] Where an answer sets up a defence, or what is claimed to be a defence, the correct practice, if no demurrer is interposed, and a motion is not made to strike out the answer as irrelevant, nor for judgment upon it as a frivolous pleading, is to place the cause upon the

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[1] An action can not be referred while any defendant against whom the plaintiff seeks to recover a judgment for deficiency has not been served with the summons, or has been served only with a notice of no personal claim, and has not appeared. Goodyear v. Brooks, 4 Robt. (N. Y.) 682 (1866); s. c. 2 Abb. (N. Y.) Pr. N. S. 296.

[2] N. Y. Supreme Court Rule 60.

[3] As to the requisites of the affidavit of regularity under the old practice, see Nott v. Hill, 6 Paige Ch. (N. Y.) 9 (1836).

[4] Laws of 1840, chap. 342, as amended by laws of 1844, chap. 346.

[5] Exchange Fire Ins. Co. v. Early, 4 Abb. (N. Y.) N. C. 78 (1878).

calendar, and at the trial to demand judgment upon the pleadings.[1]

The referee appointed in foreclosure cases to compute the amount due, or to sell the mortgaged premises, must be selected by the court; and the court can not appoint as such referee a person named by either of the parties to the action or by their attorneys.[2] Any suitable person may be appointed referee. It is not necessary that he should be an attorney, although the usual practice is to appoint an attorney or an attorney's clerk as referee;[3] yet it has been held that the court can not appoint as a referee to sell, the notary before whom the affidavit, upon which the application for the reference is based, was verified.[4]

§ 444. **Contents of order—Whole amount due, and not due.**—Where the whole amount secured by a mortgage is due, and none of the defendants are infants or absentees, the order of reference should simply direct a computation of the amount due to the plaintiff, and to such of the defendants as are prior incumbrancers of the mortgaged premises, if there are any such. The referee may also be required to compute the amount due on other mortgages set up in the answer, and to ascertain whether there are any prior liens upon such premises.[5] Such an order of reference is to be regarded as an interlocutory decree,[6] made by the court

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[1] Stuyvesant v. Browning, 33 N. Y. Supr. Ct. (1 J. & S.) 203, 207 (1871); Boyce v. Brown, 7 Barb. (N. Y.) 81 (1849); VanValen v. Lapham, 13 How. (N.Y.) Pr. 243 (1856). See N. Y. Supreme Court Rule 60.

[2] N. Y. Supreme Court Rule 61. It was held in White v. Coulter, 1 Hun (N. Y.) 357 (1874); s. c. 3 T. & C. (N. Y.) 608, that the appointment of a referee who is nominated by one of the parties in a mortgage foreclosure and approved by the other, is not an irregularity.

[3] No clerk, deputy clerk, or assistant clerk of any court of record, or of the surrogate's court of the counties of New York and Kings, shall be appointed referee in a mortgage foreclosure case under any order or judgment of any court, unless the parties to the action mutually agree to such referee. See Laws of 1876, chap. 205.

[4] Steward v. Bogart (N. Y. Sup. Ct.) 2 Month. L. Bull, 94 (1880).

[5] Chamberlain v. Dempsey, 36 N. Y. 144 (1867); s. c. 1 Trans. App. 257, reversing 9 Bosw. (N. Y.) 540; s. c. 15 Abb. (N. Y.) Pr. 1.

[6] Roberts v. White, 39 N.Y. Supr. Ct. (7 J. & S.) 272, 275 (1875). See Chamberlain v. Dempsey, 15 Abb. (N. Y.) Pr. 1 (1867); Johnson v.

and not by a judge in chambers, and is not appealable;[1] but as an order of reference is in aid of final judgment, an appeal from the final judgment will bring up for review all previous interlocutory orders and decrees.[2]

In cases where the whole amount secured by the mortgage has not become due, the order of reference should also require the referee "to examine and report whether the mortgaged premises can be sold in parcels."[3] Where the referee reports that the premises can be sold to advantage in parcels, he should also report the order in which the sale of parcels should be made, so that the court may direct the order in which such parcels shall be sold, so as to protect the rights of the different parties interested in the equity of redemption.[4]

§ 445. **Contents of order—When infant and absentee defendants.**—Where any of the defendants are infants or absentees, the order of reference, besides providing for the computation of the amount due, must also direct the referee to take proof of the facts and circumstances set forth in the complaint, and to report to the court the evidence taken before him.[5] The court is bound to protect the interests of infant litigants, whether represented by their guardians or not.[6]

Everett, 9 Paige Ch. (N. Y.) 656 (1842).

[1] Gray v. Fox, 1 N. Y. Code Rep. N. S. 334 (1852); Dickerson v. Mitchell, 19 Abb. (N. Y.) Pr. 286 (1865), Harris v. Mead, 16 Abb. (N. Y.) Pr. 257 (1863); Ubsdell v. Root, 3 Abb. (N. Y.) Pr. 142 (1856), McLean v. East River Ins. Co., 8 Bosw. (N. Y.) 700 (1861); Smith v. Dodd, 3 E. D. Smith (N. Y.) 348 (1854), Dean v. Empire Mut. Ins. Co., 9 How. (N. Y.) Pr. 69 (1853), Bryan v. Brennon, 7 How. (N. Y.) Pr. 359 (1853). But where an order of reference is directed in a case in which a reference is not authorized by law, it will be appealable. Crain v. Bradford, 4 Abb. (N. Y.) Pr. 193 (1857); Whitaker v. Dodgson, 7 Bosw. (N. Y.) 678, 680 (1861).

[2] Chamberlain v. Dempsey, 36 N. Y. 144 (1867); N. Y. Code Civ. Proc. § 1316.

[3] N. Y. Supreme Court Rule 60.

[4] See Erie Co. Savings Bank v. Roop, 48 N. Y. 292, 298 (1872); Ferguson v. Kimball, 3 Barb. Ch. 616 (1848); Rathbone v. Clark, 9 Paige Ch. 648 (1842); Jumel v. Jumel, 7 Paige Ch. 591 (1839).

[5] Wolcott v. Weaver, 3 How. (N. Y.) Pr. 159 (1847); N. Y. Supreme Court Rule 60.

[6] Sheahat v. Wayne Circuit Judge, 42 Mich. 69 (1879). General guardians do not represent their infant wards in foreclosure proceedings, and the solicitors of the guardians can not bind the rights of the infants, nor can guardians *ad litem* bind the infants, except in such proceedings

Where a non-resident defendant has not been personally served with the summons, and does not appear in the action, a judgment can not be rendered against him, except on the report of the referee as to the truth of the facts and circumstances stated in the complaint.[1]

The evidence required of the plaintiff to establish the allegations of his complaint must be legal proof; secondary evidence will not be sufficient.[2] Where an order has been made, upon the pleadings and upon affidavits in a mortgage foreclosure, appointing a referee to compute the amount due, and to inquire into the facts and circumstances set forth in the plaintiff's complaint, such referee can not receive an affidavit verified before a commissioner of deeds as evidence of any such facts.[3] But the testimony on such a reference, being in the nature of affidavits, a husband and wife may testify in behalf of each other.[4]

Where any of the defendants are infants or non-appearing absentees, the order of reference, besides providing for the computation of the amount due and for taking proof of the facts and circumstances alleged in the complaint, should also require that the referee examine the plaintiff, or his agent, under oath, as to any payments which have been made on the mortgage debt.[5] In cases where proofs have been taken in chief, prior to entering an order of reference, upon a proper application made to the court, permission will be granted to the plaintiff to use such proofs upon the reference against an absentee.[6]

§ 446. **Miscellaneous matters in order of reference—Changing referee.**—An order of reference to compute the amount due, and to take proof of the facts and circumstances alleged in the complaint, and to examine the defendant, or his agent, as to any payments that have been made, should

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with the rules for their protection. Sheahan v. Wayne Circuit Judge, *supra*.

[1] Corning v. Baxter, 6 Paige Ch. (N. Y.) 179 (1836).

[2] Wolcott v. Weaver, 3 How. (N. Y.) Pr. 159 (1847).

[3] Security Fire Ins. Co. v. Martin, 15 Abb. (N. Y.) Pr. 479 (1863).

[4] Laing v. Titus, 18 Abb. (N. Y.) Pr. 388 (1864).

[5] N. Y. Supreme Court Rule 60.

[6] Corning v. Baxter, 6 Paige Ch. (N. Y.) 178 (1836).

define the duties of the referee and limit the scope of the reference, and should also require him to report the proofs and evidence taken before him.[1] An order of reference to compute the amount due, granted against a non-answering defendant, should not combine with it a reference of the whole issue as to other defendants who contest the plaintiff's claims. They are separate proceedings, and their union in the same order will be irregular as to the non-answering defendant, though regular as to the contesting defendants.[2]

Where there has been a reference in a mortgage foreclosure to compute the amount due, to take proof of the facts and circumstances alleged in the complaint, and to examine the plaintiff or his agent on oath as to payments, the matter can not be withdrawn from the referee named without a special order of the court;[3] and such an order will not be granted, unless it is made to appear that there are special reasons therefor, such as the inability of the referee, because of illness or pressure of private business, to proceed with reasonable dispatch in hearing and determining the matter referred to him, or that there has been unreasonable delay on the part of the referee to proceed with the examination, or that he has adjourned the proceedings for an unreasonable length of time, against the wishes of a party to the suit,—either of which reasons will be a sufficient cause to justify a change of a referee.[4]

§ 447. **Proceedings on reference—General rules.**—The proceedings on a reference in a mortgage foreclosure, are, in general, similar to those on other interlocutory references, and

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[1] Wolcott v. Weaver, 3 How. (N. Y.) Pr. 159 (1847).

[2] Cram v. Bradford, 4 Abb. (N. Y.) Pr. 193 (1857). See *post* § 466.

[3] But it seems that where a referee is appointed by the court, and by stipulation of the parties, without an order from the court, another person is substituted in the place of the referee originally appointed, such substituted referee will possess all the powers of the one originally appointed. Chatfield v. Hewlett, 2 Dem. (N. Y). 191, 196 (1882), citing Nason v. Luddington, 56 How. (N. Y.) Pr. 172 (1878); Leaycroft v. Fowler, 7 How. (N. Y.) Pr. 259, 260 (1852); Whalen v. Board of Supervisors, 6 How. (N.Y.) Pr. 278 (1851).

[4] Forrest v. Forrest, 3 Bosw. (N. Y.) 650 (1859). See Rathbun v. Ingersoll, 34 N. Y. Supr. Ct. (2 J. & S.) 211, 214 (1872).

are governed by the same rules. The referee should be duly sworn before entering upon his official duties,[1] unless the parties, being of full age and competent, either by written stipulation or orally, expressly waive such oath.[2] Such waiver should be entered in the minutes of the referee.[3] Should the referee fail to take the oath prescribed, it will be an irregularity; but such irregularity will be deemed waived, if the parties proceed with the reference without objection.[4]

§ 448. Who to prosecute reference—Service of order. —The order appointing a referee in a foreclosure is his commission to act, and until such order has actually been entered, and a certified copy served upon him, he should not proceed with the reference, for the validity of all his proceedings will depend entirely upon the extent and scope of the order from which he derives his authority.[5]

It is the general rule that the party who obtains an order of reference, is entitled to the prosecution thereof in the first instance, unless the court in making it commits the prosecution to some other party; but where both parties are alike interested, the plaintiff's counsel will be entitled to

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[1] It has been held that a referee to compute the amount due in a foreclosure, should take the oath of office prescribed by § 1016 of the N. Y. Code of Civil Procedure. Exchange Fire Ins. Co. v. Early, 4 Abb. (N. Y.) N. C. 78 (1878); s. c. 54 How. (N. Y.) Pr. 279. See Browning v. Marvin, 5 Abb. (N. Y.) N. C. 285 (1878). But it is said in McGowan v. Newman, 4 Abb. (N. Y.) N. C. 80 (1878), that no oath of office is required from a referee appointed under and in pursuance to § 1215 of the N. Y. Code of Civil Procedure; that the provisions of § 1016 of the Code, relate solely to referees appointed as prescribed in that section, which relates to trials without jury, and are applicable to cases where issue is joined, but can not be extended so as to apply to referees appointed under § 1215.

[2] Exchange Fire Ins. Co. v. Early, 4 Abb. (N. Y.) N. C. 78 (1878).

[3] Malcolm v. Foster, 5 N. Y. Week. Dig. 310 (1877); Browning v. Marvin, 5 Abb. (N. Y.) N. C. 285 (1878). *In re* Vilmar, 10 Daly (N. Y.) 15 (1878).

[4] See Malcolm v. Foster, 5 N. Y. Week. Dig. 310 (1877); Bucklin v. Chapin, 53 Barb. (N. Y.) 488 (1868); Bonner v. McPhail, 31 Barb. (N. Y.) 111 (1860); Garcie v. Shelden, 3 Barb. (N. Y.) 232 (1848); Keator v. Ulster & Delaware Plank Road Co., 7 How. (N. Y.) Pr. 41 (1851).

[5] Bonner v. McPhail, 31 Barb. (N. Y.) 106, 116 (1860). See Bucklin v. Chapin, 53 Barb. (N. Y.) 488, 494 (1868).

prosecute the reference in the first instance.[1] Should the party entitled to prosecute the reference in the first instance, neglect to proceed within a reasonable time after the entry of the order, any person interested in the reference may apply to the court for an order requiring the party entitled to prosecute it, to show cause why such prosecution should not be taken from him and committed to another.[2]

§ 449. **Examination on reference—Evidence.**—Where in an action of foreclosure an order has been granted upon the pleadings and affidavits, appointing a referee to compute the amount due, to examine the plaintiff as to payments, and to take proof of the facts and circumstances alleged in the bill, the referee has no discretionary powers, but must be confined to the scope and authority of the order appointing him; he can not go into an examination of the plaintiff as to any facts except those relating to payments on the mortgage, nor can he examine an absent defendant in behalf of his co-defendant as to any defence set up in an answer.[3]

On a reference, on default in a mortgage foreclosure, to compute the amount due and to take proof of the facts and circumstances stated in the complaint, the referee should require legal proof of every fact embraced in the subject of the reference; secondary evidence is inadmissible.[4] He can not receive an affidavit verified before a commissioner of deeds as evidence of the amount due on the mortgage, or of any other fact to be established;[5] but he may receive the recital of the bond in the mortgage set out in the complaint as evidence of its execution, if the bond has been lost.[6] On a reference

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[1] Quackenbush v. Leonard, 10 Paige Ch. (N. Y.) 131 (1843).

[2] Such was the practice in the former court of chancery. See Quackenbush v. Leonard, 10 Paige Ch. (N. Y.) 131 (1843); Holley v. Glover, 9 Paige Ch. (N. Y.) 7 (1841); N. Y. Chancery Rule 101; such also is the established English practice, Powell v. Wallworth, 2 Madd. Ch. 436 (1817); and as the Code of Civil Procedure contains no provision inconsistent therewith, such, doubtless, is still the correct practice.

[3] McCrackan v. Valentine Ex'rs., 9 N. Y. 43 (1853).

[4] Wolcott v. Weaver, 3 How. (N. Y.) Pr. 159 (1847).

[5] Security Fire Ins. Co. v. Martin, 15 Abb. (N. Y.) Pr. 479 (1863).

[6] Cooper v. Newland, 17 Abb. (N. Y.) Pr. 342 (1863); Knickerbocker Life Ins. Co. v. Hill, 16 Abb. (N. Y.) Pr. N. S. 321 (1875). The proper

to compute the amount due in a foreclosure, the testimony of the witnesses need not be signed by them.[1]

Where there are infant or absentee defendants, and the plaintiff or his agent is to be examined on oath by the referee as to any payments that may have been made on the bond and mortgage, the examination of the witnesses should be full and exhaustive.

§ 450. **Computing amount due—Statement of items—Allowance for repairs and payment of prior liens.**—Upon a reference to compute the amount due upon a bond and mortgage, the referee is not limited by the penalty of the bond. Where the principal and interest exceed such penalty, the mortgagee has a lien upon the whole land for the amount of principal and interest due, according to the conditions of the mortgage, although such amount may exceed the penalty of the bond.[2] The burden of showing that the amount due and unpaid on the mortgage under foreclosure is less than the plaintiff claims, is on the defendant.[3]

In computing the amount due in a mortgage foreclosure, the referee is not obliged to set out the several items constituting the sum found due, because they will be covered by the general finding, although not stated in detail. In Sidenberg v. Ely,[4] objection was taken to the refusal of the referee to specify the several sums which constituted

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practice as to the method of proving the bond and mortgage on the reference in a mortgage foreclosure, is discussed by counsel with full citations in Knickerbocker Life Ins. Co. v. Hill, 16 Abb. (N. Y.) Pr. N. S. 321, 323 (1875).

[1] N. Y. Supreme Court Rule 30.

[2] Mower v. Kip, 6 Paige Ch. (N. Y.) 88 (1836); s. c. 29 Am. Dec. 748. See Griffiths v. Hardenbergh, 41 N. Y. 464, 471 (1869); Lyon v. Clark, 8 N. Y. 148, 153 (1853); Smedes v. Houghtaling, 3 Cai. (N. Y.) 49 (1805); s. c. 2 Am. Dec. 250; Moffat v. Barnes, 3 Cai. (N. Y.) 49, note, (1802); Clark v. Bush, 3 Cow. (N. Y.) 151 (1824); Lyon v. Hall, 1 E. D. Smith, (N. Y.) 250 (1851); State v. Wayman, 2 Gill & J. (Md.) 254 (1830); Harris v. Clap, 1 Mass. 308 (1805); s. c. 2 Am. Dec. 27; Tenant's Ex'rs v. Gray, 5 Munf. (Va.) 494 (1817); Perit v. Wallis, 2 U. S. (2 Dall.) 252 (1796); bk. 1 L. ed. 370. *Contra*, United States v. Arnold, 1 Gall C. C. 348 (1812); Lonsdale v. Church, 2 T. R. 388 (1817); Holdipp v. Otway, 2 Saund. 106 (1670).

[3] Lyon v. McDonald, 51 Mich. 436 (1883).

[4] 90 N. Y. 257 (1882); s. c. 43 Am. Rep. 163; s. c. 11 Abb. (N. Y.) N. C. 354.

the gross sum set out in his findings, and the court held that such refusal was not error. It was held in this case, that "these items are covered by the general finding, and it was not necessary to state them specifically; nor does the request made embrace facts material to the issue and the proper disposal of the case."

A mortgagee in possession before foreclosure, who purchases or pays off an outstanding lien for the purpose of protecting his possession, may be allowed what he has paid with legal interest and no more.[1] And where a mortgagee pays taxes and other prior claims to protect his lien, he can not be allowed more than the statutory rate of interest on such advances, as against a junior incumbrancer in a foreclosure proceeding, though he may have an agreement with the mortgagor for interest at the rate of ten per centum.[2]

It was held in Barthell v. Syverson,[3] that the cost of repairs made upon the mortgaged premises by a mortgagee, can not be added to the mortgage debt. This was a case in which the plaintiff held a mortgage on a flouring mill, which was out of repair; the plaintiff took out a defective piece of machinery and replaced it with a new piece. The court held that the plaintiff could not tack the amount paid for such machinery to his mortgage, and have the same made a charge on the real estate. The reason for this is that the mortgagee can not tack to his mortgage debts not secured thereby, and require their payment.[4] A mortgagee in possession after a sale on foreclosure is not entitled to compensation for repairs and improvements.[5]

§ 451. Computing amount on building and loan association mortgage—Fines and dues.—Mortgages to building and loan associations are governed by the laws relating to and governing mortgages generally, but in such mortgages there are usually conditions for the payment of fines and

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[1] Comstock v. Michael, 17 Neb. 288 (1885).

[2] Butterfield v. Hungerford, 68 Iowa, 249 (1885).

[3] 54 Iowa, 160 (1880).

[4] Bacon v. Cottrell, 13 Minn. 194 (1868).

[5] Marshall v. Stewart, 80 Ind. 189 (1881).

dues in accordance with the by-laws and regulations of the associations.

In an early case in New York,[1] it was held that a mortgage to a building and loan association, in the usual form, is a valid security only for the monthly payments stipulated to be made, and not for fines and other dues. It is a well settled rule of law that penalties agreed upon for the breach of a contract are illegal.[2] And it has been said, that there is nothing in the character of building and loan associations to except them from the doctrine of equity, applicable to other cases of penalty for the non-payment of money, which prohibits the enforcement and collection of such fines and penalties.[3]

It has been said that a covenant to pay "all fines imposed by the articles of the association," does not make such articles a part of the mortgage and does not authorize the court to consider them in construing it; because, in case of a foreclosure and sale, the court can not look beyond the mortgage itself to ascertain the sum due, unless the rules and articles of the building and loan association are made a part of the mortgage, or so referred to in it as to call the attention of the court to them.[4] But it seems that where a mortgage makes no mention of fines or of any liability to pay them, if the mortgagor has actually paid such fines, he can not recover them back; and in an action brought to foreclose, he will not be entitled to have them applied towards the satisfaction of the mortgage.[5]

But it was held in the Juniata Building and Loan Association v. Mixell,[6] that where a married woman unites with her husband in executing a mortgage on her separate property to secure a loan for her husband, which he, as a

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[1] Hamilton Building Assoc. v. Reynolds. 5 Duer (N. Y.) 671 (1856).

[2] Ocmulgee Building & Loan Assoc. v. Thomson, 52 Ga. 427 (1874).

[3] Mulloy v. Fifth Ward Building Assoc., 2 Mc. & Ar. (D. C.) 594, 597 (1876).

[4] Robertson v. American Homestead Assoc., 10 Md. 397 (1851).

[5] Clarksville Building & Loan Assoc. v. Stephens, 26 N. J. Eq. (11 C. E. Gr.) 351 (1875).

[6] 84 Pa. St. 313 (1877).

stockholder, procured from a building and loan association, it is a valid mortgage on her separate property under the married woman's act of 1859, and covers the premiums due from her husband, as such stockholder, and also the fines incurred by reason of default in the payment of dues, although under the act of 1859 a married woman's mortgage of her separate estate to a building and loan association to secure the payment of her own debt could bind her property only to the extent of the amount actually advanced with interest.[1] It is held in some of the states and in England, however, where a fine is imposed by a building and loan association, when a borrowing member becomes in arrears in the payment of his dues, that such fine is imposed as interest and not by way of penalty, and that the above rule of equity will not entitle the borrowing member to relief.[2]

§ 452. Allowance on reference of taxes and assessments paid by mortgagee.—Where the owner of mortgaged premises neglects or refuses to pay the taxes or assessments imposed thereon, which he should pay,[3] the owner or the holder of the mortgage may pay such taxes to protect his security,[4] although there may be no clause in the mortgage

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[1] Wolbach v. The Lehigh Building Assoc., 84 Pa. St. 211 (1877).

[2] See Ocmulgee Building & Loan Assoc. v. Thomson, 52 Ga. 427 (1874); Shannon v. Howard Mut. Assoc. 36 Md. 383 (1872); Juniata Building & Loan Assoc. v. Mixell, 84 Pa. St. 313 (1877); Parker v. Butcher, L. R. 3 Eq. 762 (1867); s. c. 36 L. J. Ch. 552; Matterson v. Fiderfield, L. R. 4 Ch. App. 207 (1869); s. c. 20 L. T. N. S. 503; 33 J. P. 326; 17 W. R. 422; Thompson v Hudson, L. R. 2 Ch. App. 255 (1867).

[3] The owner of an undivided half interest in real estate is under no obligations to one to whom he has mortgaged his said one-half interest to pay the whole tax levied upon the premises, but is bound to pay only one-half thereof, and in case the mortgagee pays the whole of the tax in order to preserve his lien, he will be allowed to recover only one-half of the amount so paid from the proceeds of the sale arising upon a foreclosure of his mortgage. Weed v. Hornby, 35 Hun (N. Y.) 580 (1885).

[4] Sidenberg v. Ely, 90 N. Y. 257 (1882); s. c. 43 Am. Rep. 163; Kepley v. Jansen, 107 Ill. 79 (1883); Broquet v. Sterling, 56 Iowa, 357 (1881); Leitzbach v. Jackman, 28 Kan. 524 (1882); Walton v. Hollywood, 47 Mich. 385 (1882); Southard v. Dorrington, 10 Neb. 122 (1880).

permitting him to do so;[1] and where a mortgagee pays such taxes and redeems the property from a tax sale, he will be subrogated to the rights of the state and will be entitled to a lien on the mortgaged premises for the amount of the taxes thus paid, in addition to the amount of his mortgage.[2] To give the owner of a mortgage this right, it is not necessary for him to wait until the premises are sold, or offered for sale, for such taxes and assessments, before paying the same.[3]

His claim, however, must be enforced as a part of the mortgage debt and not by an independent action against the mortgagor, as for money paid to his use, or under a claim of subrogation to the lien of the state or municipality,[4] because money paid by the holder of a mortgage to redeem the premises from a tax sale does not constitute a lien apart from the mortgage, but will be discharged when the mortgage is satisfied; and whether the amount paid is or is not included in the sum for which the mortgage is foreclosed, no subsequent or separate proceeding can be maintained against the mortgagor to enforce its payment.[5]

Even the owner of an invalid mortgage is entitled to a lien upon the premises for taxes paid by him upon the same.[6] And where a subsequent mortgage lien is cut off by the foreclosure of a prior mortgage, if the amount paid for taxes has been added to the latter incumbrance, the lien therefor will not be extinguished with the mortgage.[7] On a

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[1] Sidenberg v. Ely, 90 N. Y. 257 (1882); s. c. 43 Am. Rep. 163.

[2] Sidenberg v. Ely, 90 N. Y. 257 (1882); s. c. 43 Am. Rep. 163; Faure v. Winans, Hopk. Ch. (N. Y.) 283 (1824); s. c. 14 Am. Dec. 545; Sharp v. Thompson, 100 Ill. 447 (1881); Broquet v. Sterling, 56 Iowa, 357 (1881); Baker v. Clark, 52 Mich. 22 (1883); Walton v. Hollywood, 47 Mich. 385 (1882); Horrigan v. Wellmuth, 77 Mo. 542 (1883). Whether taxes paid by a mortgagee upon the property, in the absence of an agreement, can be tacked to the mortgage debt, is questioned in Barthell v. Syverson, 54 Iowa, 160 (1880).

[3] Sidenberg v. Ely, 90 N. Y. 257 (1882); s. c. 43 Am. Rep. 163; Williams v. Townsend, 31 N. Y. 414 (1865); Eagle Fire Ins. Co. v. Pell, 2 Edw. Ch. (N. Y.) 631 (1836).

[4] Horrigan v. Wellmuth, 77 Mo. 542 (1883); Young v. Brand, 15 Neb. 601 (1884).

[5] Vincent v. Moore, 51 Mich. 618 (1883).

[6] Aultman v. Jenkins, 19 Neb. 209 (1886).

foreclosure the mortgagee will not be entitled to recover taxes paid on a tract of land not covered by the mortgage;[1] neither will the mortgagee or the assignee of a mortgage be entitled to recover as taxes paid by himself or his agent, sums expended in purchasing the mortgaged premises at a tax sale.[2] And where a mortgagee in possession suffers the land to be sold for taxes, he will not be permitted to recover on foreclosure, the amount paid by him to redeem from such sale, but only the actual amount of the taxes with interest.[3]

§ 453. Computing the amount due on failure to pay taxes and assessments.—In computing the amount due, where the owner of the mortgaged property has failed to pay taxes, assessments or liens of a like nature imposed upon it, and the mortgagee or the assignee of the mortgage has paid them in order to protect his security, the referee should include the amount thus paid with interest, and add it to the mortgage debt in his report as to the amount due.[4]

If the referee should find that the mortgage is upon an undivided one-half interest in real estate, and that the mortgagee, in order to protect his lien, has paid the tax or assessment levied against the whole premises, he should allow the mortgagee only one-half of the tax so paid, in computing

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[1] Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113 (1881).

[1] Crane v. Aultman Taylor Co., 61 Wis. 110 (1884).

[2] Maxfield v. Willey, 46 Mich. 253 (1881). See Williams v. Townsend, 31 N. Y. 411 (1865); however, a contrary doctrine was held in Allison v. Armstrong, 28 Minn. 276 (1881); s. c. 41 Am. Rep. 281.

[3] Moshier v. Norton, 100 Ill. 63 (1881).

[4] Sidenberg v. Ely, 90 N. Y. 257, 263 (1882); s. c. 43 Am. Rep. 163; 11 Abb. (N. Y.) N. C. 354; Robinson v. Ryan, 25 N. Y. 320, 327 (1862); Eagle Fire Ins. Co. v. Pell, 2 Edw. Ch. (N. Y.) 631, 634 (1834); Faure v. Winans, Hopk. Ch. (N. Y.) 283 (1824); s. c. 14 Am. Dec. 545; Brevoort v. Randolph, 7 How. (N. Y.) Pr. 398 (1853); Burr v. Veeder, 3 Wend. (N. Y.) 412 (1829). See Williams v. Townsend, 31 N. Y. 411, 414 (1865); Dale v. McEvers, 2 Cow. (N. Y.) 118 (1823); Sharp v. Thompson, 100 Ill. 447 (1881); Waterson v. Devoe, 18 Kan. 223 (1877); Sharp v. Barker, 11 Kan. 381 (1873); Stanclift v. Norton, 11 Kan. 218 (1873); Leland v. Collver, 34 Mich. 418 (1876); Johnson v. Payne, 11 Neb. 269 (1881).

the amount due, because the mortgagor is under no obligations to the person to whom he has mortgaged his interest in such real estate, to pay the whole of the tax or assessment levied against the premises, but is bound to pay only one-half thereof.[1] Where the referee finds that the mortgage is upon a lease-hold interest, and that the mortgagor has covenanted to pay the rent charges, but has failed to do so, and that to protect his interest, the mortgagee has been compelled to pay the same, he should allow the amount thus paid in computing the amount due on the mortgage.[2]

§ 454. Allowance of insurance premiums paid by mortgagee.—Where a mortgage contains a clause requiring the mortgagor to keep the premises insured for the benefit and protection of the mortgagee, and agreeing that in case of his failure to do so the mortgagee shall have the right to insure the same, all moneys paid by the mortgagee for insurance, because of the mortgagor's failure to procure insurance, will be a charge upon the premises and collectible under the mortgage;[3] and the moneys so paid may be included in the amount of the judgment of foreclosure, even though the insurance was taken for the full term of the mortgage.[4] But in an action to foreclose, in the absence of a supplemental complaint, the plaintiff will not be entitled to recover moneys paid for insurance premiums after the commencement of the action.[5]

In the absence, however, of an express agreement on the part of the mortgagor to keep the mortgaged premises insured for the benefit and protection of the mortgagee, the

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[1] Weed v. Hornby, 35 Hun (N. Y.) 580 (1885).

[2] Catlin v. Grissler, 57 N. Y. 363 (1874); Robinson v. Ryan, 25 N. Y. 320 (1862). If the stipulation of the mortgagor to pay rent charges does not appear on the face of the mortgage, the mortgagee will not be entitled to enforce his rights under such agreement, as against subsequent *bona fide* grantees without notice. See Robinson v. Ryan, 25 N. Y. 320 (1862); St. Andrew's Church v. Tompkins, 7 Johns. Ch. (N. Y.) 14 (1823); Frost v. Beekman, 1 Johns. Ch. (N. Y.) 288 (1814).

[3] Neale v. Albertson, 39 N. J. Eq. (12 Stew.) 384 (1885); Overby v. Fayettville Building & Loan Assoc., 81 N. C. 56 (1879).

[4] Walton v. Hollywood, 47 Mich. 385 (1882).

[5] Washburn v. Wilkinson, 59 Cal. 538 (1881).

premiums paid by him for insurance against fire can not be charged upon the mortgaged premises; and on a reference to compute the amount due in such a case, the referee can not allow any premiums paid by the mortgagee for insurance.[1] In an early case[2] in New York, it was held that "insurance stands on a different footing from taxes, as it may be effected by the mortgagee for his own security. But taxes are a legal charge upon the estate, not upon the mortgagee."

§ 455. Powers and duties of referees — Generally.— The general powers and duties of a referee appointed to compute the amount due on a mortgage, to examine the plaintiff or his agent as to any payments made on the mortgage debt, and to take proof of the facts and circumstances stated in the complaint in a foreclosure suit, not being prescribed by the Code of Civil Procedure nor provided for by the rules of practice, and being the same powers as were formerly possessed and exercised by a master in chancery, the referee in his proceedings will be governed by the rules and the former practice of the court of chancery, as far as they are applicable under the Code.[3] It is the duty of the referee "to report the proofs and examinations had before him,"[4] that the court may make such order thereon as shall be just. It will not be sufficient for the referee simply to report the result of his examination of the witnesses, or his own conclusions from the evidence; but the proofs, whether documentary or oral, should be fully reported to the court.[5]

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[1] Faure v. Wymans, Hopk. Ch. (N. Y.) 283 (1824), s. c. 14 Am. Dec. 545.

[2] Faure v. Wymans, Hopk. Ch. (N. Y.) 283 (1824); s. c. 14 Am. Dec. 545.

[3] Ketchum v. Clark, 22 Barb. (N. Y.) 319 (1856). See Palmer v. Palmer, 13 How. (N. Y.) Pr. 363 (1856); VanZant v. Cobb, 10 How. (N. Y.) Pr. 348 (1854); Graves v. Blanchard, 4 How. (N. Y.) Pr. 300 (1850).

[4] Wolcott v. Weaver, 3 How. (N. Y.) Pr. 159 (1847). Bayles says, however, that the referee is no longer required to report the evidence had before him, and that he should simply state his conclusions of fact, and not give the evidence on which such conclusions are based. See Bayles' Pr. 15, 419; also N. Y. Supreme Court Rule 40.

[5] Wolcott v. Weaver, 3 How. (N. Y.) Pr. 159 (1847).

It has been said that the referee should perform his duty as though he were an examiner; and where, under such an order, a report was made which did not set out a certificate of acknowledgment by the mortgagor of the execution of the mortgage, but merely referred to the mortgage by a brief statement of its date and conditions, giving the names of the parties thereto, with the additional fact that it had been acknowledged by the mortgagor, the report was held defective, because it did not contain such a statement as was required by the statute to make it evidence of the execution of the mortgage by the defendant.[1]

§ 456. **Finding as to how property should be sold.**— Under an order of reference in foreclosure cases, if the whole amount secured by the mortgage is not due, it is the duty of the referee after computing the amount due on the mortgage, to ascertain whether the mortgaged premises are so situated that they can be sold in parcels, without injury to the interested parties.[2] Should the referee find that the property can not be sold in parcels, as he is bound to do in cases where it can not be divided to advantage, such finding will practically end his duties under the order.

But should he find that the mortgaged premises consist of distinct parcels of land, whose relative values are entirely independent of one another, he should so report; he should also report the order in which they can best be sold. Should the premises consist of a single tract of land, the referee may, under direction of the court, inquire whether such tract can be subdivided and sold in distinct parcels without impairing its aggregate value, and if so, in what parcels, or whether the premises are so situated that a sale of the whole in one parcel will be most beneficial to the parties interested. In other words, the duty of the referee under such an order will be to inquire and to report how the mortgaged premises may be sold so as to realize the largest sum.[3]

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[1] Wolcott v. Weaver, 3 How. (N. Y.) Pr. 159 (1847).

[2] N. Y. Supreme Court Rule 60.

[3] Gregory v. Campbell, 16 How. (N. Y.) Pr. 417 (1858). The sale of the whole premises in one parcel

Where the referee finds that the mortgage covers several lots owned separately by different defendants, he should report the order in which the sale should be made.[1]

§ 457. Conduct of reference—Discretion and authority of referee—Where reference to be held.—In computing the amount due, taking proof of the facts and circumstances alleged in the complaint, and in examining the plaintiff or his agent under oath, as to payments on the mortgage, in cases of default, it is within the discretion of the referee to determine how he will conduct the proceedings.[2]

Upon an ordinary reference to compute the amount due in a mortgage foreclosure, if the plaintiff claims priority, and the claim is denied by the defendant's answer, the referee will have no power or authority to examine into and to settle questions of priority between the parties; such questions must be left to be passed upon by the court upon the trial of the cause.[3]

Where a reference to compute the amount due is directed in a mortgage foreclosure, it is not necessary that it be executed in the county in which the venue of the action is placed.[4] Thus, where an action was commenced in Westchester county to foreclose a mortgage, and a reference to compute the amount due was made to the clerk of the court, who held the reference in Kings county where the court was sitting at the time, objection was made that the reference should have been executed in Westchester county where the action was triable, instead of in Kings county where the court was sitting. The court held that, "If the court has the power to devolve upon its clerk, or other suitable

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can be most beneficial to the parties only when the mortgagee will receive, and the mortgagor pay, from the sale thereof, the largest amount of the mortgage debt, or leave the largest surplus after payment of the whole debt.

[1] Bard v. Steele, 3 How. (N. Y.) Pr. 110 (1847).

[2] Pratt v. Stiles, 17 How. (N. Y.) Pr. 211, 223 (1859); s. c. 9 Abb. (N. Y.) Pr. 150, 157; Palmer v. Palmer, 13 How. (N. Y.) Pr. 363 (1856); McCarten v. VanSyckel, 10 Bosw. (N. Y.) 694 (1863).

[3] Harris v. Fly, 7 Paige Ch. (N. Y.) 421 (1839).

[4] Kelly v. Searing, 4 Abb. (N. Y.) Pr. 354, 357 (1857).

person, the duty of making this computation, in order to proceed at once to render judgment upon the main application, it can not be required that the clerk, or referee, must go to another county, it may be at the extremity of the district, to perform his duty. If he must, the very object of the reference is defeated. Instead of expediting, it will delay the proceedings."[1]

§ 458. **Report of referee.**—The referee, having computed the amount due and discharged the other duties required in the order of reference, must make a report thereof to the court as the basis for a judgment and decree of sale. The report of the referee should show the facts upon which his conclusions are based;[2] it should also contain the proofs and examinations had before him, and be accompanied by an abstract of the documentary evidence produced on the reference.[3]

On a reference in an action to foreclose a mortgage, the referee should report upon all the matters embraced in the order of reference. Thus, where the defendant in a foreclosure alleges numerous payments on account, exceeding the amount of the debt, and sets up a counter-claim for the balance due him, the referee should state an account between the parties.[4] But the referee should not report matters not fully within the issues referred to him. Thus, where in an action to foreclose a mortgage the defendant by counter-claim sets up a prior mortgage and seeks to have the priority established, to which there is filed a reply of general denial and payment, a special finding by the referee that the defendant's mortgage, although it describes the property embraced in plaintiff's mortgage, was not so intended, and a conclusion of law that it is not a prior lien, are not within the issues and are therefore irrelevant, and an exception thereto will be sustained.[5]

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[1] Kelly v. Searing, 4 Abb. (N. Y.) Pr. 354, 357 (1857).

[2] Wolcott v. Weaver, 3 How. (N. Y.) Pr. 159 (1847).

[3] Security Fire Ins. Co. v. Martin, 15 Abb. (N. Y.) Pr. 497 (1863). See *ante* § 455.

[4] Killops v. Stephens, 66 Wis. 571 (1886).

[5] Porter v. Reid, 81 Ind. 569 (1882).

On a reference to ascertain the facts, the report of the referee, to be sufficient, must clearly report all the facts pertinent to the issue. Thus, upon an issue as to whether one of the defendants had authority to execute a note and mortgage in the name of another, as her attorney in fact, a finding by the referee that the note and mortgage purported to be executed in the name of the latter by the former as her attorney in fact, and that the attorney assumed to be authorized to execute the note and mortgage, is not a sufficient finding of fact.[1]

On a reference to compute the amount due and to report as to the manner of the sale of the property, if the referee should find that a sale of the whole of the premises is necessary, he should also give the reasons upon which his opinion is founded. If he finds that the property should be sold in parcels, he must then state in his report the relative situation and value of the several parcels, and what part of the premises should be sold first, together with all the facts necessary to enable the court to render such judgment as will be most beneficial to the parties in interest.[2]

§ 459. **Filing and confirming referee's report—Exceptions thereto—New hearing.**—Upon the coming in of the report of the referee, it must be filed with the clerk; a note of the day of filing should also be entered in the proper book under the title of the cause or proceeding, and notice of the filing must be given to the attorneys for such of the parties as were entitled to notice of the execution of the reference.[3] Such report shall become absolute and stand confirmed in all things, unless exceptions thereto are filed within eight days after the service of notice of filing the same.[4]

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[1] Hibernia Sav. & Loan Soc. v. Moore, 68 Cal. 156 (1885).

[2] Ontario Bank v. Strong, 2 Paige Ch. (N. Y.) 301 (1830).

[3] Somers v. Milliken, 7 Abb. (N. Y.) Pr. 524 (1858). See Chamberlain v. Dempsey, 36 N. Y. 144 (1867); Morgan v. Stevens, 6 Abb. (N. Y.) N. C. 356 (1878); American Exchange Bk. v. Smith, 6 Abb. (N. Y.) Pr. 1 (1857). See N. Y. Supreme Court Rule 30.

[4] N. Y. Supreme Court Rule 30. See Kelly v. Searing, 4 Abb. (N. Y.) Pr. 354 (1857). In the case of Somers v. Millken, 7 Abb. (N. Y.) Pr. 524

If any party is dissatisfied with the report of the referee appointed to compute the amount due in a mortgage foreclosure, he may file exceptions to the report, and the court may, on the evidence, overrule the computation of the referee.[1] Where any of the defendants desire to take exceptions to the computation and to the report of the referee, they should attend at the time appointed for the application for judgment, and present their objections to the court.[2] If exceptions are filed and served within the time required by the rule, or within such time as the court shall fix, they may be brought to a hearing at any special term thereafter, on notice by any party interested therein.[3]

The report of the referee appointed to compute the amount due and to take proofs, must be presented to the court at a special term thereof for confirmation.[4] Upon confirmation of the referee's report, his computation of the amount due becomes the act of the court, as fully as though originally made by the court itself.[5]

Where the reference to compute the amount due on a mortgage has been executed, either party may apply for an order directing a new hearing, upon proof by affidavit that an error has been committed to his prejudice, either upon the hearing or in the report. In a proper case the application may be granted even after judgment has been entered.

(1858), the attention of the court was called to the proper construction to be given to N. Y. Supreme Court Rule 32 (now Rule 30) in regard to filing reports of referees other than for the trial of issues. The court held: (1) that all such reports must be filed, and a note of the day of filing be made by the clerk; (2) that in all cases where any of the defendants appear, so as to be entitled to notice, such report can not be confirmed until eight days after service of notice of the filing of the same; (3) that all the parties who have appeared in the cause or proceeding, may consent in writing to waive the delay of eight days and have the same confirmed at once; (4) that in cases where no one appears for the defendant, the report may be presented to the court for the final order of confirmation and for judgment without waiting eight days. See Voorhis's Code (9th ed. 1867), 861, 862.

[1] Crine v. White, 1 Month. Law Bull (N. Y.) 92 (1879).

[2] 5 Wait Pr. 215, 216.

[3] N. Y. Supreme Court Rule 30.

[4] Swarthout v. Curtis, 4 N. Y. 415 (1850); s. c. 5 How. (N. Y.) Pr. 198.

[5] McGowan v. Newman, 4 Abb. (N. Y.) N. C. 80 (1878).

Where the application is granted after judgment, the judgment may be set aside either then or after the new hearing.[1]

§ 460. Application for judgment — What must be shown.—After the referee appointed to compute the amount due has made his report, the plaintiff is entitled to move for judgment.[2] The motion for judgment, if the suit is brought in the supreme court, must be made at a special term thereof, held within the judicial district in which the action is triable, or in a county adjoining that in which it is triable; except that where it is triable in the first judicial district, the motion must be made in that district.[3] The application for judgment in the first judicial district may be made to a judge out of court,[4] and the motion can not be made in the first judicial district where the action is triable elsewhere.[5]

Upon appointing a referee to compute the amount due in an action for the foreclosure of a mortgage, the court can not direct that, upon the coming in of the report of the referee, the same be confirmed and the plaintiff have the usual judgment of foreclosure and sale without further notice. Notice of motion for judgment is indispensable. In a recent case[6] it was held that, "No court can be certain in advance what will be the contents of a referee's report; and to direct that it shall be confirmed before it is made, is to go beyond the competent exercise of judicial authority. The question of the propriety of its confirmation can not be intelligently determined until it is laid before the court."

Upon an application for judgment upon default in an action to foreclose a mortgage, the plaintiff must show, by affidavit or otherwise, whether any of the defendants who have not appeared are absentees; and if any of them are absentees, he must produce the report of the referee as to the proof of the facts and circumstances stated in the complaint, and as to the examination of the plaintiff or his agent

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[1] See N.Y. Code Civ. Proc. § 1232.

[2] N. Y. Supreme Court Rule 60. See Citizens' Savings Bank v. Bauer, 14 Civ. Proc. Rep. (N. Y.) 340 (1888).

[3] N. Y. Code Civ. Proc. § 769.

[4] N. Y. Code Civ. Proc. § 770.

[5] N. Y. Code Civ. Proc. § 769.

[6] Citizens' Savings Bank v. Bauer, 14 Civ. Proc. Rep. (N. Y.) 340, 343 (1888).

on oath as to any payments which have been made, together with the papers upon which such order of reference was granted, or show that such papers have been filed with the clerk of the court.[1]

In every case when the plaintiff moves for final judgment of foreclosure and sale, he must show, by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, in due form of law as required by the rules and practice of the court, has been filed at least twenty days before such application for judgment, and at or after the time of filing the complaint as required by law.[2] And where there are infant defendants, the application should show the time of the appointment of the guardian *ad litem*, because a judgment by default can not be taken against an infant defendant, until the expiration of twenty days after the appointment of his guardian *ad litem*;[3] if such guardian has appeared or pleaded an answer, judgment may be taken without waiting twenty days.[4]

If service of the summons on any of the defendants was made by publication, the motion papers should show, in addition to the above matters, that service of the summons has been completed, and that all the requirements of the statute in regard to the publication of the summons have been fully complied with.[5]

§ 461. **Notice of application for judgment.**—Where no answer has been pleaded denying the material facts and allegations of the complaint, the motion for judgment may be made upon due notice to such of the defendants as have appeared in the action, without placing the cause upon the calendar.[6]

The court by ordering a reference to compute the amount due in a mortgage foreclosure, does not lose control of the

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[1] N. Y. Supreme Court Rule 60.

[2] N. Y. Supreme Court Rule 60; N. Y. Code Civ. Proc. § 1631.

[3] N. Y. Code Civ. Proc. § 1218.

[4] Newins v. Baird, 19 Hun (N.Y.) 306 (1879).

[5] N. Y. Code Civ. Proc. § 1216. See Kendall v. Washburn, 14 How. (N. Y.) Pr. 380 (1857); Hallett v. Righters, 13 How. (N. Y.) Pr. 43 (1856).

[6] N. Y. Supreme Court Rule 60.

main application; such reference may be immediately proceeded with and judgment rendered upon the report of the referee, without a new notice to a defendant who has appeared but has made default in pleading.[1]

In a mortgage foreclosure, judgment on default, where a reference has been directed and a report thereon has been made, follows as a matter of course. On application, the court will render such judgment as is proper, according to the proof submitted. In determining what the judgment should be, the court will not be limited to the report of the referee as the only evidence before it, but it may also look to the pleadings and receive their allegations in its discretion; it may also consider any stipulations, offers or admissions of the parties presented to it.

In the case of Gregory v. Campbell,[2] the court held that, "nothing is referred to a referee under these orders of reference except the questions relating exclusively to the material situation of the mortgaged premises, and how the same can be most advantageously sold, having reference to its condition, the demand for such property, and its relative value and saleableness in the market in the locality where it is situated. The report of the referee is a part of the evidence before the court, and upon which it is called upon to decide whether it will or will not be most beneficial to the parties to decree a sale of the whole premises in one parcel in the first instance. The court will look to the pleadings and will receive other evidence in its discretion, and will consider any stipulations or admissions of the parties, or of other persons, presented to it on the hearing."

§ 462. Decree of foreclosure and sale—Variations from referee's report.—In an action to foreclose a mortgage upon real property, when the plaintiff becomes entitled to final judgment, such judgment must direct the sale of the property mortgaged, or, if a part thereof will be sufficient to satisfy

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[1] Kelly v. Searing, 4 Abb. (N. Y.) Pr. 354 (1857). See Citizen's Savings Bank v. Bauer, 14 Civ. Proc. Rep. (N. Y.) 340 (1888).

[2] 16 How. (N. Y.) Pr. 417, 419 (1858).

the mortgage debt, the expenses of the sale, and the costs of the action, then that such part only be sold. The judgment may also direct the sale of the mortgaged premises, either as an entirety or in separate parcels, as the referee may have reported to be most advantageous; or that one part or parcel be sold first and that the remainder be left unsold, unless the sale of such remainder shall be necessary to pay the amount due, with the costs and expenses.[1] A judgment in a foreclosure, which includes also the foreclosure of mortgages prior in lien to the one upon which the action was brought, will be irregular and may be opened by the prior mortgagee, but the foreclosure of mortgages subsequent to the one sued upon will be valid and binding.[2]

Where in a foreclosure suit one judge settles and adjusts all the rights of the parties therein, and orders a reference to compute the amount due, and, after the report of the referee comes in, final judgment is rendered by a judge other than the one who first tried the case and settled the rights of the parties, such judgment will be as binding and valid as though rendered by the judge before whom the case was tried.[3]

It has been held that where, in an action brought to foreclose a mortgage, the referee's report states the amount due at the commencement of the action and also the amount due at the date of his report, before which latter date and after the commencement of the action a payment of the principal fell due under the provisions of the mortgage, and the judgment set forth the latter amount as due, the remedy of the defendant is by motion to correct the judgment and to conform the same to the report, and not by an appeal therefrom.[4]

§ 463. **Extent of relief granted by decree of sale.**—A judgment on default in a foreclosure suit can not be entered

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[1] N. Y. Code Civ. Proc. §§ 1626, 1636, 1637.

[2] McReynolds v. Munns, 2 Keyes (N. Y.) 214 (1865). See Adams v. McPartlin, 11 Abb. (N. Y.) N. C. 369 (1882).

[3] Chamberlain v. Dempsey, 36 N. Y. 144 (1867); s. c. 1 Trans. App. 257, reversing 9 Bosw. (N. Y.) 540; s. c. 15 Abb. (N. Y.) Pr. 1.

[4] Walbridge v. James, 4 Hun (N. Y.) 793 (1875); aff'd 66 N. Y. 639.

for a larger amount than the complaint shows to be due,[1] but if an answer is pleaded, the court may permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issues.[2] A judgment on default, which grants to the plaintiff relief not demanded in the complaint, will be void as unauthorized;[3] it is not enough to state the facts entitling the plaintiff to the relief, but he must specifically demand it.[4] In a decree on default in a mortgage foreclosure a judgment for deficiency can not be rendered, unless it has been specially demanded in the complaint.[5] It has been held that a plaintiff in a mortgage foreclosure is not entitled, under the Code of Civil Procedure,[6] to a contingent personal judgment against any of the defendants before final judgment of foreclosure, nor until the referee to sell has made his final report.[7]

In an action to foreclose a mortgage, where only a part of the sum secured is due and payable at the time of the commencement of the action, the court may make a decree of sale to recover not only the sum due at the time the complaint was filed, but also such other sum as may have become due at the time of making the decree.[8] Thus, where a mortgage secures two or more promissory notes, all of which are not due at the time of the commencement of the action, the court may include in the judgment and decree

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[1] Savings & Loan Society v. Horton, 63 Cal. 105 (1883); Zwickey v. Haney, 63 Wis. 464 (1885).

[2] N. Y. Code Civ. Proc. § 1207.

[3] Grant v. VanDercook, 8 Abb. (N. Y.) Pr. N. S. 455 (1869); s. c. 57 Barb. (N. Y.) 165; 2 Alb. L. J. 52; Simonson v. Blake, 12 Abb. (N. Y.) Pr. 331 (1861); Bullwinker v. Ryker, 12 Abb. (N. Y.) Pr. 311 (1861); Swart v. Boughton, 35 Hun (N. Y.) 281 (1885).

[4] Simonson v. Blake, 12 Abb. (N. Y.) Pr. 331 (1861); s. c. 20 How. (N. Y.) Pr. 484; Swart v. Boughton, 35 Hun (N. Y.) 281 (1885). See Bullard v. Sherwood, 85 N. Y. 253 (1881), reversing s. c. 22 Hun (N. Y.) 462; Peck v. New York & N. J. R. Co., 85 N. Y. 246 (1881).

[5] Simonson v. Blake, 12 Abb. (N. Y.) Pr. 331 (1861); s. c. 20 How. (N. Y.) Pr. 484; Swart v. Boughton, 35 Hun (N. Y.) 281 (1885).

[6] §§ 1204, 1205, 1206.

[7] Cobb v. Thornton, 8 How. (N. Y.) Pr. 66 (1852).

[8] Asendorf v. Meyer, 8 Daly (N. Y.) 278 (1879); Johnson v. Van Velsor, 43 Mich. 208 (1880). See Walbridge v. James, 66 N. Y. 639 (1876), aff'g 4 Hun (N. Y.) 793.

such as fall due after the commencement of the action and before the decree is rendered.[1]

On a bill to foreclose a mortgage on an undivided interest in land, the court will have no power in its decree to nullify, reverse or modify a decree of sale in an action for the partition of the same land, where no such purpose is indicated in the bill, and the parties to the partition are not brought before the court for that purpose.[2]

§ 464. **Opening default—Power of court.**—There is no question but that a court of equity has power, in a proper case, to open a judgment taken by default, and to allow an answer to be made if the defendant has a meritorious defence ;[3] this may be done either before judgment is entered or afterwards.[4]

Although equity is ever ready to receive the excuses of a mortgagor, and to open a foreclosure where there is any good reason for the default,[5] yet it has long been the established practice in this state not to set aside a regular judgment entered upon default in a foreclosure suit, or in any other case, where the defendant has any interest or inducement to delay the proceedings, unless the application is made upon affidavits excusing failure to answer, accompanied by an affidavit of merits;[6] in such a case the defendant must either produce the sworn answer which he proposes to plead, so that the court may see that he has a meritorious defence *prima facie*, or he must, in his affidavit, state the

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[1] Bostwick v. McEvoy, 62 Cal. 496 (1882); Hanford v. Robertson, 47 Mich. 100 (1881).

[2] Thompson v. Frew, 107 Ill. 478 (1883).

[3] Foster v. Udell, 2 N. Y. Code Rep. 30 (1849); Allen v. Ackley, 2 N. Y. Code Rep. 21 (1849); Salutat v. Downes, 1 N. Y. Code Rep. 120 (1848); Lynde v. Verity, 1 N. Y. Code Rep. 97 (1848); Clark v. Lyon, 2 Hilt. (N. Y.) 91 (1859); Ramsey v. Gould, 4 Lans. (N. Y.) 476 (1871).

[4] McGuin v. Cace, 2 Hilt. (N. Y.) 467 (1859); s. c. 9 Abb. (N. Y.) Pr. 160; Bogardus v. Livingston, 7 Abb. (N. Y.) Pr. 428 (1858); s. c. 2 Hill (N. Y.) 236; Sharpe v. Mayor, etc., 31 Barb. (N. Y.) 578 (1860); s. c. 19 How. (N. Y.) Pr. 193; Ellsworth v. Campbell, 31 Barb. (N. Y.) 134 (1860).

[5] Golden v. Fowler, 26 Ga. 451 (1858).

[6] Powers v. Trenor, 3 Hun (N. Y.) 3 (1874); Hunt v. Wallis, 6 Paige Ch. (N. Y.) 371, 377 (1837).

nature of his defence and his belief in the truth of the matters stated therein, so far at least as to enable the court to see that injustice would probably be done, if the judgment entered upon default were permitted to stand ;[1] and this early established rule of practice, not being inconsistent with any of the provisions of the Code of Civil Procedure, still continues in force.[2]

§ 465. Proceedings on trial after issue joined—General rules.—The trial of an action to foreclose a mortgage is conducted substantially the same as that of other actions tried by a court or a referee down to the entry of judgment.[3] Unless a reference is directed in a foreclosure suit, it can be tried only at a special term of the court held in the county in which the mortgaged premises are situated.[4] The provisions of the Code,[5] authorizing the adjournment of a special term of the court to the chambers of any justice of the court residing in the district, and an adjournment from time to time as the justice holding the same shall order and direct, does not authorize the transfer of the trial of a local action to another county, but was intended simply to facilitate the transaction of such business as might have been done in the county to which the term was adjourned.[6] Thus, where the trial of an action for the foreclosure of a mortgage upon real estate situated in the county of Westchester was adjourned by the judge holding the special term, to his chambers in Brooklyn, in the county of Kings, where he proceeded to try the action at the adjourned term in Brooklyn against the objection of the defendant, the appellate court held that this was error.[7]

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[1] Goodhue v. Churchman, 1 Barb. Ch. (N. Y.) 596 (1846); Winship v. Jewett, 1 Barb. Ch. (N. Y.) 173 (1845); Powers v. Trenor, 3 Hun (N. Y.) 3 (1874); Hunt v. Wallis, 6 Paige Ch. (N. Y.) 371, 377 (1837).

[2] N. Y. Supreme Ct. Rules 28, 85.

[3] Baylies' Tr. Pr. 341.

[4] Gould v. Bennett, 59 N. Y. 124 (1874); Birmingham Iron Foundry v. Hatfield, 43 N. Y. 224 (1870); N. Y. Code Civ. Proc. § 982. See Marsh v. Lowry, 26 Barb. (N. Y.) 197 (1857); Miller v. Hull, 3 How. (N. Y.) Pr. 325 (1848).

[5] N. Y. Code Civ. Proc. § 239.

[6] Gould v. Bennett, 59 N. Y. 124 (1874).

[7] Gould v. Bennett, 59 N. Y. 124 (1874).

In this case the counsel for the plaintiff insisted that the error in adjourning the trial to the judge's chambers, was obviated by the fact that the judge, after partly trying the case in Brooklyn, by taking a part of the testimony, adjourned the further proceedings in the trial to a special term, thereafter to be held in the county of Westchester, at which special term further testimony was taken and the judgment given. The court say: "This, so far from obviating the error, unless consented to, was an additional error. The court has no more authority to require parties, without their consent, to go with their witnesses from county to county, partially trying the case in each, in cases triable by the court without a jury, than it has, in cases triable by jury, to require the jurors to attend out of their county."

Where there is an issue, either of law or of fact, it must be disposed of before the plaintiff can proceed with the cause. If the defendant, having answered, fails to appear at the trial, an inquest must be taken by the court, or the whole issue must be referred.[1] But failure to appear at the trial can not be treated as equivalent to a failure to answer, or the same as a case in which a general answer is interposed by the guardian *ad litem* of an infant defendant.[2]

Where an action to foreclose a mortgage is tried by a court, and all the rights of the parties are adjudicated and settled, the court, instead of making the necessary computation to ascertain the amount due to the plaintiff, may order a reference for that purpose. and may also direct the referee to ascertain the amount due upon any mortgages set up in the answer and also to ascertain and report whether there are any prior liens by mortgage upon the premises, and if so, whether they are yet due.[3]

Where an issue has been joined as to all the defendants in an action to foreclose a mortgage, the action must be brought on for trial in the usual manner, and be heard and determined the same as other actions in equity.

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[1] Baylies' Tr. Pr. 341.

[2] Exchange Fire Ins. Co. v. Early, 4 Abb. (N. Y.) N C. 78 (1878).

[3] Chamberlain v. Dempsey, 36 N. Y. 144 (1867); Baylies' Tr. Pr. 342.

§ 466. Proceedings after issue joined — Where part only of the defendants have answered.— Where only a part of the defendants have answered, the trial must be by the court without a jury, unless a reference is ordered or a trial by jury specially directed, because issues of fact in mortgage foreclosures are not triable by a jury as a matter of right.[1] But where a mortgagee brings an action against the grantees of a mortgagor to recover the deficiency arising on the foreclosure of a mortgage, which they had by their deed covenanted and agreed to pay as part of the purchase price of the land, the action is one at law and is triable by a jury.[2]

In such a case, when the plaintiff notices the cause for trial, he should also give notice to all defendants who have appeared but who have not pleaded an answer, that he will apply at the same time for the relief demanded against them. He may then proceed to a trial of the issues raised by the pleas of those defendants who have answered, and he may at the same time produce the proofs necessary to entitle him to recover against the non-answering defendants. If, on such trial, the plaintiff proves the material facts stated in the complaint, and is examined upon oath as to the payments which have been made, the court may render final judgment without ordering a reference as against the non-answering defendants.

Where the answer of any defendant presents a defence to the plaintiff's claim, or any part of it, and no demurrer is interposed and no motion is made to strike it out as irrelevant, or for judgment upon it as frivolous, the proper practice is to have the case placed on the calendar for trial, and upon the hearing to obtain a decision on the issues presented.[3] He should then apply to the court for an order referring the cause to some suitable person to compute the amount

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[1] Baylies' Tr. Pr. 341. See N. Y. Code Civ. Proc. §§ 968, 969.

[2] Hand v. Kennedy, 83 N. Y. 149 (1880), aff'g s. c. 45 N. Y. Supr. Ct. (13 J. & S.) 385.

[3] Stuyvesant v. Browning, 33 N. Y. Supr. Ct. (1 J. & S.) 203 (1871), Baylies' Tr. Pr. 342. The proceedings provided for by N. Y. Supreme Court Rule 60, do not apply to such an answer.

due to the plaintiff and to such of the defendants as are prior incumbrancers, and, if the whole amount of the debt secured by the mortgage has not yet become due, to examine and report whether the mortgaged premises can be sold in parcels.[1] The reference in such cases is made for the information and convenience of the court, and without regard to the question whether any party has made default, or whether any of the defendants are infants or absentees.[2]

Where a verdict is rendered in his favor on the trial of the issues by a jury, or on the coming in of the referee's report, where the trial of the cause has been referred, the plaintiff may move for the usual order of reference as to the defendants who have not appeared, or who have not answered.[3] The plaintiff may expedite matters by having this reference made to the referee having charge of the issues of fact, so that one report may embrace both matters. In such a case the referee will be clothed with the double power of deciding the issues of fact, in which his decision will stand as the decision of the court, and of reporting the amount due and the other facts required by the rule;[4] upon the confirmation of the report and the motion for judgment, the court will still have to pass upon the questions of fact and the conclusions of law, as well as upon the proofs upon which the conclusions are founded.[5] It will be irregular to combine in one reference both the trial of the issues and the inquiry as to the facts and circumstances stated in the complaint, and to enter a judgment as of course upon the report, without application to the court for judgment against the non-answering or absentee defendants.[6]

Upon the coming in and the confirmation of the report of the referee appointed for that purpose, the court may direct the entry of the usual judgment of foreclosure and sale.[7]

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[1] Baylies' Tr. Pr. 341.

[2] Baylies' Tr. Pr. 342.

[3] Hill v. McReynolds, 30 Barb. (N. Y.) 488 (1859).

[4] N. Y. Supreme Court Rule 60.

[5] 2 VanSant. Pr. 98; Baylies' Tr. Pr. 342.

[6] Cram v. Bradford, 4 Abb. (N. Y.) Pr. 193 (1857). See Citizens' Savings Bank v. Bauer, 14 Civ. Proc. Rep. (N. Y.) 340, 343 (1888).

[7] Chamberlain v. Dempsey, 36 N. Y. 144 (1867); Baylies' Tr. Pr. 342.

§ 467. **Proceedings after default or issue joined—Where some of the defendants are infants or absentees.**—Where no proof of the material allegations in the complaint is made, because the issues involved do not require it, and there are infant or absentee defendants, a reference will be necessary to take proof of the facts and circumstances stated in the complaint.[1] The decision in such a case is merely interlocutory, determining only the issues involved and directing a reference. The same facts must be shown on the reference in such cases, as where there is a default.[2]

If the defendant is an infant and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference must also direct the referee to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made, and to compute the amount due on the mortgage preparatory to application for judgment of foreclosure and sale. After the referee has filed his report, the plaintiff will be in a position to apply for final judgment of foreclosure and sale.[3]

§ 468. **Proceedings where the bill is confessed.**—Where the bill is taken as confessed against all the defendants, or where no answer has been pleaded by any of them denying the material allegations of the complaint, the plaintiff may, when the cause is in readiness for a hearing as to all the defendants, apply for a final decree of foreclosure and sale on any regular motion day, either in vacation or during a regular term of the court, upon giving due notice to such of the defendants as have appeared in the suit. He need not have the case placed on the calendar.[4] This rule applies only to cases where the bill is taken as confessed, and does not authorize the complainant to apply for a decree on a motion day, where a plea or a demurrer to the bill has been filed in good faith.[5]

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[1] New York Supreme Court Rule 60.

[2] 1 Crary Pr. 301; 5 Wait Pr. 217. See *ante* §§ 447, 449.

[3] Cram v. Bradford, 4 Abb. (N. Y.) Pr. 193 (1857); Hill v. McReynolds, 30 Barb. (N. Y.) 488 (1859); N. Y. Supreme Court Rule 60.

[4] N. Y. Supreme Court Rule 60, 2 Barb. Ch. Pr. 182.

Where the defendant puts in a frivolous plea or demurrer, however, the complainant may, on a motion day, apply to have such plea or demurrer stricken out as frivolous, and for a final decree in the cause as upon default. To entitle him to this relief the complainant must give special notice to the defendants, that he intends to move for an order to strike out the plea or demurrer as frivolous and to take the bill as confessed and for a final decree thereon.[1] Where a bill is taken as confessed against any of the defendants, the complainant, at the hearing or when he moves for final decree, must show by affidavit or otherwise whether it is so taken against any of the defendants as absentees, and where it is, the complainant must produce the referee's report as to the proof of the facts and circumstances stated in the complaint, and as to the examination of the complainant or his agent on oath as to any payments which have been made.[2] But where the record in the case shows that personal service of process has been made upon each of the defendants, an affidavit showing that none of them are absentees will not be required.[3]

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[5] Bowman v. Marshall, 9 Paige Ch. (N. Y.) 78 (1841).

[1] Bowman v. Marshall, 9 Paige Ch. (N. Y.) 78 (1841).

[2] 2 Barb. Ch. 183.

[3] Manning v. McClurg, 14 Wis. 350 (1861).

CHAPTER XXII.

SALE OF MORTGAGED PREMISES.

DECREE OF SALE—OFFICER MAKING SALE—NOTICE OF SALE—TIME OF SALE—PLACE OF SALE—TERMS OF SALE—STAY OF SALE.

§ 469. Decree of sale—Generally.
470. Form and contents of decree of sale.
471. By what officer sale to be made—Employing auctioneer or deputy.
472. Sale in New York City—By whom.
473. Duties of officer making sale.
474. Discretion of the officer—Selling in parcels.
475. Notice of sale.
§ 476. Contents of notice of sale.
477. Publication of notice of sale.
478. When sale may be made—Hour of day.
479. Sale to be made at time advertised—Place of sale.
480. Terms and conditions of sale.
481. Conditions of sale sometimes published.
482. Sale on credit.
483. Order staying sale.

§ 469. Decree of sale—Generally.—The plaintiff having duly procured the judgment of foreclosure and sale, and entered the same, is entitled to proceed to have the mortgaged premises sold for the payment of his debt. A sale under such decree is, in contemplation of the law, the act of the court, although it may be made through the instrumentality of some officer designated by statute, or appointed by the court. When the sale is confirmed, it becomes the act of the court, or, in other words, is a judicial sale; but until such confirmation there is no judicial sale, and no title passes to the purchaser.[1] In New York, however,

[1] Thorn v. Ingram, 25 Ark. 52 (1867); Southern Bank v. Humphreys, 47 Ill. 227 (1868); Bozza v. Rowe, 30 Ill. 198 (1863); Penn v. Heisey, 19 Ill. 297 (1857); s. c. 68 Am. Dec. 597; Ayers v. Baumgarten, 15 Ill. 444 (1854); Young v. Keough, 11 Ill. 642 (1850); Forman v. Hunt, 3 Dana (Ky.) 614, 621 (1835); Hurt v. Stull, 4 Md. Ch. Dec. 391 (1851); Harrison v. Harrison, 1 Md. Ch. Dec. 331 (1848); Sewall v. Costigan, 1 Md. Ch. Dec. 208 (1848); Andrews v. Scotton, 2 Bland. Ch. (Md.) 629 (1825); Mullikin v. Mullikin, 1 Bland. Ch. (Md.) 538 (1824); Iglehart v. Arminger, 1 Bland. Ch. (Md.) 527 (1824); Wagner v. Cohen, 6 Gill (Md.) 97 (1847); Mason v. Osgood, 64 N. C. 467 (1870);

confirmation of the referee's report of sale is not necessary to pass title.[1]

The sale may be made by a master in chancery, a referee, trustee, commissioner or sheriff; and in the federal courts it is usually made by a United States marshal, or by a referee specially appointed for that purpose.[2] Whatever name may be given to the officer who makes the sale, he acts as the agent of the court, and must report his proceedings in the execution of its decrees. And it has been said that the sheriff, or other officer to whom the decree of sale is committed, may conduct the sale, though his term of office will expire before the sale can be completed.[3]

In this respect a sale under a mortgage foreclosure is different from an ordinary sheriff's sale on execution. The latter is a ministerial act in which the officer, and not the court, is regarded as the vendor; and when such a sale is made in conformity with law, it is valid and passes title to the purchaser.[4] But on a sale of mortgaged premises by a referee, all the proceedings, from the order appointing the referee up to the final confirmation of his report of sale, including the passing of title to the vendee, and the distribution of the proceeds of the sale to the persons entitled thereto, are under the direction and control of the court; and the court can stay the sale, or confirm or reject the referee's report, as law and justice may require.[5]

Vendaver v. Baker, 13 Pa. St. 121, 126 (1850); Moore v. Shultz, 13 Pa. St. 102 (1850); s. c. 53 Am. Dec. 446; Yerby v. Hill, 16 Tex. 377, 381 (1856); Griffith v. Fowler, 18 Vt. 394 (1846); Blossom v. Railroad Co., 70 U. S. (3 Wall.) 207 (1865); bk. 18 L. ed. 47; Minnesota R. R. Co. v. St. Paul Co., 69 U. S. (2 Wall.) 609 (1864); bk. 17 L. ed. 886; Williamson v. Berry, 49 U. S. (8 How.) 547 (1850); bk. 12 L. ed. 1170, 1192.

[1] See *post* § 525.

[2] Heyer v. Deaves, 2 Johns. Ch. (N. Y.) 154 (1816); Mayer v. Wick, 15 Ohio St. 548 (1864); Blossom v. Railroad Co., 70 U. S. (3 Wall.) 196, 205 (1865); bk. 18 L. ed. 43.

[3] Union Dime Savings Inst. v. Andariese, 19 Hun (N. Y.) 310 (1879); Cord v. Hirsch, 17 Wis. 403 (1863).

[4] Harrison v. Harrison, 1 Md. Ch. Dec. 335 (1848); Williamson v. Berry, 49 U. S. (8 How.) 495, 546 (1850); bk. 12 L. ed. 1170, 1191.

[5] Sessions v. Peay, 23 Ark. 39, 41 (1861). See Penn's Adm'r v. Tolleson, 20 Ark. 652 (1859); Robertson v. Haun, Freem. Ch. (Miss.) 270 (1839); Tooley v. Kane, 1 Smed. & M. Ch. (Miss.) 518, 522 (1842);

§ 470. **Form and contents of decree of sale.**—Under the New York practice, in mortgage foreclosures, the decree for the sale of the mortgaged premises must contain a description of the property to be sold, with its particular boundaries, so far as the same can be ascertained from the mortgage; and unless otherwise specially ordered by the court, the judgment should direct that the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action, as provided by the Code, be sold by and under the direction of the sheriff, or a referee appointed by the court;[1] that the plaintiff or any other party may become the purchaser at such sale; that the sheriff or referee appointed to make the sale, execute to the purchaser a deed of the premises sold; that out of the proceeds of the sale, unless otherwise directed, he pay all taxes, assessments and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute as prescribed by the Code;[2] and that he also pay to the plaintiff or to his attorney the amount of his debt, interest and costs, or so much thereof as the purchase money will pay, and that the purchaser at such sale be let into possession of the premises on production of the referee's deed.[3]

§ 471. **By what officer sale to be made—Employing auctioneer or deputy.**—The sale must be made by the sheriff of the county in which the mortgaged premises are situated, or by some person designated by the court for that purpose; and if not so made, the sale will be irregular. It

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Deaderick v. Smith, 6 Humph. (Tenn.) 146 (1845).

[1] N. Y. Code Civ. Proc. §§ 1626, 1676. The sale must also be made under the directions of the sheriff of the county in which the premises are situated, or of a person selected by the court for that purpose, according to the judgment. It is not, however, necessary that the sheriff or other person selected by the court should cry the sale in person; it will be sufficient if made by an auctioneer or some person employed for that purpose by such sheriff, or referee, in his presence and under his direction. Heyer v. Deaves, 2 Johns. Ch. (N. Y.) 154 (1816). See *post* § 471.

[2] N. Y. Code Civ. Proc. § 1676.

[3] N. Y. Supreme Court Rule 61.

has been said that the death of the plaintiff, after a regular decree of sale has been entered in a mortgage foreclosure, will not affect the power of the sheriff or referee to proceed with the sale of the premises, in pursuance of the decree or judgment, and to execute a deed to the purchaser; it will not be necessary to revive the action and to bring in the representatives of the deceased plaintiff as parties.[1]

Under the former chancery practice in New York, every sale of mortgaged premises under a decree of foreclosure was required to be made by a master in chancery, or by some one selected by him in his presence and under his immediate direction. The constitution of 1846 abolished the office of master in chancery, and the Judiciary Act[2] of the following year provided that any matter before referred to a clerk, master or referee, might be referred to a clerk, county judge or other suitable person or persons, with the same powers formerly possessed by masters in chancery.

Under these provisions it was customary, when any controversy arose or was likely to arise between the parties, as to the order in which different portions of the premises should be sold, to appoint a referee to make the sale, instead of the sheriff.[3] A sale and a conveyance of the real estate by such referee was governed by § 77 of the Judiciary Act until the year 1851, when, for the purpose of obviating any questions which might arise concerning the power of a referee to sell,[4] § 287 of the New York Code of Procedure[5] was adopted, providing that where real property was decreed to be sold, it must be sold in the county where it is situated by the sheriff of that county, or by a referee appointed by the court specially for the purpose of making the sale.

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[1] Lynde v. O'Donnell, 21 How. (N. Y.) Pr. 34 (1861); s. c. 12 Abb. (N. Y.) Pr. 286. See also Center v. Billinghurst, 1 Cow. (N. Y.) 33 (1825); Cleve v. Veer, Cro. Car. 450 (1625).

[2] § 77.

[3] Knickerbacker v. Eggleston, 3 How. (N. Y.) Pr. 130 (1847).

[4] It was held in an early case under the Code, that a foreclosure sale might be made by a referee as well as by a sheriff; Jennings v. Jennings, 2 Abb. (N. Y.) Pr. 7, 17 (1855); Knickerbacker v. Eggleston, 3 How. (N. Y.) Pr. 130 (1847).

[5] See New York Code Civ. Proc. § 1242.

The sale on a mortgage foreclosure must be made by the officer designated by the court, or by some one selected by him to act under his supervision,[1] or it will be void.[2] Thus, where a sale was directed to be made by a master in chancery residing in New York city, and a sale was made by a master residing in Brooklyn, the sale was set aside, although the purchaser had taken his deed.[3] And a sale made by a person deputized by the officer authorized to make such sale will be irregular, if made in the absence of such officer.[4]

§ 472. **Sale in New York City—By whom.**—It is provided by statute,[5] that all sales of real estate made in the counties of New York and Kings, under the judgment or decree of a court in actions for foreclosure, shall be made by the sheriff, except where both parties to the suit agree upon a referee to be appointed by the court. This law was passed to take the place of the law of 1869, chap. 569, which was declared unconstitutional and was of doubtful validity.[6]

§ 473. **Duties of officer making sale.**—The duties of a referee appointed to sell in a mortgage foreclosure,[7] are purely ministerial in their nature, and he can not vary the judgment in prescribing the terms of sale, nor relieve himself thereby from the performance of his duties.[8] It is his duty

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[1] Heyer v. Deaves, 2 Johns. Ch. (N. Y.) 154 (1816); Gould v. Garrison, 48 Ill. 258 (1868). See Reynolds v. Wilson, 15 Ill. 394 (1854); s. c. 60 Am. Dec. 753; Blossom v. Milwaukee & C. R. R. Co., 70 U. S. (3 Wall.) 196, 205 (1865); bk. 19 L. ed. 43; Williamson v. Berry, 49 U. S. (8 How.) 495, 544 (1850); bk. 12 L. ed. 1170.

It is said in Blossom v. Milwaukee & C. R. R. Co., *supra*, that such sales "must be made by the person designated in the decree, or under his immediate direction and supervision, but he may employ an auctioneer to conduct the sale, if it be made in his presence." See *ante* § 470.

[2] See N. Y. Supreme Court Rule 61.

[3] Yates v. Woodruff, 4 Edw. Ch. (N. Y.) 700 (1846). See Fuller v. VanGeeson, 4 Hill (N. Y.) 171, 176 (1843).

[4] Heyer v. Deaves, 2 Johns. Ch. (N. Y.) 154 (1816).

[5] Laws of 1876, chap. 439.

[6] Gaskin v. Meek, 42 N. Y. 186 (1870). See Gaskin v. Anderson, 7 Abb. (N. Y.) Pr. N. S. 1 (1869), affirming 55 Barb. (N. Y.) 259.

[7] There is no doubt that the statute imposes a duty upon the referee; O'Donnell v. Lindsay, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 529 (1873).

[8] People v. Bergen, 53 N. Y. 404 (1873); s. c. 15 Abb. (N. Y.) Pr. N. S. 97.

to proceed to execute the decree of sale without delay, if he is requested to do so by any of the parties to the suit who will be injured by delay, regardless of any directions he may receive from the plaintiff or his attorney. And should the officer, under whose direction the premises are ordered to be sold, neglect to proceed at once to sell the same, the court will direct such officer to proceed forthwith upon the application of any person who is interested in the sale.[1]

It is the duty of the officer conducting a sale under a decree of foreclosure, to attend at the time and place of the sale, and (1) to announce the terms of sale, if they are not contained in the published notice; (2) to offer the premises to the highest bidder, and to receive bids as long as they are offered, waiting a reasonable time after each bid is made for others, and if no others are made, to strike off the premises to the highest bidder; (3) after marking down the premises to the highest bidder, to require him to sign a memorandum of the sale, agreeing to complete the same; (4) if at the time appointed for the sale, there are no bidders, or if from the few persons in attendance, or other sufficient cause, the officer is satisfied that a fair price can not be obtained, to postpone the sale and not sacrifice the property unnecessarily.[2]

Where the property has been struck off to a bidder who does not comply with the terms of the sale, the officer making the sale may again offer the property for sale upon sufficient notice, so that no one will be misled or injured.[3] And where the highest bidder has withdrawn his bid, it is the duty of the officer making the sale, to mark the premises down to the next highest bidder; and if such person leaves the sale before the property is marked down to him, it is the duty of the officer making the sale to suspend the proceedings until such bidder can be notified.[4]

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[1] Kelley v. Israel, 11 Paige Ch. (N. Y.) 147 (1844).

[2] Bicknell v. Byrnes, 23 How. (N. Y.) Pr. 486, 487 (1862).

[3] Lentz v. Craig, 2 Abb. (N. Y.) Pr. 294 (1855); s. c. 13 How. (N. Y.) Pr. 72.

[4] May v. May, 11 Paige Ch. (N. Y.) 201 (1844).

It has been held, that where the party purchasing offers to pay in bank notes, and specie payment is demanded, it is the duty of the officer making the sale to wait a reasonable time, in order to allow the bidder to comply with the terms.[1] It has been the general practice of sheriffs, masters in chancery and referees, in making mortgage foreclosure sales, to receive current bank bills in payment.[2]

Where an execution is issued upon a decree of foreclosure to sell mortgaged property, it is not necessary for the sheriff to make a levy upon the premises before proceeding to sell the same.[3]

§ 474. Discretion of the officer—Selling in parcels.—The Code requires where real property offered for sale, by virtue of a decree of the court or on execution, consists of two or more known lots, tracts or parcels, that such lots, tracts or parcels must be separately exposed for sale, and that no more of the property shall be exposed for sale, than appears to be necessary in order to satisfy the plaintiff's claim.[4]

The present provisions of the Code[5] are a re-enactment of a former statute,[6] and are only directory to the sheriff or officer making the sale. A sale to a *bona fide* purchaser will be held to be valid, although the requirements of the statute may not have been complied with; but where the purchase is not made in good faith, the sale will be set aside upon the application of the proper parties.[7]

The provisions of the statute and the rules of practice give to the referee, or other officer making the sale on a mortgage foreclosure, a discretion regarding the amount of property to be sold, similar to that in the case of other

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[1] See Baring v. Moore, 5 Paige Ch. (N. Y.) 48 (1835).

[2] Hall v. Fisher, 9 Barb. (N. Y.) 17 (1849). See Mumford v. Armstrong, 4 Cow. (N. Y.) 553 (1826); Baring v. Moore, 5 Paige Ch. (N. Y.) 48, 52 (1835).

[3] Bank of British Columbia v. Page, 7 Oreg. 454 (1879).

[4] N. Y. Code Civ. Proc. § 1437; N. Y. Supreme Court Rule 61; Groff v. Jones, 6 Wend. (N. Y.) 522 (1831); s. c. 22 Am. Dec. 545.

[5] N. Y. Code Civ. Proc. § 1437.

[6] 2 Rev. St. 369, § 38.

[7] Wallace v. Feely, 1 N. Y. Civ. Proc. Rep. 126 (1881). See Groff v. Jones, 6 Wend. (N. Y.) 522 (1831); s. c. 22 Am. Dec. 545.

sales of real estate. Under some circumstances the officer will be obliged to exercise a discretion, which is judicial in its nature, in deciding what is the best course to pursue upon the sale, in which case an honest exercise of that discretion will be as final as the decision of any judicial tribunal.

Where the question of determining whether the property shall be sold in parcels or as one tract rests in the sound discretion of the referee, if he honestly and fairly exercises that discretion, in the absence of any special circumstances tending to show a clear mistake of judgment, such discretion will control and the sale will be valid.[1]

Although the statute and the rules of the court require that no more of the real estate shall be sold than will be sufficient to satisfy the judgment,[2] yet the provisions of the statute and the rules of the court are only directory, and failure to follow them will be merely an irregularity and will not necessarily vitiate the sale, although it may be a ground for setting it aside on motion of any party aggrieved who may have claimed, at the time of the sale, the right to have the property sold in parcels, and who has not waived his right by delay in objecting to the sale on that account.[3]

The statute presupposes that the officer making a sale in a mortgage foreclosure will ascertain the situation of the property, before he sells in obedience to the decree.[4] Where the mortgaged premises directed to be sold consist of several different lots or parcels of land, which can be disposed of separately without diminishing their value, it is the duty of the officer making the sale to sell the same in separate lots or parcels, unless otherwise specially directed by the court.

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[1] Whitbeck v. Roe, 25 How. (N. Y.) Pr. 403 (1862).

[2] Groff v. Jones, 6 Wend. (N. Y.) 522 (1831); s. c. 22 Am. Dec. 545.

[3] Cunningham v. Cassidy, 17 N. Y. 276 (1858); s. c. 7 Abb. (N. Y.) Pr. 183; Wallace v. Feely, 1 N. Y. Civ. Proc. Rep. 126 (1881); McIntyre v. Sanford, 9 Daly (N. Y.) 21 (1880); Ames v. Lockwood, 13 How. (N. Y.) Pr. 555 (1856); Woods v. Monell, 1 Johns. Ch. (N. Y.) 502 (1815).

[4] O'Donnell v. Lindsay, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 529 (1873).

Thus, where a deed of trust was given on the west one hundred acres of a quarter section of land, and the land was afterwards subdivided into lots and blocks, a decree of foreclosure ordering a sale of the premises was held not to require the sale of the property *en masse*, but that it would be the duty of the officer to sell the same by lots, if such mode of sale would be more advantageous.[1] But where the officer making the sale is satisfied that the property will produce a greater price if sold together than if sold in parcels, he may sell it together, unless otherwise directed by the court.

§ 475. **Notice of sale.**—In most, if not all of the states, the notice required to be given of a foreclosure sale is regulated by statute; and where so regulated, the sale will be illegal, if it is made without the prescribed notice, and may be set aside.[2] Thus, where thirty days' notice is required to be given to the defendant of a sale of real estate by a sheriff under a decree of foreclosure, the sale will be set aside if such notice is not given.[3] The right of a defendant in a foreclosure to all the time the decree allows him for making a payment, can not be presumed to be waived in order to sustain a sale prematurely made without notice to him.[4]

When not regulated by statute, the notice of sale may be prescribed by the decree of foreclosure, or left to the discretion of the officer entrusted with the execution of the decree. Whether prescribed by the court or determined by the officer, the notice should not only fix the time of sale, but also the hour of the day on which it will be made, in order to prevent the setting aside of the sale in case a reasonable price is not obtained for the property.[5]

The New York Code of Civil Procedure[6] provides that the sale shall be made in the county where the real estate is situated, and that due notice of the time and place of holding

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[1] Chicago & Gt. Western R. Co. v. Peck, 112 Ill. 408 (1885).

[2] See Shier v. Prentis, 55 Mich. 175 (1884); Miller v. Lefever, 10 Neb. 77 (1880).

[3] Miller v. Lefever, 10 Neb. 77 (1880).

[4] Shier v. Prentis, 55 Mich. 175 (1884).

[5] Trustees of Schools v. Snell, 19 Ill. 156 (1857); s. c. 68 Am. Dec. 586. See Miller v. Lefever, 10 Neb. 77 (1880).

[6] N. Y. Code Civ. Pro. §§ 1434, 1678.

the sale shall be publicly advertised for six successive weeks immediately preceding the sale, as follows: "A written or printed notice thereof must be conspicuously fastened up at least forty-two days before the sale, in three public places, in the town or city where the sale is to take place, and also in three public places in the town or city where the property is situated, if the sale is to take place in another town or city. A copy of the notice must be published at least once in each of the six weeks immediately preceding the sale, in a newspaper published in the county, if there is one, or, if there is none, in the newspaper printed at Albany, in which legal notices are required to be published."[1]

But where the property is situated wholly or partly in a city in which a daily paper is published, notice of the sale may be given by the publication in such daily paper of notice thereof at least twice in each week for three successive weeks immediately preceding the sale; or, if in the city of New York or the city of Brooklyn, in two such papers.[2]

Under a provision of the statute,[3] the judges of the various courts in the city of New York have designated *The Law Journal* as the official paper in which all legal notices are to be published.

The notice of sale is usually drawn and posted by the plaintiff's attorney,[4] who should also prepare a statement of the terms of sale, which are usually read with the notice on the day of sale. This statement should specify the terms and conditions of the sale, the time of payment of the purchase money, what amount is to be paid on the day of sale, when and where the referee's deed is to be executed and delivered, what amount, if any, is to be deducted for taxes, assessments, water rents and other incumbrances; but it

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[1] N. Y. Code Civ. Proc. § 1434.

[2] N. Y. Code Civ. Proc. § 1678. As to sufficiency of publication within the meaning of this section, see Chamberlain v. Dempsey, 13 Abb. (N. Y.) Pr. 421 (1862); s. c. 22 How. (N. Y.) Pr. 356.

[3] Laws of 1874, chap. 656.

[4] In the sale of mortgaged property the attorney for the plaintiff is considered as the agent of all the parties to the action, and the proceedings on the sale are usually supervised by him. Dalby v. Pullen, 1 Russ. & Myl. 296 (1830).

need not describe the nature and situation of the property, that being fully done by the notice of sale.

§ 476. **Contents of notice of sale.**—While it is not absolutely necessary, yet it is the proper practice, to insert the title of the cause in the notice of sale. This is usually done by stating the names of the first plaintiff, and of the first defendant at length, and by adding the words "*et al.*," or "and others," where there are several plaintiffs or several defendants.[1] Where land is to be sold by a referee, it should be described with reasonable certainty by setting forth the number of the township or tract, and the number of the lot, if the lot has a number; and if it has none, by some other appropriate description. It is usually best to follow the description given in the decree or order of sale. The referee is not at liberty to insert any further particulars in such notice, whereby the value of the property will be enhanced or depreciated, or the purchaser will be in any way misled.[2] In other respects there is no rule of law prescribing the form of the notice of sale.

Where the mortgaged premises consist of several tracts which can be sold separately, without prejudice to the parties, it is not necessary to state in the notice of sale that the premises will be sold in separate parcels.[3]

§ 477. **Publication of notice of sale.**—The number of weeks and the number of times each week which a notice of sale under a decree of foreclosure is required to be published, is regulated by the statutes of the various states. Thus, in Maine the notice is not required to be published three weeks successively so as to continue for the space of twenty-one days,[4] but it must appear in three consecutive

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[1] Ray v. Oliver, 6 Paige Ch. (N. Y.) 489 (1837).

[2] Marsh v. Ridgeway, 18 Abb. (N. Y.) Pr. 262 (1864); Laight v. Pell, 1 Edw. Ch. (N. Y.) 577 (1833); Veeder v. Fonda, 3 Paige Ch. (N. Y.) 94 (1832).

[3] Hoffman v. Burke, 21 Hun (N. Y.) 580 (1880).

[4] Wilson v. Page, 76 Me. 279 (1885). This statute has been construed to mean three consecutive weekly issues of a newspaper; not that there must be a period of twenty-one days between the time of the first publication, and the date of the last insertion.

weekly issues of the paper; while under the Wisconsin statute,[1] a notice of sale under a decree of foreclosure is required to be published for six full weeks after the expiration of one year from the date of the judgment.[2]

Where the published notice of sale is dated prior to the expiration of the year, there will be an apparent irregularity at least in the proceedings tending to the defendant's injury; but whether, upon clear proof of the regular publication of the notice at and for the time prescribed by statute, such apparent irregularity will be fatal to the sale is not determined.[3]

Whether publication of a notice is required to be made for three weeks, twice in each week, or for six weeks, once in each week, it is not necessary that in the first instance twenty-one days should elapse between the time of the first publication and the time of sale, nor in the second case, that forty-two days should elapse between the first publication, and the day of sale, in order to render the publication of the notice sufficient and the sale made thereunder valid.[4] It has been held that the notice of sale need not be inserted in every edition of the paper issued on the day on which the

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[1] Wis. Rev. Stat. §§ 2993, 3162, 3168.

[2] Kopmeier v. O'Neil, 47 Wis. 593 (1879).

[3] Kopmeier v. O'Neil, 47 Wis. 593 (1879).

[4] Market Nat. Bank v. Pacific Nat. Bank, 89 N. Y. 397, 399 (1882); s. c. 11 Abb. (N. Y.) N. C. 104; Olcott v. Robinson, 21 N. Y. 150 (1860); Sheldon v. Wright, 5 N. Y. 497 (1851); Steinle v. Bell, 12 Abb. (N. Y.) Pr. N. S. 171, 177 (1872); Merritt v. Village of Rochester, 8 Hun (N. Y.) 40, 45 (1876); Wood v. Terry, 4 Lans. (N. Y.) 80, 85 (1871); Hackley v. Draper, 4 T. & C. (N. Y.) 614, 622 (1874). In the case of Valentine v. McCue, 26 Hun (N. Y.) 456 (1882), the court say: "The period of a week, therefore, is seven full days, and when the publication is directed to be made twice a week for three weeks, it means that there shall be a period of twenty one days before the sale, calculated by weeks, during each of which, two publications shall be made, and this shall occur without regard to the day of the week when the publication was commenced." But in this case, the notice of sale of real property in the city of New York, under decree of foreclosure, to take place on the 20th day of May, was published in two papers on April the 27th (Wednesday) and 30th (Saturday), May 4th (Wednesday), 7th (Saturday), 11th (Wednesday) and 14th (Saturday), and in one of them on May 20th; and this publication of notice was held to be sufficient.

notice was published.[1] And it seems that the court may amend the judgment during the publication of the notice of sale, without affecting the validity of such notice, or the validity of the title to the property sold thereunder.[2]

A notice of sale of property was directed to be published in a designated paper, which, after the decree and before the publication of the notice, was merged in another paper and its name changed; on application to the judge at chambers, he directed the sale to be advertised in the same paper under its new name. The publication of the notice in such paper under its new name was held to be in accordance with the decree and to be valid and sufficient.[3]

Under a judgment of foreclosure and sale, a notice of the sale to take place on the twenty-eighth day of December was published on the ninth, twelfth, sixteenth, nineteenth, twenty-third and twenty-sixth of that month, and the court held this to be a publication twice in each week for three weeks immediately preceding the sale within the meaning of the Code.[4] In the case of Wood v. Morehouse,[5] an execution was issued to the sheriff on the twenty-sixth day of September, and he caused a notice of the sale thereunder to be published on the following first day of November, in a newspaper printed in the proper county, and to be continued once a week for six successive weeks, and afterwards sold the property on an adjourned day, and such publication of the notice was held valid.

Proof of the due publication of the notice may be made by the affidavit of any person having knowledge of the fact.[6] In the absence of proof to the contrary, it will be presumed that publication of a notice of sale made in a daily newspaper was first made on the day of the date of such notice, especially if such presumption does not conflict with either the sheriff's certificate or the printer's affidavit.[7]

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[1] Everson v. Johnson, 22 Hun (N. Y.) 115 (1880).

[2] Valentine v. McCue, 26 Hun (N. Y.) 456 (1882).

[3] Sage v. Cent. R. R. Co., 13 West. Jurist, 218 (1878).

[4] Chamberlain v. Dempsey, 13 Abb. Pr. 421 (1862); s. c. 22 How. (N. Y.) Pr. 356.

[5] 1 Lans. (N. Y.) 405 (1869); aff'd 45 N. Y. 368.

[6] Miller v. Lefever, 10 Neb. 77 (1880).

[7] Kopmeier v. O'Neil, 47 Wis. 593 (1879).

§ 478. **When sale may be made—Hour of day.**—It is provided in many of the states that mortgaged premises shall not be sold under a judgment of foreclosure, until after the lapse of a specified time from the commencement of the action, or the recovery of the judgment.[1] Where there is such a regulation, any proceedings taken for a sale before the expiration of the prescribed period, such as publishing the notice thereof, will be irregular, but not void.[2] And under such a statute, where a party is brought in as a defendant by an amended complaint, and is charged with a personal liability, the statutory period after which a sale may be made will run only from the date of filing the amended complaint.[3]

The time of day at which a sale of mortgaged premises shall be made under a decree of foreclosure is usually a matter resting entirely in the discretion of the referee or other officer making the sale,[4] except that in New York the sale is required by the Code of Civil Procedure[5] to be made at public auction between the hour of nine o'clock in the morning and sunset.[6] Should the sale be made before sunrise in the morning or after sunset in the evening, it will be absolutely void.[7]

Where the lands to be sold are situated wholly or partly within the city of New York, or the city of Brooklyn, the sale shall be made at public auction between twelve o'clock noon and three o'clock in the afternoon, unless otherwise specially directed.[8]

§ 479. **Sale to be made at time advertised—Place of sale.**—The sale of mortgaged premises in an action for foreclosure must be made at the time fixed for selling the

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[1] Burt v. Thomas, 49 Mich. 462 (1882); Culver v. McKeown, 43 Mich. 322 (1880). See Andrews v. Welch, 47 Wis. 132 (1879); Northwestern Mut. L. Ins. Co. v. Neeves, 46 Wis. 147 (1879); Wis. Rev. Stat. § 3162.

[2] See Northwestern Mut. L. Ins. Co. v. Neeves, 46 Wis. 147 (1879).

[3] Canfield v. Shear, 49 Mich. 313 (1882).

[4] Sessions v. Peay, 23 Ark. 39 (1861).

[5] N. Y. Code Civ. Proc. § 1384.

[6] See Carnrick v. Myers, 14 Barb. (N. Y.) 9 (1852).

[7] Carnrick v. Myers, 14 Barb. (N. Y.) 9 (1852). See Wood v. Morehouse, 45 N. Y. 369 (1869), aff'g 1 Lans. (N. Y.) 405, 413; Hackley v. Draper, 4 T. & C. (N. Y.) 614, 622 (1874); Frederick v. Wheelock, 3 T. & C. (N. Y.) 210, 212 (1874).

same, pursuant to the notice; and if such time has passed, and a valid sale has not been made, or if the party in interest elects to disregard it, the officer conducting the sale can not sell again without an order of the court, unless he advertises the sale *de novo*.[1]

It was held in Bicknell v. Byrnes,[2] that where the "mortgagor, or other person interested in the premises, attends at the time fixed for the sale, and a sale upon satisfactory terms is made and he leaves, and thereafter, without notice, the party foreclosing abandons the sale and makes a new one, he may create just such an amount for deficiency, or he may purchase the premises at just such a price as he deems proper. Such a practice can not be tolerated."

If the officer making the sale re-advertises the property before selling, an order of the court will not be necessary, and such a resale, if otherwise conducted in conformity to the rules regulating sales of real estate, will be valid.

As a general rule, the sale of real property under a decree of the court must be made on the premises, or at the court house in the county in which the lands are situated, unless for good cause shown the court directs otherwise.[3] In New York the Code provides that all sales of real property on mortgage foreclosure under final judgment, shall be made by the sheriff or other officer executing the decree of sale in the county in which the property is situated.[4]

If the mortgaged premises are situated in the city of New York, unless otherwise specially directed by the court, they are required to be sold at public vendue at the Exchange Sales Rooms, No. 111 Broadway, between the hours of twelve and three o'clock in the afternoon.[5]

§ 480. **Terms and conditions of sale.**—The New York Code of Civil Procedure requires that the terms of sale on a mortgage foreclosure shall be made known at the time of the sale; if the property or any part thereof is to be sold

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[5] N. Y. Supreme Court Rule 62.

[1] Bicknell v. Byrnes, 23 How. (N. Y.) Pr. 486 (1862).

[2] 23 How. (N. Y.) Pr. 489 (1862).

[3] Sessions v. Peay, 23 Ark. 39 (1861).

[4] N. Y. Code Civ. Proc. § 1242.

[5] N. Y. Supreme Court Rule 62.

subject to any lien or charge, or to a right of dower, that fact must also be made known at the time of the sale.[1] It is the usual practice for the officer conducting such sale to read the notice of sale for the purpose of informing bidders of the location and general description of the property to be sold; it is also his duty to announce the terms of sale, if they are not contained in the published notice.[2] After announcing the terms of sale, the officer in charge should offer the premises, or separate parcels thereof, to the highest bidder.[3] But the officer making the sale is not obliged to accept the highest bid, if he has reasons for believing that the bid is not made in good faith, or that the bidder is unable to comply with the terms of sale.[4]

As a reasonable precaution in order to insure the completion of the sale, or to cover the costs and expenses of a resale, in case the purchaser should fail to fulfill his contract, a deposit, or the payment of some portion of the bid, at the time of the sale, is usually required. The amount to be paid or deposited should be a sum reasonably sufficient to insure the completion of the purchase or to cover the expenses of a resale.[5] To require the immediate payment of the whole purchase money in cash at the time of the sale, would tend to deter bidders, and in this manner be oppressive and unjust to the mortgagor; a sale made upon such terms, unless specially ordered, may be set aside by a court of equity.[6]

Where, by the terms of sale, the purchase money is to accompany the bid, or a deposit is to be made, and the bidder refuses to make such deposit or to pay the price bid when demanded, the referee may at once resume the sale.[7] It is said that under special circumstances the sale may be

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[1] N. Y. Code Civ. Proc. § 1678.

[2] Bicknell v. Byrnes, 23 How. (N. Y.) Pr. 486 (1862).

[3] N. Y. Code Civ. Proc. § 1678.

[4] Gray v. Veirs, 33 Md. 18 (1870).

[5] Maryland Permanent Land and Building Society of Baltimore v. Smith, 41 Md. 516 (1874).

[6] Goldsmith v. Osborne, 1 Edw. Ch. (N. Y.) 560, 562 (1833).

[7] See Lents v. Craig, 13 How. (N. Y.) Pr. 72 (1855); s. c. 2 Abb. (N. Y.) Pr. 294; Sherwood v. Reade, 8 Paige Ch. (N. Y.) 633 (1841).

adjourned to another day and then resumed, if the deposit is not made or the price bid is not paid.[1] Should the day of sale be permitted to pass without an adjournment or the completion of the sale by the purchaser, the referee may re-advertise and resell the premises, as if no notice of sale had been published.[2]

Where by the terms of the sale the price bid was to be paid in cash, it has been held in a contest between bidders, where the sale took place on Saturday and the money was paid on the following Monday, that this was a substantial compliance with the terms of the sale.[3]

Where the terms of the sale are cash and the mortgagee becomes the purchaser at the sale, he can not be required to pay at once in cash the whole or a part of his bid as earnest money.[4] It seems that the holder of the mortgage may comply with the terms of the sale where it is to be for cash, by simply indorsing the amount of his bid on the notes which he holds, and that the formality of paying the money to the officer making the sale, and of receiving it back from him, is unnecessary.[5]

But if any person other than the mortgagee becomes the purchaser, where the sale is to be for cash, he must comply strictly with the terms of sale, and pay the price bid in cash; a note of the party entitled to the proceeds of the sale is not cash, and the tender of such note will not be a compliance with the terms of sale.[6]

§ 481. **Conditions of sale sometimes published.**—It is sometimes the practice to annex to the notice of sale a statement of the conditions or terms of sale. This statement should specify fully the terms and conditions of the sale, the time of payment of the purchase money, what amount in cash is to accompany the bid, and when and where the deed is to be delivered. It should also state whether the sale is to

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[1] Hoffman on Referees, 236.

[2] Robinson v. Brennan, 90 N. Y. 208 (1882); Bicknell v. Byrnes, 23 How. (N. Y.) Pr. 486 (1862).

[3] Jacobs v. Turpin, 83 Ill. 424 (1876).

[4] Sage v. Central R. R. Co., (Iowa), 13 West. Jurist, 218 (1878).

[5] Jacobs v. Turpin, 83 Ill. 424 (1876).

[6] Pursley v. Forth, 82 Ill. 327 (1876); Sage v. Central R. R. Co., (Iowa), 13 West. Jurist, 218 (1878).

be subject to taxes, assessments and water rents, for it is the well settled practice of the courts to have all taxes, assessments and water rents, which are liens on the premises sold, paid out of the purchase money by the officer making the sale, unless otherwise provided. The decree for the sale of the property, in some instances, directs that these liens be paid, but they are more frequently provided for by the terms of the sale.[1]

It has been held, that, since the purchaser of lease-hold property at public sale takes it subject to being dispossessed for rents in arrears, it is necessary that the judgment of foreclosure on a mortgage of lease-hold property, or the terms of sale thereof, should provide for the payment of such rents, in order to obtain the full value of the property, and that the purchaser may acquire the title discharged of such liens.[2]

§ 482. **Sale on credit.**—Although a sale upon credit might produce a greater price than a sale for cash, yet judicial sales, it seems, are not made on credit unless with the consent of the parties interested, for if the court should direct that the sale be made on credit, and the mortgaged land should produce more than the amount of the mortgage debt, two new mortgages would follow, one to the complainant for whose benefit the land is being sold, and the other to the defendant, or to some one entitled to the surplus. Such a practice would, in effect, convert one mortgage into

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[1] See Catlin v. Grissler, 57 N. Y. 363 (1874); Robinson v. Ryan, 25 N. Y. 320 (1862); Stillman v. Van Beuren, 49 N. Y. Supr. Ct. (17 J. & S.) 86 (1883); N. Y. Code Civ. Proc. § 1676. It was said in the case of Stuyvesant v. Browning, 33 N. Y. Supr. Ct. Rep. (1 J. & S.) 203, 210 (1871), however, that "it is not usual to insert in the judgment a direction to pay taxes or assessments which may at the time of the sale be a lien upon the mortgaged premises. That is usually done by the referee, or officer who makes the sale. Yet, in an ordinary case of mortgage upon real property, it would not be deemed an essential error. But in this case, which is a mortgage upon lease-hold property, taxes and assessments should not be paid out of the purchase money. If the lessees have agreed to pay such liens, it is at most a mere personal covenant, and not included in their mortgage."

[2] Stillman v. VanBeuren, 49 N. Y. Supr. Ct. (17 J. & S.) 86 (1883). See Catlin v. Grissler, 57 N. Y. 363 (1874); Robinson v. Ryan, 25 N. Y 320 (1862).

another or into several mortgages, and it might be injurious rather than beneficial to the defendant.[1]

It seems, however, that the plaintiff may direct the referee, or other officer making the sale, to sell the premises on credit. If no one objects, and the referee, thus authorized, sells the property on time, and such sale is confirmed by the court, the purchaser will have a right to insist upon the terms on which the sale was made, and can not be compelled to pay cash.[2] Should the defendant object to having the sale made on credit, the plaintiff, or the court on his application, may allow the sale to be made on credit to the extent of the amount due to him for principal and interest;[3] but beyond this amount, credit can not be allowed to the purchaser.

It is said in Chaffraix v. Packard,[4] that "the principle upon which the right of a mortgage creditor to sell for cash rests, is that every part of the property is mortgaged for the whole of the principal debt, and in the distribution of the proceeds of the pledge the holders of the different installments of the same mortgage are entitled to participate." It has been held that where the mortgage provides for the sale of the property for cash, and the mortgagee makes an arrangement with the purchaser of the property to allow him time on the sum due on his mortgage, the mortgagor can not complain of such an arrangement, whether made before or after the sale, inasmuch as he can not, by any possibility, be injured by such arrangement; it therefore constitutes no ground for setting the sale aside. The tendency of such an arrangement would be to increase the number of bidders, and to enhance the price rather than to decrease it.[5] Yet, it seems that the property can be sold for cash to pay the notes which are due, and on credit to meet unmatured notes, according to the contract of the mortgage.[6]

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[1] Sedgwick v. Fish, Hopk. Ch. (N. Y.) 594 (1824).

[2] Rhodes v. Dutcher, 6 Hun 453, 455 (1876).

[3] Sedgwick v. Fish, Hopk. Ch. 594 (1824).

[4] 26 La. An. 173, 175 (1874).

[5] Mahone v. Williams, 39 Ala. 202, 215 (1863).

[6] Pepper v. Dunlap, 16 La. 163, 170, 171 (1840). See Chaffraix v. Packard, 26 La. An. 172, 174 (1874).

It has been said that the court may order the premises to be sold on credit without violating the obligation of the mortgage contract.[1] And it was held by the supreme court of Tennessee, in the case of Mitchell v. McKinny,[2] where a trust deed provided that the trustee should sell the property for cash, that, on a bill to foreclose, the court might order a sale on time. But it was held by the supreme court of Virginia, in the case of Crenshaw v. Seigfried,[3] that where the mortgage provides that the property shall be sold for cash, the court must act according to the provisions of the mortgage, and can not sell on time.

§ 483. **Order staying sale.**—In an action to foreclose a mortgage the court will do its utmost to secure a fair and advantageous sale of the mortgaged premises.[4] The unfortunate debtor is not beneath the protection of the court, and it will not permit the slightest advantage to be taken of him, even by pursuing the strict forms of the law.[5] Thus, in case of any calamity, such as hostile invasion, or an epidemic prevailing at the time and place of sale, the court will interfere and postpone the sale.[6] But the sale of mortgaged premises under a decree of foreclosure will not be postponed merely on account of a general depression in the business of the country,[7] nor on account of the existence of war, because the existence of war is a general calamity and is not sufficient to justify the interruption of the regular administration of justice by the courts in the collection of debts.[8]

A judicial sale made on the day of the charter election of a city is not necessarily void;[9] but if the plaintiff has been

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[1] Stoney v. Shultz, 1 Hill (S. C.) Eq. 465, 500 (1834); s. c. 27 Am. Dec. 429; Lowndes v. Chisholm, 2 McC. (S. C.) Eq. 455 (1826); s. c. 16 Am. Dec. 667.

[2] 6 Heisk. (Tenn.) 83 (1871).

[3] 24 Gratt. (Va.) 272 (1874).

[4] Lansing v. Goelet, 9 Cow. (N. Y.) 346, 402 (1827).

[5] King v. Platt, 37 N. Y. 155, 160 (1867); s. c. 35 How. (N. Y.) Pr. 23. See 1 Story Eq. Jur. 239.

[6] Lansing v. Goelet, 9 Cow. (N. Y.) 346, 402 (1827).

[7] McGown v. Sanford, 9 Paige Ch. (N. Y.) 290 (1841).

[8] Astor v. Romayne, 1 Johns. Ch. (N. Y.) 310 (1814). It would be otherwise, however, if an invasion of the immediate neighborhood where the property is situated was imminent. See McGown v. Sanford, 9 Paige Ch. (N. Y.) 290 (1841).

unnecessarily oppressive in his proceedings, the sale may be set aside.[1] Thus, where the sale is made against the defendant's remonstrance on a day of general election, or on a day most unfavorable to a large gathering of bidders, and under circumstances which give rise to the belief that free competition was obstructed, the sale ought not to stand. The court held in King v. Platt,[2] that "occupying the position of advantage, it behooved the plaintiffs to pursue their remedy with scrupulous care, lest they should inflict an injury on one who was comparatively powerless. A court of equity justly scrutinizes the conduct of a party, placed by the law in a position where he possesses the power to sacrifice the interests of another, in a manner which may defy detection, and stands ready to afford relief on very slight evidence of unfair dealing, whether it is made necessary by moral turpitude, or only by a mistaken estimate of others' rights."

Chancellor Walworth held in the early case of McGown v. Sandford,[3] that "it is the duty of the officer entrusted with the sale of property, under a judgment or decree for the payment of a debt, to put it up for sale at such a time and under such circumstances as to make it bring the best price, without injuring the party entitled to the proceeds of the sale by delaying the payment of his debt. And where a master, or other officer appointed to make the sale, in violation of his duty, is proceeding to sell property under a decree in chancery at an improper time, when such sale must necessarily sacrifice the property, as during the raging of a pestilence, or while there is a threatened invasion, which will destroy all chance of fair competition by deterring bidders from attending the sale, it will unquestionably be the duty as well as the right of this court to interfere. But the court of chancery has no legal right to interfere for the relief of an individual by arbitrarily suspending the ordinary

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[1] King v. Platt, 37 N. Y. 155 (1867); s. c. 35 How. (N. Y.) Pr. 23. See Kellogg v. Howell, 62 Barb. (N. Y.) 280 (1872).

[2] 37 N. Y. 155, 160 (1867); s. c. 35 How. (N. Y.) Pr. 23.

[3] 9 Paige Ch. (N. Y.) 290, 291 (1841).

operation of the laws for the collection of debts to meet his particular case."

In an action to foreclose a mortgage, no order to stay the sale shall be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney.[1] Consequently, it has been held that an order to show cause, made by a judge out of court, and returnable in less than two days, is irregular, if it contains a stay of proceedings of sale under a judgment for foreclosure and sale.[2] It has been said that if a subsequent purchaser desires the prior mortgagee to act with reference to the order of alienation of the mortgaged premises, he should give notice of the facts to such mortgagee in proper time, and request him to sell accordingly. If he is not a party to the proceedings for foreclosure, and is given no opportunity therein to present his equities, he may file a bill against the mortgagee, and the other subsequent purchasers, where there are any, staying the sale until their respective equities can be adjusted. But he can not remain passive until the sale has been made and confirmed, and then assert his rights against the mortgagee upon an allegation of facts of which the latter had no knowledge.[3]

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[1] N. Y. Supreme Court Rule 67.

[2] Asinari v. Volkening, 2 Abb. (N. Y.) N. C. 454 (1877).

[3] Lausman v. Drahos, 8 Neb. 457 (1879).

CHAPTER XXIII.

SALE OF MORTGAGED PREMISES IN PARCELS.

DISCRETION OF COURT—WHEN TO BE MADE—PART ONLY DUE—SALE FOR AN INSTALLMENT—STAYED ON PAYMENT—FUTURE DEFAULTS.

§ 484. Sale in parcels—Discretion of court.
485. Sale in parcels under the New York Code.
486. Determining how much of premises to be sold.
487. Sale to be made so as to protect subsequent liens and equities.
488. Sale in parcels—When matter of right.
489. Selling in parcels when premises described in one piece.
490. Mortgagee or mortgagor dictating order of sale.
491. Discretion of officer as to selling in parcels.
§ 492. Sale of premises subdivided into lots after execution of mortgage.
493. Sale of moiety—Land held by tenants in common.
494. Sale in parcels when only part of mortgage due.
495. Sale of portion of premises for part of debt due—Failure to pay subsequent installments.
496. Petition for order of second sale—Reference thereon to compute amount due.
497. Order for second sale.
498. Where proceedings stayed by payment—Subsequent default.

§ 484. **Sale in parcels—Discretion of court.**—On the foreclosure of a mortgage the court is not bound to ascertain, whether it will be to the advantage of the defendants to have the mortgaged premises sold in separate lots.[1] But the premises may be sold in one piece or in parcels, as the court may think most likely to bring the highest price;[2] and on proof that a sale in parcels will probably be injurious to the interests of the defendants, the court may decree the sale of the whole of the mortgaged premises in one parcel, though composed of separate and distinct tracts or lots.[3] In a case where the whole amount of the mortgage debt was not due, and the premises were ample security for the amount due, with costs,

[1] Jones v. Gardner, 57 Cal. 641 (1881).
[2] Macomb v Prentis, 57 Mich. 225 (1885).
[3] Firestone v. Klick, 67 Ind. 309 (1879).

but the land could not be sold advantageously in parcels, and the whole mortgage debt would become due before there could be a sale under the judgment, the court held that the case should be treated as though the whole debt were due.[1]

Where the mortgaged property is in separate parcels, and the amount due upon the mortgage can be realized by a sale of one or more of the parcels, if it is necessary that the property should all be sold together, in order to protect the rights of subsequent incumbrancers, the sale will be made in that manner;[2] and where a sale of a part of the premises is made in accordance with the directions of the court, and it is afterwards made to appear that the interests of the parties require the sale of the whole property, the court may make a supplementary order for the sale of the remainder of the mortgaged premises.[3] And where the decree of sale directs that the whole of the premises be disposed of for the payment of installments due, it is within the discretion of the court afterwards, in regulating the execution of its decree, if the premises can be divided into parcels, to direct a sale of a part only.[4]

If the order to sell the premises as a whole, or in parcels, be erroneous, the party aggrieved may ask to have the order amended. This should be done by motion, as the defect can not be taken advantage of by appeal.[5]

Where, in a decree for the sale of mortgaged premises, the court directs that the land shall be sold together, or in parcels, it is the duty of the sheriff or person making the sale to comply strictly with such order; and the parties interested can not, by stipulation, provide for a different order, although one of the defendants might be greatly benefited by such change. It is to be presumed, in

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[1] Schreiber v. Carey, 48 Wis. 208 (1879).

[2] Gregory v. Campbell, 16 How. (N. Y.) Pr. 417 (1858).

[3] Livingston v. Mildrum, 19 N. Y. 440 (1859); DeForest v. Farley, 4 Hun (N. Y.) 640 (1875).

[4] American Life & Fire Ins. & Trust Co. v. Ryerson, 6 N. J. Eq. (2 Halst.) 9 (1846).

[5] Horner v. Corning, 28 N. J. Eq. (1 Stew.) 254 (1877).

such a case, that the court made its order with a view to the rights of all parties,[1] and parties holding subsequent interests will have a right to insist upon a compliance with the order of sale as made by the court.[2]

§ 485. Sale in parcels under the New York Code.— The New York Code of Civil Procedure[3] provides that "where a mortgage debt is not all due, and the mortgaged property is so circumstanced that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct that no more of the property be sold, in the first place, than is sufficient to satisfy the sum then due, with the costs of the action and the expenses of the sale; and that upon a subsequent default in the payment of principal or interest, the plaintiff may apply for an order directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order as often as a default happens."

But where "it appears that the mortgaged property is so circumstanced, that a sale of the whole thereof will be most beneficial to the parties, the final judgment must direct that the whole property be sold; that the proceeds of the sale, after deducting the costs of the action and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest as justice requires, or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest for the benefit of the plaintiff, to be paid to him from time to time, as any part of the principal or interest becomes due." Section 1678 of the New York Code of Civil Procedure, regulating sales upon foreclosure, prescribes only a rule of proceeding to render the judgment of foreclosure available; and therefore the amendment of 1881,[4]

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[1] Babcock v. Perry, 8 Wis. 277 (1859).

[2] Farmers' & Millers' Bank of Milwaukee v. Luther, 14 Wis. 96 (1861).

[3] N. Y. Code Civ. Proc. §§ 1636, 1637.

[4] Laws of 1881, chap. 682.

allowing two or more buildings situated on the same city lot to be sold together, is effectual pursuant to its provisions to render valid sales previously made, which would be lawful according to its terms.[1]

These provisions of the Code of Civil Procedure simply declare the rules and formulate the principles by which courts of equity, without statutory provisions, are necessarily governed in foreclosure suits;[2] the statute merely establishes by legislative enactment the rules which already prevailed in such cases.[3]

It has been held, however, that the provisions of the statute regarding sales in parcels are merely directory, and that a sale made in disregard of such provisions is not void, but only voidable, if an application is made for relief within a reasonable time by the party aggrieved. But such party may waive the irregularity of the sale by express ratification, or by neglecting to take exceptions to it within a reasonable time.[4]

It was held by the court in Wallace v. Feely,[5] that "The question is whether this provision is directory merely, as the provision in the former statute regulating judicial sales

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[1] Wallace v. Feely, 10 Daly (N. Y.) 331 (1882).

[2] Cunningham v. Cassidy, 17 N. Y.) 276 (1858); s. c. 7 Abb. (N. Y.) Pr. 183. See Livingston v. Mildrum, 19 N. Y. 440, 443 (1859); Campbell v. Macomb, 4 Johns. Ch. (N. Y.) 534 (1820); Magruder v. Eggleston, 41 Miss. 284 (1866); American Life & Fire Ins. & Trust Co. v. Ryerson, 6 N. J. Eq. (2 Halst.) 9 (1846); Wilmer v. Atlanta & R. A. L. R. Co., 2 Wood C. C. 447 (1875).

[3] Cunningham v. Cassidy, 17 N. Y. 276 (1858). See Campbell v. Macomb, 4 Johns. Ch. (N. Y.) 534 (1820); Lyman v. Sale, 2 Johns. Ch. (N. Y.) 487 (1817); Brinckerhoff v. Thallhimer, 2 Johns. Ch. (N. Y.) 486 (1817). See *post* § 489.

[4] Cunningham v. Cassidy, 17 N. Y. 276 (1858). See Sherman v. Willett, 42 N. Y. 146 (1870); Ellsworth v. Lockwood, 42 N. Y. 89 (1870); Husted v. Dakin, 17 Abb. (N. Y.) Pr. 137 (1857); Griswold v. Fowler, 4 Abb. (N. Y.) Pr. 238 (1857); Merchants' Ins. Co. v. Hinman, 3 Abb. (N. Y.) Pr. 455 (1856); Wells v. Wells, 47 Barb. (N. Y.) 416 (1867); Lamerson v. Marvin, 8 Barb. (N. Y.) 9 (1850); Wolcott v. Schenck, 23 How. (N. Y.) Pr. 385 (1862); Ames v. Lockwood, 13 How. (N. Y.) Pr. 555 (1856); Woods v. Monell, 1 Johns. Ch. (N. Y.) 503 (1815); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841); s. c. 38 Am. Dec. 561.

[5] 1 N. Y. Civ. Proc. Rep. 126 (1881).

was held to be.[1] That statute enacted that if the premises consist of distinct buildings, they shall be sold separately. The reason of the codifiers for substituting 'must' for 'shall' is not apparent; they give no explanation in their note to the section. The substituted word is more imperative than that which it replaces. As verbal alterations occur frequently in the new Code without apparent reason, the change in question loses much of its significance. The reasons for holding the former enactment to be directory merely are applicable in every respect to the new. No different construction could be adopted without doing, in certain cases, a great injury."

§ 486. **Determining how much of premises to be sold.** —On an order of reference in a mortgage foreclosure, the first duty of the referee, aside from computing the amount due on the mortgage, is to ascertain whether the mortgaged premises are so circumstanced that they can be sold in parcels without injury to the interests of the parties. A sale of the whole premises in one parcel can be most beneficial to the parties only when the mortgagee will receive, and the mortgagor will be able to pay, from the proceeds thereof, the largest amount of the mortgage debt, or when the sale will leave the largest surplus after the payment of the whole debt. The benefits intended by the statute should be common to both parties.

But the report of the referee, in regard to the manner of sale, is only a part of the evidence before the court, upon which it should decide whether it will or will not be most beneficial to the parties to decree a sale of the whole premises in one parcel in the first instance. The court may look to the pleadings and receive other evidence in its discretion; it may also consider the stipulations, offers or admissions of any of the parties on the hearing.[2] In determining whether the premises shall be sold together or in parcels, the court should take into consideration the interests of the parties having equities subject to the

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[1] Cunningham v. Cassidy, 17 N. Y. 276 (1858).

[2] Gregory v. Campbell, 16 How (N. Y.) Pr. 417 (1858).

mortgage, and direct the sale to be made in such a manner that the rights of no party interested will be prejudiced by the order of the sale.[1]

§ 487. **Sale to be made so as to protect subsequent liens and equities.**—A mortgage foreclosure sale is not for the benefit of the complainant alone, but for the benefit of all the parties who are before the court; and where the complainant in such a suit makes a junior mortgagee of the premises a party, the court may make a decree directing the sale of so much of the mortgaged premises as will be sufficient to satisfy the amount due on such junior mortgage and on intermediate incumbrances, in addition to the amount due on the complainant's mortgage, besides the costs of the action. But it is said that before such junior mortgage can be paid, the report of the referee, or other officer making the sale, must be filed and the surplus moneys brought into court, so that interested persons, who have not been made parties to the suit, may have an opportunity to file their claims to such surplus money.[2]

It is the duty of the court in decreeing a foreclosure of the mortgaged premises, to provide that only so much thereof shall be sold, and in such a manner, as that the parties having equities subject to the primary lien will not be prejudiced thereby. This power may be exercised as long as the subject matter and the parties remain under the jurisdiction of the court.[3] But where the court has failed in a decree of foreclosure to protect the equitable rights of the parties before it, it may supply the defect independently of the statute by a supplementary order;[4] and this may be done even after a portion of the premises sufficient to satisfy the primary lien has been sold.[5]

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[1] Livingston v. Mildrum, 19 N. Y. 440 (1859). See DeForest v. Farley, 62 N. Y. 628 (1875); Malcolm v. Allen, 49 N. Y. 448 (1872); Beekman v. Gibbs, 8 Paige Ch. (N. Y.) 511 (1840); Blazey v. Delius, 74 Ill. 299 (1874).

[2] Beekman v. Gibbs, 8 Paige Ch. (N. Y.) 511 (1840).

[3] Livingston v. Mildrum, 19 N. Y. 440 (1859). See DeForest v. Farley, 62 N. Y. 628 (1875); Malcolm v. Allen, 49 N. Y. 448 (1872).

[4] Malcolm v. Allen, 49 N. Y. 448 (1872); Livingston v. Mildrum, 19 N. Y. 440 (1859).

[5] Livingston v. Mildrum, 19 N. Y. 490 (1859).

§ 488. Sale in parcels—When matter of right.—In a mortgage foreclosure the plaintiff is entitled to the sale of a sufficient amount of land to pay his claim and the costs of the suit, and no more;[1] and the sale should be made by the officer conducting it in such a manner as to pay the just demands of the plaintiff without inflicting unnecessary loss upon the debtor, or interfering with the rights and interests of subsequent incumbrancers.[2]

It is a well settled principle of law, irrespective of any statute, that where a tract of mortgaged land has been laid out in parcels for separate and distinct enjoyment, it should be sold in parcels on a decree of foreclosure.[3] This general rule is said to rest upon the reasonable presumption, sanctioned alike by observation and experience, that such property will realize more when sold in parcels than in one piece, because of the fact that such sale will better correspond to the probable wants of the purchasers.[4]

Aside from statutory regulations touching the matter, it is the primary duty of the officer making the sale to adopt such a mode of sale as will probably realize the largest amount, and to exercise his best judgment in determining how that end can be best accomplished; a sale in a different manner may be a sufficient reason for avoiding the sale, if the price received is disproportionate to the actual value of the premises.[5]

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[1] Ellsworth v. Lockwood, 42 N. Y. 89 (1870); Hewson v. Deygert, 8 Johns. (N. Y.) 333 (1811); Tiernan v. Wilson, 6 Johns. Ch. (N. Y.) 411 (1822); Jenks v. Alexander, 11 Paige Ch. (N. Y.) 619 (1845); Mohawk Bank v. Atwater, 2 Paige Ch. (N. Y.) 61 (1830); O'Donnell v. Lindsay, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 530 (1873).

[2] Woodhull v. Osborne, 2 Edw. Ch. (N. Y.) 614 (1830).

[3] Wolcott v. Schenck, 23 How. (N. Y.) Pr. 385 (1862); Hewson v. Deygert, 8 Johns. (N. Y.) 333 (1811); Wood v. Monell, 1 Johns. Ch. (N. Y.) 502 (1815); Mahone v. Williams, 39 Ala. 202 (1863); Rowley v. Brown, 1 Binn. (Pa.) 61 (1803); Stead's Exrs. v. Course, 8 U. S. (4 Cr.) 403 (1808); bk. 2 L. ed. 660.

[4] It has been held that if there is no division of the tract into parcels, adapted for separate and distinct enjoyment, it is generally reasonable that the defendant should show to the referee, or other officer selling, by a map or diagram, or in some other intelligible manner, the distinct parcels into which the land might be profitably divided for sale. See Woodhull v. Osborne, 2 Edw. Ch.

§ 489. **Selling in parcels when premises described in one piece.**—And the rule as to selling in parcels is the same, whether the land is described in the mortgage in parcels or as one piece.[1] It seems, however, that if the premises are described in the mortgage as one tract, the referee, or officer making the sale, is not bound to sell them in parcels;[2] but where the premises are so situated that he can sell in parcels without injury to the interests of any of the parties, he may properly do so.[3] And it has been held, where mortgaged premises consist of two or more parcels of land which have previously been held, used and conveyed together, that a sale of the whole in one parcel will be valid.[4]

The provisions of the Code of Civil Procedure regulating this matter are simply declaratory of the law on the subject, as the same was enforced by the courts of chancery before the enactment of the statute.[5] The object of the statute, as well as of the chancery rule, is to insure from the sale of the

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(N. Y.) 614 (1830); Wood v. Monell, 1 Johns. Ch. (N. Y.) 502 (1815).

[5] Mahone v. Williams, 39 Ala. 202 (1863); Gray v. Shaw, 14 Mo. 341 (1851); Stull v. Macalester, 9 Ohio, 19, 24 (1839); Ord v. Noel, 5 Madd. 438 (1820).

But, "a mere error of judgment in the selection of a mode of sale, whereby some injury may probably have resulted, ought not to be any ground for the avoidance of a sale. If it were, all certainty and stability would be stripped from such sales, and their validity would depend upon mere vague speculation. The rule which we have deduced from Chancellor Kent's opinion [see Wood v. Monell, 1 Johns. Ch. (N. Y.) 502 (1815); Woodhull v. Osborne, 2 Edw. Ch. (N. Y.) 614 (1830)], is a general one, adopted because it will lead, usually, to a correct solution of the question whether a sale should be by parcels, and is designed to aid in determining whether a sale should be avoided, because it was not made in that manner." Mahone v. Williams, 39 Ala. 202, 218 (1863).

[1] Ellsworth v. Lockwood, 42 N. Y. 89 (1870). See Hewson v. Deygert, 8 Johns. (N. Y.) 333 (1811); Tiernan v. Wilson, 6 Johns. Ch. (N. Y.) 411 (1822); Jencks v. Alexander, 11 Paige Ch. (N. Y.) 619 (1845); Mohawk Bank v. Atwater, 2 Paige Ch. (N. Y.) 54, 61 (1830).

[2] Sherman v. Willett, 42 N. Y. 146, 150 (1870); Griswold v. Fowler, 24 Barb. (N. Y.) 135 (1857); s. c. 4 Abb. (N. Y.) Pr. 238; Lamerson v. Marvin, 8 Barb. (N. Y.) 9 (1850).

[3] Sherman v. Willett, 42 N. Y. 146, 150 (1870).

[4] Anderson v. Austin, 34 Barb. (N. Y.) 319 (1861).

[5] Campbell v. Macomb, 4 Johns. Ch. (N. Y.) 534 (1820); Lyman v. Sale, 2 Johns Ch. (N. Y.) 487 (1817); Brinckerhoff v. Thallhimer, 2 Johns. Ch. (N. Y.) 486 (1817). See *ante* § 485.

property the largest possible sum of money; and a sale in parcels is generally best for the interests of all parties concerned, because it tends to accommodate the wants of the bidders and to promote competition.[1]

The practice of selling several distinct parcels of land as one piece and of offering an entire tract at one time, when a portion of it would be sufficient to satisfy the judgment without detriment to the interests of any of the parties to the suit, has been uniformly condemned by the courts as tending to the sacrifice of the property and to the oppression of the debtor.[2]

§ 490. Mortgagee or mortgagor dictating order of sale.—In determining the order of sale the question always is, what method of sale will produce the best result. In deciding this much necessarily depends upon the circumstances of each particular case. The plaintiff has a right to have his lien protected in the fullest manner possible; and if the property is of doubtful value, and he acts in good faith and no party in interest is willing to furnish him additional security, he may properly be allowed to designate the manner in which the sale shall be made.[3] But where the land is ample security, the desires and preferences of the owner of the equity of redemption will be entitled to the fullest consideration from the referee or officer making the sale.[4]

In King v. Platt,[5] the decree of foreclosure directed the sale of certain lots in New York city; the defendant mortgagor presented a written request to the referee to have the corner lot, which was the most valuable, sold first; the

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[1] See Wood v. Monell, 1 Johns. Ch. (N. Y.) 502 (1815).

[2] Griffith v. Hadley, 10 Bosw. (N. Y.) 587 (1862). See Cunningham v. Cassidy, 17 N. Y. 276 (1858); s. c. 7 Abb. (N. Y.) Pr. 183; Jackson v. Newton, 18 Johns. (N. Y.) 355, 362 (1820); Tiernan v. Wilson, 6 Johns. Ch. (N. Y.) 411, 414 (1822); Wood v. Monell, 1 Johns. Ch. (N. Y.) 502 (1815).

[3] Griswold v. Fowler, 24 Barb. (N. Y.) 135 (1857); Brown v. Frost, Hoff. Ch. (N. Y.) 41, 43 (1839).

[4] Walworth v. Farmers' Loan & Trust Co., 4 Sandf. Ch. (N. Y.) 51 (1846). See Ellsworth v. Lockwood, 42 N. Y. 89 (1870).

[5] 37 N. Y. 155 (1867); s. c. 3 Abb. (N. Y.) Pr. N. S. 434; 35 How. (N. Y.) Pr. 23.

referee disregarded this request and directed the sale to proceed in a different manner. It appearing that the request was made in good faith and in the belief that it would increase the amount realized from the sale of the property, and no satisfactory reason for denying the request being shown by the referee, the sale was set aside and a resale ordered.

The mortgagee can only demand that the usual terms of sale as to the time of the payment of the purchase money, or so much thereof as is necessary to discharge his debt and the costs of suit, be not departed from without special reasons.[1]

And it has been held, where a party directly interested in the price which the property to be sold should bring, makes a reasonable request as to the order in which the parcels shall be sold, with a view of enhancing the price for which the property may sell, and the request is disregarded without an apparently good cause, that the court will be justified in setting the proceedings aside and in ordering a new sale;[2] and in a case where the mortgaged premises, which were clearly worth more than the mortgage debt and the costs of the suit, had been laid out into city lots, the decree of foreclosure and sale allowed the owners of the equity of redemption to direct the order in which the lots should be sold.[3]

§ 491. **Discretion of officer as to selling in parcels.**— The provisions of the Code of Civil Procedure leave the question as to whether the mortgaged premises shall be sold as a whole, or in parcels, in the discretion of the officer making such sale, in case the court does not in the decree, direct the manner in which the sale shall be made. In some cases the facts will be such that the officer will be called upon to exercise a discretion, which is judicial in its nature,[4] in which case an honest exercise of that discretion will be as

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[1] Brown v. Frost, Hoff. Ch. (N. Y.) 41 (1839); Vandercook v. Cohoe's Savings Institute, 5 Hun (N. Y.) 641 (1875).

[2] King v. Platt, 37 N. Y. 155 (1867).

[3] Walworth v. Farmers' Loan & Trust Co., 4 Sandf. Ch. (N. Y.) 51 (1846).

[4] Where the decree directs the referee or officer making the sale, to inquire and ascertain in what order

final as the action of any judicial tribunal.[1] In those cases in which it is proper for the officer making the sale, to determine whether the property shall be sold in parcels, it seems that the parties to the action are entitled to whatever possible benefit might follow from the judicious exercise of that discretion.[2] And it seems that where the officer making the sale, instead of exercising his discretion, relies upon the purchaser for his information, the sale may be treated as invalid.[3]

Thus, it has been held where the mortgaged premises are contiguous and adjoining and appear always to have been controlled by a single person, that it is in the sound discretion of the referee conducting the sale of such premises on a mortgage foreclosure to sell the same in one piece or in parcels, and that the careful and honest exercise of such discretion will not be disturbed by the court directing the sale.[4]

Whether the property on a mortgage foreclosure sale is to be sold as an entirety or in parcels, is in some cases determined by the court—generally through a referee—while in other cases it is left to the discretion of the officer making the sale. When the method of sale is determined by the court, the order of sale sometimes directs the form and manner of the division of the property, and designates the order in which the parcels shall be offered for sale.[5]

The order of the sale may be based upon the facts shown at the hearing, or upon the consent of the parties;[6] and

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the different parcels of the mortgaged premises should be sold under the decree, in order to protect the equitable rights of the several persons claiming to have interests therein, or liens on the respective parcels, such referee or other officer, in determining this question, acts as a *quasi* judge of the court. Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844).

[1] O'Donnell v. Lindsay, 39 N. Y. Supr. Ct. (7 J. & S.) 529 (1873).

[2] O'Donnell v. Lindsay, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 530 (1873); Russell v. Conn, 20 N. Y. 83 (1859).

[3] O'Donnell v. Lindsay, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 530 (1873).

[4] Whitbeck v. Rowe, 25 How. (N. Y.) Pr. 403 (1862). See Waldo v. Williams, 3 Ill. (2 Scam.) 470 (1840); Benton v. Wood, 17 Ind. 260 (1861); White v. Watts, 18 Iowa, 74 (1864); Lay v. Gibbons, 14 Iowa, 377 (1862).

[5] Bard v. Steele, 3 How. (N. Y.) Pr. 110 (1847); Cissna v. Haines, 18 Ind. 496 (1862); Brugh v. Darst, 16 Ind. 79 (1861).

where an order is once made, it will not be disturbed without good cause therefor being first shown.[1] Where the statute directs that only so much of the mortgaged premises shall be sold as will pay the amount due to the plaintiff and the costs of the suit, if a division of the property into parcels is possible, the statute will control the case,[2] the court being required simply to determine whether the property can be subdivided without injury to the parties in interest.

§ 492. **Sale of premises subdivided into lots after execution of mortgage.**—Where lands have been mortgaged as an undivided tract or parcel, and are subsequently cut up into lots for the convenient occupation of the mortgagor, or for the purpose of sale, the mortgagor will have no right upon foreclosure to insist that the mortgagee shall sell the premises in lots, according to the map, instead of selling the whole as one undivided tract according to the description contained in the mortgage,[3] because by the terms of the mortgage the whole premises are pledged for the payment of the mortgage debt, and the contract of the parties is, that in case of non-payment, the whole land shall be sold; and no court has any power to alter or impair that contract in any particular, or to direct that only a part of the land shall be sold, and that the remainder shall be given away or dedicated to the public. The mortgagor can not, by laying out the mortgaged premises in village lots, bounded upon and intersected by streets, withdraw from the lien of the mortgage the land included in the streets.[4]

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[6] Cord v. Southwell, 15 Wis. 211 (1862).

[1] Vaughn v. Nims, 36 Mich. 297 (1877).

[2] Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835).

[3] Griswold v. Fowler, 24 Barb. (N. Y.) 135 (1857); s. c. 4 Abb. (N. Y.) Pr. 238; Lamerson v. Marvin, 8 Barb. (N. Y.) 9 (1850); Hubbell v. Sibley, 5 Lans. (N. Y.) 51 (1871), distinguishing Ellsworth v. Lockwood, 42 N. Y. 89 (1870); Lane v. Conger, 10 Hun (N. Y.) 1 (1877); Ellsworth v. Lockwood, 9 Hun (N. Y.) 548 (1877).

[4] Griswold v. Fowler, 24 Barb. (N. Y.) 135 (1857); s. c. 4 Abb. (N. Y.) Pr. 238. See Hubbell v. Sibley, 5 Lans. (N. Y.) 51 (1871); Lane v. Conger, 10 Hun (N. Y.) 1 (1877); Ellsworth v. Lockwood, 9 Hun (N. Y.) 548 (1877).

§ 493. **Sale of moiety—Land held by tenants in common.**—Where land is held by tenants in common, and they unite in executing a joint mortgage to secure a joint and several debt, one of them can not compel the mortgagee to receive half the debt and to proceed against his co-tenant's moiety for the collection of the other half of the mortgage debt; and this is true, notwithstanding he may tender a sufficient bond of indemnity against eventual loss. And on a foreclosure of the mortgage against both mortgagors, a decree will not be made for a sale of the undivided moieties separately for the respective half parts of the debt.[1]

But it seems that where tenants in common mortgage their land for a joint debt and afterwards make a partition of the land, each half will be chargeable primarily with one-half of the debt and one-half of the costs of the suit.[2] This is presumably on the principle that equity will require each portion of the mortgaged premises to bear its own proportion of the mortgage debt.

Where the owner of an undivided half of real estate mortgaged the same, and the land was afterwards partitioned, it was held that the portion of the land set off to the mortgagor must first be sold. In such a case, where the officer making the sale was tendered the whole amount of the debt and costs, for which sale was directed to be made of the undivided half set off to the mortgagor, but refused such bid and sold the whole mortgaged premises, the court set the sale aside.[3] The equitable effect of the sale of an undivided one-half of mortgaged premises by the mortgagor, and the payment of the purchase money to him, is to cast the burden of the payment of the mortgage debt primarily on the remaining half, if that is sufficient to pay the incumbrance.[4]

§ 494. **Sale in parcels when only part of mortgage due.**—The Code of Civil Procedure provides that where a part only of the mortgage debt has become due, and the

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[1] Frost v. Frost, 3 Sandf. Ch. (N. Y.) 188 (1846).

[2] Rathbone v. Clarke, 9 Paige Ch. (N. Y.) 648 (1842).

[3] Quaw v. Lameraux, 36 Wis. 626 (1875).

[4] Schrack v. Shriner, 100 Pa. St. 451 (1882).

mortgaged property is so situated that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct that no more of the property be sold, in the first place, than will be sufficient to satisfy the sum due with the costs and expenses of the sale.[1] The fact that the premises are a meager security for the debt and are depreciating in value for want of proper care, will not justify a sale of the entire premises for a debt, only a portion of which is due.[2] It seems that under such circumstances, in order to secure a sale of the whole property, it is necessary that it should be alleged in the pleadings and decided by the court that the premises can not be divided without manifest injury to the parties concerned.[3] If a part only of the debt is due and the premises are so situated that they can not be divided, the whole premises should be directed to be sold;[4] and the decree should provide for the payment of the money to the mortgagee for the extinction of the debt, unless some safe course more beneficial to the mortgagor is suggested to the court.[5]

Where there is a sale of the whole premises for an installment due, such sale exhausts the remedy of the mortgagee and passes a clear title to the purchaser,[6] because, as against

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[1] N. Y. Code Civ. Proc. § 1636; Long v. Lyons, 54 How. (N. Y.) Pr. 129 (1875). See Caufman v. Sayre, 2 B. Mon. (Ky.) 202 (1841). It has been said that where there is no statutory requirement, a court of equity will order a sale in parcels where the premises consist of different tracts, which are together worth more than the amount secured. Ryerson v. Boorman, 7 N. J. Eq. (3 Halst.) 167, 640 (1849).

[2] Blazey v. Delius, 74 Ill. 299 (1874).

[3] Blazey v. Delius, 74 Ill. 299 (1874).

[4] N. Y. Code Civ. Proc. § 1637.

[5] Walker v. Hallett, 1 Ala. 379, 393 (1840). See Knapp v. Burnham, 11 Paige Ch. (N. Y.) 330 (1844); Levert v. Redwood, 9 Port. (Ala.) 79, 96 (1839).

[6] Poweshiek Co. v. Denison, 36 Iowa, 244, 248 (1873); s. c. 15 Am. Rep. 521. See Packer v. Rochester & S. R. R. Co., 17 N. Y. 287 (1858) Holden v. Sackett, 12 Abb. (N. Y.) Pr. 473 1861); Lansing v. Goelett, 9 Cow. (N. Y.) 346 (1827). See also Bradford v. Harper, 25 Ala. 337 (1854); Kelly v. Payne, 18 Ala. 371 (1850); Hobby v. Pemberton, Dudley (Ga.) 212 (1831); Marston v. Marston, 45 Me. 412 (1858); Haynes v. Wellington, 25 Me. 458 (1845); Brown v. Tyler, 72 Mass. (8 Gray), 135 (1857); s. c. 69 Am. Dec. 239; Ritger v. Parker, 62 Mass. (8 Cush.) 145 (1851); Clower v. Rawlings, 17 Miss. (9 Smed. & M.) 122 (1847);

the mortgagee, the presumption is, in all cases, that the property sells for its full value.[1] In such a case the mortgagee is entitled to retain from the proceeds of the sale enough to satisfy unpaid installments, though not yet due.[2] Where judgment of foreclosure is rendered upon a mortgage securing both matured and unmatured notes, and the land is ordered to be sold as not divisible, the plaintiff may bid the whole amount due and to become due on the mortgage, besides the costs of the action, and upon paying the costs and simply receipting for the whole amount of the judgment, the same will constitute a valid payment.

§ 495. **Sale of portion of premises for part of debt due—Failure to pay subsequent installments.**—Where a portion of the mortgage debt is not yet due, and the judgment directs that so much of the mortgaged premises be sold as will be sufficient to pay the amount then due on the mortgage, with the costs of the suit, and there has been a sale of such separate portion, the judgment will remain in force as a security against any subsequent default. And if there should be a default subsequent to the judgment in the payment of any portion of the interest or any installment of the principal, the court will, upon a proper petition of the plaintiff, due notice having been served upon the parties interested, by further order founded upon the first judgment, direct a sale to be made of so much of the mortgaged premises as will be necessary to satisfy the amount of interest, or the installment of the principal then due, together with the costs of the petition and of the subsequent proceedings thereon. And this proceeding may be repeated as often as a subsequent default is made.[3]

Stark v. Mercer, 4 Miss. (3 How.) 377 (1839); Carter v. Walker, 2 Ohio St. 339 (1853); West Branch Bank v. Chester, 11 Pa. St. 282 (1849); s. c. 57 Am. Dec. 547; McCall v. Lenox, 9 Serg. & R. (Pa.) 302 (1823); Pierce v. Potter, 7 Watts. (Pa.) 477 (1838); Berger v. Hiester, 6 Whart. (Pa.) 210 (1840); Hodson v. Treat, 7 Wis. 263 (1859); Tallman v. Ely, 6 Wis. 244 (1858); Hope v. Booth, 1 Barn. & Ad. 498 (1830).

[1] Escher v. Simmons, 54 Iowa, 269 (1880).

[2] Fowler v. Johnson, 26 Minn. 338 (1880).

[3] N. Y. Code Civ. Proc. § 1636. See Malcolm v. Allen, 49 N. Y. 448 (1872).

It would seem that the provisions of the Code of Civil Procedure, relating to a foreclosure sale for installments not due at the commencement of the suit, apply only to the foreclosure of mortgages executed to secure the payment of money by installments, and can not be applied to mortgages conditioned for the performance of covenants other than for the payment of money.[1] Thus, in an action brought to foreclose a mortgage, conditioned merely for the support of the mortgagee, no relief can be granted for neglect to support after the commencement of the action, except by a new foreclosure, if only a portion of the premises were sold.[2]

§ 496. **Petition for order of second sale—Reference thereon to compute amount due.**—Where a portion of the premises have been sold for an installment due, and there has been a subsequent default, the plaintiff should apply by petition to the court for a subsequent sale of the residue of the premises, or so much thereof as may be necessary to pay the installment or interest then due, besides the costs of the proceeding. Such a petition should bear the title of the action and be addressed to the court in which the judgment of foreclosure was obtained. It should contain all the essential points upon which the previous order for sale was founded, and should recite the judgment, and the continuance thereof as security for subsequent defaults. It should also set forth briefly the facts in the case showing the amount of the installment or interest due, the time when it became due, and other particulars for the full information of the court. It should be verified on the oath of the petitioner and contain a prayer for the relief desired, the same as other petitions. Due notice of application to the court for the second sale should be served upon all the parties interested who have appeared in the action.[3]

If all the parties are adults, and have been personally served, the court will order a second sale on a petition without

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[1] Ferguson v. Ferguson, 2 N. Y. 360 (1849), modifying 3 Barb. Ch. (N. Y.) 616.

[2] Morrison v. Morrison, 4 Hun (N. Y.) 410 (1875); Ferguson v. Ferguson, 2 N. Y. 360 (1849).

a reference; but if any of the defendants are absentees or infants who are not represented in the action, the court will not proceed and order a second sale without a reference.

The referee will have duties and authority similar to those of a referee appointed to compute the amount due upon an application for judgment on default.[1] If there are further installments yet to become due, the referee should ascertain whether the premises still remaining unsold can be sold in parcels without prejudice to the interests of the parties. But where, upon a bill for the foreclosure of a mortgage payable by installments, some of which were not due and payable at the time of granting the decree of sale, the referee appointed by the court upon the first reference, reported that the premises could not be sold in parcels, it seems that it will not be necessary to obtain another report upon that subject previous to obtaining a second order of sale to pay installments which have become due subsequently to the decree.[2]

§ 497. **Order for second sale.**—If there has been a second reference, on the coming in of the referee's report, the order for a second sale will follow as a matter of course, as under the original order of reference, and the manner of conducting the sale will be the same. The second order of sale should refer to, and be founded upon the first judgment, and should in a similar manner direct the sale of the mortgaged premises, or so much thereof as will be necessary to satisfy the amount due, besides costs, and the payment of the same to the petitioner; it should also contain all the other essential requisites of a judgment in foreclosure.

The report of the referee to compute the amount due, must be filed and confirmed before the plaintiff will be entitled to apply for an order of sale founded upon it. In those cases where any of the defendants attend before the referee and contest the reference, the order of the court, together with the petition and the report of the referee upon

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[8] Knapp v. Burnham, 11 Paige Ch. (N. Y.) 330 (1844).
[1] Knapp v. Burnham, 11 Paige Ch. (N. Y.) 330 (1844).
[2] Knapp v. Burnham, 11 Paige Ch. (N. Y.) 330 (1844).

which it was founded, and all the other orders and papers in the proceedings must be filed before applying for an order of sale.[1]

§ 498. **Where proceedings stayed by payment—Subsequent default.**—The New York Code of Civil Procedure provides,[2] where an action is brought to foreclose a mortgage upon real property, upon which a portion of the principal or interest is due, and a portion of either is to become due, and after a final judgment directing a sale is rendered, but before the sale is made, that if the defendant pays into court the amount due for principal and interest, and the costs of the action, together with the expenses of the proceedings to sell, if any, all proceedings upon the judgment must be stayed; but that upon a subsequent default in the payment of principal or interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due.

If after such stay, the defendant makes default in the payment of any subsequent installment of principal or interest when it becomes due, the plaintiff may apply to the court upon petition, setting forth the default subsequent to the judgment, the amount due on the mortgage, and the time when it became due, and ask that leave be granted to enforce his judgment by a sale of the mortgaged premises.

The application must be made to the court upon due notice to all parties who have appeared in the action; all the proceedings are substantially the same as those in the case of a failure to pay subsequent installments, where a portion of the premises have been sold to pay an installment due, except that a reference in this case is not necessary, as the judgment fixes the rights of the parties; if the facts are not disputed, the order follows as a matter of course.[3]

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[1] Knapp v. Burnham, 11 Paige Ch. (N. Y.) 330 (1844)
[2] N. Y. Code Civ. Proc. § 1634, 1635.
[3] N. Y. Code Civ. Proc. § 1635.

CHAPTER XXIV.

SALE IN INVERSE ORDER OF ALIENATION.

GENERAL RULE—DETERMINING ORDER OF SALE—COURT DIRECTING ORDER—EQUITABLE RIGHTS BETWEEN SUBSEQUENT GRANTEES AND LIENORS.

§ 499. Rule for selling in inverse order of alienation.
500. Rule in Iowa, Kentucky and Georgia.
501. Rule where conveyances by grantees of mortgagor.
502. Determining order of sale where various grantees—Equities between them.
503. Directions by court for the order of sale.
504. Application to the court for directions.
505. Equitable rights between subsequent grantees and lienors.
506. Equities between grantees—Time of acquiring title.
507. Rights of successive subsequent mortgagees — New Jersey rule.
§ 508. Rights of purchaser of part of mortgaged premises subject to mortgage.
509. Order of sale in parcels where subsequent grantee of part has assumed mortgage.
510. When rule for sale in inverse order does not apply.
511. Contribution according to value — Valuation, when made.
512. Where the mortgagee has other securities and there are subsequent mortgagees.
513. Rule where portions alienated have been released.
514. Rule for order of sale where the mortgage covers homestead and other lands.

§ 499. **Rule for selling in inverse order of alienation.**—Upon a sale of mortgaged premises in an action for foreclosure, if the mortgagor, subsequent to the execution of the mortgage, has made successive transfers of separate parcels of the mortgaged premises to different persons, that portion, if any, still remaining in his hands, must first be sold to satisfy the mortgage debt and the costs and expenses of the action; and if a sufficient sum for that purpose is not realized from such sale, then the various portions of the mortgaged lands conveyed by the mortgagor must be sold in the inverse order of their alienation, according to the equitable rights of the different grantees as among themselves, until a sufficient sum is realized to satisfy the mortgage debt.

The same principle of equity is applicable to subsequent incumbrances upon different portions of the mortgaged

premises, either by mortgage or by judgment,[1] as well as to sales of parcels of the equity of redemption,[2] because subsequent incumbrances are deemed sales within the rule above stated.[3]

This rule has been adopted throughout the states of the Union, and now prevails in New York,[4] Alabama,[5] Colorado,[6] Florida,[7] Illinois,[8] Indiana,[9] Maine,[10] Massachusetts,[11]

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[1] Bernhardt v. Lymburner, 85 N. Y. 172 (1881); Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151, 155 (1847); New York Life Insurance and Trust Co. v. Milnor, 1 Barb. Ch. (N. Y.) 353 (1846); Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844); Fassett v. Mulock, 5 Colo. 466 (1880); Conrad v. Harrison, 3 Leigh (Va.) 532 (1832).

[2] Steere v Childs, 15 Hun N. Y. 511 (1878); Dodds v. Snyder, 44 Ill. 53 (1867).

[3] Milligan's Appeal, 104 Pa. St. 503 (1883). See Fassett v. Mulock, 5 Colo. 466 (1880).

[4] Bernhardt v. Lymburner, 85 N. Y. 172 (1881); Hopkins v. Wolley, 81 N. Y. 77 (1880); Barnes v. Mott, 64 N. Y. 397, 402 (1876); Chapman v. West, 17 N. Y. 125 (1858); Ingalls v. Morgan, 10 N. Y. 178 (1854); Howard Ins. Co. v. Halsey, 8 N. Y. 271 (1853); s. c. 59 Am. Dec. 478; Crafts v. Aspinwall, 2 N. Y. 289 (1849); McDonald v. Whitney, 2 N Y. Week. Dig. 529 (1876); Woods v. Spalding, 45 Barb. (N. Y.) 608 (1866); Lafarge Fire Ins. Co. v. Bell, 22 Barb. (N. Y.) 54 (1856); St. John v. Bumpstead, 17 Barb. (N. Y.) 102 (1853); Weaver v. Toogood, 1 Barb. (N. Y.) 238 (1847); Ferguson v. Kimball, 3 Barb. Ch. (N. Y.) 616 (1846); Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847); New York Life Ins. & Trust Co. v. Milnor, 1 Barb. Ch. (N. Y.) 353 (1846); *Ex parte* Merrian, 4 Den. (N. Y.) 254 (1847); VanSlyke v. VanLoan, 26 Hun (N. Y.) 344 (1882); Coles v. Appleby, 22 Hun (N. Y.) 72 (1880); Steere v. Childs, 15 Hun (N. Y.) 518 (1878); Clowes v. Dickenson, 5 Johns. Ch. (N. Y.) 235 (1827); s. c. 9 Cow. (N. Y.) 403; Gill v. Lyon, 1 Johns. Ch. (N. Y.) 447 (1815); Kellogg v. Rand, 11 Paige Ch. (N. Y.) 59 (1844); Rathbone v. Clark, 9 Paige Ch. (N. Y.) 648 (1842); Schryver v. Teller, 9 Paige Ch. (N. Y.) 173 (1841); Farmers' Loan & Trust Co. v. Maltby, 8 Paige Ch. (N. Y.) 361 (1840); Patty v. Pease, 8 Paige Ch. (N. Y.) 277 (1840); s. c. 35 Am. Dec. 683; Skeel v. Spraker, 8 Paige Ch. (N. Y.) 182 (1840); Guion v. Knapp, 6 Paige Ch. (N. Y.) 35 (1836); s. c. 29 Am. Dec. 741; Jenkins v. Freyer, 4 Paige Ch. (N. Y.) 47 (1833); Gouverneur v. Lynch, 2 Paige Ch. (N. Y.) 300 (1830); James v. Hubbard, 1 Paige Ch. (N. Y.) 228 (1828); New York Life Ins. & Trust Co. v. Cutler, 3 Sandf. Ch. (N. Y.) 176 (1845).

[5] Mobile M. D. & M. Ins. Co. v. Huder, 35 Ala. 713 (1860).

[6] Fassett v. Mulock, 5 Colo. 466 (1880).

[7] Ritch v. Eichelberger 13 Fla. 169 (1869).

[8] Niles v. Harmon, 80 Ill. 396 (1875); Moore v. Chandler, 59 Ill. 466 (1871); Sumner v. Waugh, 56 Ill. 531 (1869); Tompkin v. Wiltberger, 56 Ill. 385 (1870); Lock v. Fulford, 52 Ill 166 (1869); Dodds v.

Michigan,[1] Minnesota,[2] New Hampshire,[3] New Jersey,[4] Ohio,[5] Pennsylvania,[6] South Carolina,[7] Texas,[8] Vermont,[9] Virginia,[10]

Snyder, 44 Ill. 53 (1867); Iglehart v. Crane, 42 Ill. 261 (1866); Matteson v. Thomas, 41 Ill. 110 (1866); McLaurie v. Thomas, 39 Ill. 291 (1866); Marshall v. Moore, 36 Ill. 321 (1865).

[9] Evansville Gas Light Co. v. State, 73 Ind. 219 (1881); Medsker v. Parker, 70 Ind. 509 (1880); Mc Cullum v. Turpie, 32 Ind. 146 (1869); Aiken v. Bruen, 21 Ind. 137 (1863); Williams v. Perry, 20 Ind. 437 (1863); Cissna v. Haines, 18 Ind. 496 (1842); Day v. Patterson, 18 Ind. 114 (1862).

[10] Sheperd v. Adams, 32 Me. 63 (1850); Holden v. Pike, 24 Me. 427 (1844).

[11] Beard v. Fitzgerald, 105 Mass. 134 (1870); Pike v. Goodnow, 94 Mass. (12 Allen), 474 (1866); George v. Wood, 91 Mass. (9 Allen), 80 (1864); Kilborn v. Robbins, 90 Mass. (8 Allen), 466 (1864); George v. Kent, 89 Mass. (7 Allen), 16 (1863); Chase v. Woodbury, 60 Mass. (6 Cush.) 143 (1850); Allen v. Clark, 34 Mass. (17 Pick.) 47 (1835). But see Parkman v. Welch, 36 Mass. (19 Pick.) 231 (1837).

[1] McVeigh v. Sherwood, 47 Mich. 545 (1882); Sager v. Tupper, 35 Mich. 134 (1876); McKinney v. Miller, 19 Mich. 142 (1869); Ireland v. Woolman, 15 Mich. 253 (1867); Cooper v. Bigly, 13 Mich. 463 (1865); Briggs v. Kaufman, 2 Mich. N. P. 160 (1871); Mason v. Payne, Walk. Ch. (Mich.) 459 (1844).

[2] Johnson v. Williams, 4 Minn. 260, 268 (1860).

[3] Mahagan v. Mead, 63 N. H. 570 (1885); Brown v. Simons, 44 N. H. 475 (1863).

[4] Hill v. McCarter, 27 N. J. Eq. (12 C. E. Gr.) 41 (1876); Mutual L. Ins. Co. of N. Y. v. Boughrum, 24 N. J. Eq. (9 C. E. Gr.) 44 (1873); Mount v. Potts, 23 N. J. Eq. (8 C. E. Gr.) 188 (1872); Weatherby v. Slack, 16 N. J. Eq. (1 C. E. Gr.) 491 (1864); Keene v. Munn, 16 N. J. Eq. (1 C. E. Gr.) 398 (1863); Gaskill v. Sine, 13 N. J. Eq. (2 Beas.) 400 (1861); s. c. 78 Am. Dec. 105; Winters v. Henderson, 6 N. J. Eq. (2 Halst.) 31 (1846); Wikoff v. Davis, 4 N. J. Eq. (3 H. W. Gr.) 224 (1842); Britton v. Updike, 3 N. J. Eq. (2 H. W. Gr.) 125 (1834); Shannon v. Marselis, 1 N. J. Eq. (Saxt.) 413 (1831).

[5] Sternberger v. Hanna, 42 Ohio St. 305 (1884); Nellons v. Truax, 6 Ohio St. 97 (1856); Cary v. Folsom, 14 Ohio, 365 (1846); Commercial Bank of Lake Erie v. Western Reserve Bank, 11 Ohio, 444 (1842); s. c. 38 Am. Dec. 739. But see Green v. Ramage, 18 Ohio, 428 (1849); s. c. 51 Am. Dec. 458.

[6] Milligan's Appeal, 104 Pa. St. 503 (1883); Carpenter v. Koons, 20 Pa. St. 222 (1852); Warren v. Sennett, 4 Pa. St. 114 (1846); Cowden's Estate, 1 Pa. St. 267 (1845); Presbyterian Corporations v. Wallace, 3 Rawle (Pa.) 109 (1831); Donley v. Hays, 17 Serg. & R. (Pa.) 400 (1828); Nailer v. Stanley, 10 Serg. & R. (Pa.) 450 (1823); s. c. 13 Am. Dec. 691.

[7] Norton v. Lewis, 3 S. C. 25 (1871); Stoney v. Shultz, 1 Hill (S. C.) Eq. 465 (1834); s. c. 27 Am. Dec. 429; Meng v. Houser, 13 Rich. (S. C.) Eq. 210 (1867).

[8] Rippetoe v. Dwyer, 49 Tex. 498 (1878); Miller v. Rogers, 49 Tex. 398 (1878).

and Wisconsin.[1] The same rule also prevails in England.[2] But a different rule obtains in Iowa, Kentucky and Georgia.[3]

§ 500. **Rule in Iowa, Kentucky and Georgia.**—The courts of Iowa, Kentucky and Georgia hold, contrary to the general rule above stated, that where several parts of a mortgaged estate are conveyed in distinct parcels to different persons, at different times, the several owners must contribute to the payment of the mortgage debt *pro rata*, according to the value of their respective portions of the property.[4]

The supreme court of Iowa, in stating the arguments in favor of this rule in Bates v. Ruddick,[5] said: "When we come to settle the question, however, as between two grantees purchasing the different parcels of the incumbered premises, at different times, there is no more moral obligation on the one to pay than on the other. Both of them have purchased premises that are alike affected by a lien, which neither created nor undertook to pay. The purchased premises are liable to be sold, because of the failure of their grantor to discharge his undertaking, and not because of any failure on their part. In such cases their interest is common, their rights are equal and there should be an

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[9] Root v. Collius, 34 Vt. 173 (1861); Lyman v. Lyman, 32 Vt. 79 (1859).

[10] Jones v. Myrick, 8 Gratt. (Va.) 179 (1851); Henkle v. Allstadt, 4 Gratt. (Va.) 284 (1848); Conrad v. Harrison, 3 Leigh. (Va.) 532 (1832).

[1] Aiken v. Milwaukee & St. P. R. Co., 37 Wis. 469 (1875); State of Wisconsin v. Titus, 17 Wis. 241 (1863); Worth v. Hill, 14 Wis. 559 (1861); Ogden v. Glidden, 9 Wis. 46 (1859).

[2] See Hartley v. O'Flaherty, Lloyd & Goold Cas. Temp. Plunkett, 208 (1835); Averall v. Wade, Lloyd & Goold Cas. Temp. Suyden, 252 (1836); Hamilton v. Royse, 2 Sch. & Lef. 315 (1806). But see Barnes v. Racster, 1 Young & C. C. R. 401 (1842).

[3] See *post* § 500.

[4] Huff v. Farewell, 67 Iowa, 298 (1885); Barney v. Myers, 28 Iowa, 472 (1870); Griffith v. Lovell, 26 Iowa, 226 (1868); Massie v. Wilson, 16 Iowa, 391 (1864); Bates v. Ruddick, 2 Iowa, 423 (1856); s. c. 65 Am. Dec. 174; Campbell v. Johnson, 4 Dana (Ky.) 182 (1836); Hughes v. Graves, 1 Litt. (Ky.) 317 (1822); Poston v. Eubanks, 3 J. J. Marsh. (Ky.) 44 (1829); Dickey v. Thompson, 8 B. Mon. (Ky.) 312 (1848); Burk v. Chrisman, 3 B. Mon. (Ky.) 50 (1842); Hunt v. McConnell, 1 T. B. Mon. (Ky.) 219 (1824). See also Stanly v. Stocks, 1 Dev. (N. C.) Eq. 314 (1829); Borden v. Grady, 37 Ga. 660 (1868).

[5] 2 Iowa, 423 (1856).

equality of burden. It is difficult for us to see why the last purchaser, any more than the first, sits in the seat of the grantor."

In Kentucky, in the case of Dickey v. Thompson,[1] Chief Justice Marshall held it to be decided by authority, even if not by reason, so far as that state is concerned, that the rule as to the application of property to the satisfaction of a mortgage in the inverse order of its transfer by the mortgagor, does not prevail, but that the transferees must contribute ratably.

In Barden v. Grady,[2] the supreme court of Georgia held that, inasmuch as a judgment binds all the property of the defendant from its date, equity will not compel the plaintiff to levy on that portion of the property last sold by the mortgagor, and sell that part, before he can proceed against property previously sold.

§ 501. Rule where conveyances by grantees of mortgagor.—The rule, that if successive sales of portions of mortgaged lands are made by the mortgagor to different persons, the part unsold shall first be liable to satisfy the mortgage debt, and after it, the parcels alienated in the inverse order of the sales, applies also to successive conveyances with warranty by the mortgagor's grantees.[3] Thus, where the grantee of a mortgagor conveys the mortgaged premises in separate parcels, and the grantees of such parcels subsequently convey them in parcels, the parcels subsequently conveyed will be subject to sale in the inverse order of their conveyance.[4]

The same rule applies where there are general liens upon the entire mortgaged premises and subsequent incumbrances on separate parcels thereof, in which case the general liens are primarily chargeable on the parcels in the inverse order of the dates of the subsequent incumbrances.[5] This rule,

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[1] 8 B. Mon. (Ky.) 312, 319 (1847).

[2] 37 Ga. 660 (1868), overruling Cumming v. Cumming, 3 Ga. 460 (1847). See Knowles v. Lawton, 18 Ga. 476 (1855); Hammond v. Myrick, 14 Ga. 77 (1853).

[3] Mahagan v. Mead, 63 N. H. 570 (1885).

[4] Hiles v. Coult, 30 N. J. Eq. (3 Stew.) 40 (1878). See Guion v. Knapp, 6 Paige Ch. (N.Y.) 35 (1836).

[5] Schryver v. Teller, 9 Paige Ch.

however, will not be enforced in any case where its application would work injustice to any party.[1]

§ 502. **Determining order of sale where various grantees—Equities between them.**—In a contest between successive purchasers as to whose premises shall be sold first to pay the mortgage debt, the order of sale will be determined *prima facie* by the dates when their respective titles vested; but the holder of a junior conveyance may show that, prior to the execution and delivery of the senior conveyance, he was in the actual and open possession of the parcel of land purchased by him, under a contract of sale, and that he had so far performed his part of the contract as to be entitled to a specific performance thereof prior to the date of the record title held by a senior grantee.[2] The rule providing for the sale of parcels of mortgaged premises in the inverse order in which the conveyances thereof were made, has been said to rest upon the principle, that where the mortgagor sells a part of the mortgaged premises without reference to the incumbrance, it is right between him and the purchaser, that the part still held by the mortgagor should first be applied to the payment of the debt.[3]

The supreme court of Illinois[4] has held, that "where the owner of land mortgaged conveys a portion of it with warranty, it is his duty to protect the grantee against the mortgage; and, in foreclosing the mortgage, it is just and right that it should be satisfied, if may be, out of the portion of the land which remains in the mortgagor, and that it should be first charged with the debt. This protects the interest of the purchaser of the part, and makes the

(N. Y.) 173 (1841). See Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847).

[1] Hill v. McCarter, 27 N. J. Eq. (12 C. E. Gr.) 41 (1876).

[2] Sternberger v. Hanna, 42 Ohio St. 305 (1884).

[3] Lock v. Fulford, 52 Ill. 166 (1869); Hoy v. Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 563 (1868); Gaskill v. Sine, 13 N J. Eq. (2 Beas.) 400 (1861); s. c. 78 Am. Dec. 105; Messervey v. Barelli, 2 Hill (S. C.) Eq. 567 (1837). See Dickey v. Thompson, 8 B. Mon. (Ky.) 314 (1847); Blight v. Banks, 6 T. B. Mon. (Ky.) 197 (1827); s. c. 17 Am. Dec. 136; Blackledge v. Nelson, 2 Dev. (N. C.) Eq. 66 (1831); Mervey's Appeal, 4 Pa. St. 80 (1846).

[4] Niles v. Harmon, 80 Ill. 396, 399 (1879).

mortgagor but pay his own debt out of his own land. It saves such purchaser from loss and injury, and does no harm to any one else. And should the mortgagor convey the portion remaining in him to a second purchaser, he takes the land as it was in the hands of the mortgagor, subject to the equity of being first charged with the payment of the mortgage debt, and it is thus equitable that the portion of the land held by the second purchaser should first be sold for the satisfaction of the debt, before resort is had to the land of the first purchaser."

The portion of the mortgaged premises retained by the mortgagor, being regarded as equitably charged with the payment of the debt, if the mortgagor afterwards sells another parcel thereof, the second purchaser will take his parcel charged with the payment of the mortgage debt, as between him and the purchaser of the first lot; but as between such second purchaser and his vendor, the land still retained by the mortgagor will be primarily liable for the payment of the whole debt. The same principle will apply to every successive alienation throughout the entire order thereof.[1]

Where it has been established by statutory enactment, or by the decisions of the courts, in the case of the sale of mortgaged premises on foreclosure, where portions thereof have been sold by the mortgagor at various times subsequent to the execution of the mortgage, that the parcels shall be subject to sale in the inverse order of their alienation, it is held that this rule, being a rule of property, is binding on the courts of the United States sitting in that state.[2]

§ 503. **Directions by court for the order of sale.**—If the original mortgagor or his grantee has made several successive conveyances of portions of the mortgaged premises, to different persons, the court, upon judgment of foreclosure and

[1] Iglehart v. Crane, 42 Ill. 261 (1866). See Ingalls v. Morgan, 10 N. Y. 178 (1854); Thompkins v. Wilkburger, 56 Ill. 385 (1870); Matteson v. Thomas, 41 Ill. 110 (1866); Weatherby v. Slack, 16 N. J. Eq. (1 C. E. Gr.) 491 (1864); Wikoff v. Davis, 4 N. J. Eq. (3 H. W. Gr.) 224 (1842).

[2] Orvis v. Powell, 98 U. S. (8 Otto), 176 (1878); bk. 25 L. ed. 238; s. c. 8 Cent. L. J. 74.

sale, will decree that the parcels shall be sold in the inverse order of their alienation, as shown by the dates of the respective conveyances.[1] In Erie County Savings Bank v. Roop,[2] it was held that "courts of equity have long exercised the power of directing, in foreclosure actions, the order in which the different parcels of the mortgaged premises shall be sold, arising out of the equities of the different parties interested in the equity of redemption as between themselves."[3] This rule is applicable, however, only where the mortgage was originally a lien resting uniformly upon the whole of the land.[4]

In granting a decree of foreclosure and for the sale of mortgaged premises, directions as to the order in which the different parcels of the mortgaged premises shall be sold, will be given as a matter of course, upon information that separate portions of such premises are held or claimed by different persons under conveyances or incumbrances which are subsequent to the mortgage of the plaintiff.[5] In a case where, upon judgment of foreclosure and sale, a motion was made for directions as to the manner of selling the mortgaged property, and such directions were given as the equities of the parties required, it was held that no error was committed; but a motion for such directions can not be first made in an appellate court.[6]

In case there are conflicting claims, among junior judgment creditors, to the surplus that may arise from the sale of mortgaged premises, should the parcels be sold in any special manner, such creditors should apply to the court, previously to the sale under the decree, for directions that

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[1] Hart v. Wandle, 50 N. Y. 381 (1872). See Erie Co. Sav. Bank v. Roop, 48 N. Y. 292 (1872); New York L. Ins. & T. Co. v. Milnor, 1 Barb. Ch. (N. Y.) 353 (1846); National State Bank v. Hibbard, 45 How. (N. Y.) Pr. 280 (1873); Evansville Gas Light Co. v. State, 73 Ind. 219 (1881).

[2] 48 N. Y. 292, 299 (1872).

[3] See Ferguson v. Kimball, 3 Barb. Ch. (N. Y.) 616 (1846); Rathbone v. Clark, 9 Paige Ch. (N. Y.) 648 (1842); Jumel v. Jumel, 7 Paige Ch. (N. Y.) 591 (1839).

[4] Evansville Gas Light Co. v. State, 73 Ind. 219 (1881).

[5] New York L. Ins. & T. Co. v. Milnor, 1 Barb. Ch. (N. Y.) 353 (1846).

[6] Haggerty v. Byrne, 75 Ind. 499 (1881). See Medsker v. Parker, 70 Ind. 509 (1880).

the premises be sold in such manner as will enable them to settle their respective claims upon the reference for the distribution of the surplus.

§ 504. **Application to the court for directions.**—Where a party to an action brought to foreclose a mortgage and to obtain a sale of the mortgaged premises, desires to have the parcels of such premises sold in a particular order, he should ask to have a clause to that effect inserted in the decree of sale.[1] An application for directions in the judgment as to the order of sale, should be made at the trial or at a special term of the court; failure to give directions for such order of sale will not be a sufficient ground for a reversal of the judgment on appeal.[2]

If a person wishing a clause inserted in the decree directing the order in which the referee shall sell the premises, neglects to apply to the court at the time the decree is rendered, or at a special term thereafter, he may apply to the referee personally, requesting the sale to be made in a particular order; and if such request be proper, and is disregarded by the referee without reason, the person aggrieved may, after sale, move to set the same aside.[3]

Where an application is made at the trial for the insertion of directions in the decree of sale as to the order in which the parcels shall be sold, the proper form of decree is that the referee or other officer making the sale of the mortgaged premises, shall sell the parcels thereof in the inverse order of their alienation, and according to equity as between the several defendants, leaving the officer making the sale to settle the details of the order of sale upon principles of equity.[4]

It was held in the case of Knickerbacker v. Eggleston,[5] that where a controversy exists between different defendants

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[1] Vandercook v. Cohoes Savings Institution, 5 Hun (N. Y.) 641 (1875); Bergen v. Backhouse, 7 N. Y. Week. Dig. 113 (1878).

[2] Bergen v. Backhouse, 7 N. Y. Week. Dig. 113 (1878); Vandercook v. Cohoes Savings Institution, 5 Hun (N. Y.) 641 (1875).

[3] Vandercook v. Cohoes Savings Institution, 5 Hun (N. Y.) 641 (1875).

[4] Rathbone v. Clark, 9 Paige Ch. (N. Y.) 648 (1842).

[5] 3 How. (N. Y.) Pr. 130 (1847).

in relation to the order in which the several portions of the mortgaged premises shall be sold, instead of directing a reference preliminary to the decree to settle the order of the sale of the different parcels, a provision should be inserted in the decree of sale referring it to some suitable person to make the sale, and directing that if it shall appear to such referee that separate parcels of the mortgaged premises have been conveyed or incumbered by the mortgagee, or by those claiming under him subsequent to the lien of the complainant's mortgage, then the referee shall sell the mortgaged premises in parcels, in the inverse order of their alienation, according to the equitable rights of the parties who are subsequent grantees or incumbrancers, as such rights shall be made to appear to the officer making the sale.

§ 505. **Equitable rights between subsequent grantees and lienors.**—Where the entire mortgaged premises are to be sold, it can make but little difference which parcel is sold first. The proceeds will go into a common fund and be taken into court to be distributed according to the equitable rights of the parties to the suit.[1] If a part of the mortgaged premises is incumbered by a second mortgage, and the residue thereof is sold and conveyed absolutely, subsequent to such second mortgage, the part mortgaged should be sold first and the surplus proceeds of that sale, beyond the amount of principal and interest due on the second mortgage, should be applied in payment of the first mortgage before resorting to the sale of the part of the premises which was conveyed absolutely.[2]

The right to have the lands which have been sold by the mortgagor charged on foreclosure with the payment of the mortgage debt in the inverse order of alienation, is not strictly a legal but an equitable right, and is governed by those equitable principles by which courts of equity protect the rights of sureties or those who stand in the relation of sureties.[3] And the rights and duties of the party

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[1] Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844). See Oppenheimer v. Walker, 3 Hun (N. Y.) 30 (1874).

[2] Kellogg v. Rand, 11 Paige Ch. (N. Y.) 59 (1844).

[3] Guion v. Knapp, 6 Paige Ch

who holds the mortgage under foreclosure will not be affected, unless he is informed of the facts upon which the equitable rights of the parties depend, or unless he has sufficient notice of the probable existence of the rights to make it his duty to ascertain whether such equitable rights do, in fact, exist.[1]

§ 506. Equities between grantees—Time of acquiring. —Where subsequent to the execution of a mortgage, the mortgaged premises are sold by the mortgagor in separate parcels at different times to different purchasers, who have no notice of the mortgage, and one of the parties takes a conveyance executed and delivered prior to the giving of a deed to another party, whose later conveyance is first recorded, upon a sale on foreclosure of the mortgage, the purchaser whose deed was first executed and delivered will take precedence over the party whose deed was executed last but recorded first, and he will have a prior equity in respect to the order in which the several parcels are to be sold.[2]

This rule does not apply, however, in case there has been a condemnation of a part of the mortgaged lands for a public use under the power of eminent domain. Thus, in a case where, after five mortgages had been given on a tract of land, a small strip thereof was condemned and taken for a railroad, and the owner paid therefor, the court held that the decree on foreclosure should order, first, the sale of all the land, except the strip condemned for the railroad, to satisfy, in their order, all five of the mortgages, and in case of a deficiency, then the sale of that strip.[3]

(N.Y.) 35, 42 (1836). See Bernhardt v. Lymburner, 85 N. Y. 172, 175 (1881).

[1] Guion v. Knapp, 6 Paige Ch. (N. Y.) 35, 42 (1836). See Colgrove v. Tallman, 67 N. Y. 95, 98 (1876); Howard Ins. Co. v. Halsey, 8 N. Y. 271, 273 (1853); Kendall v. Niebuhr, 45 N. Y. Supr. Ct. (13 J. & S.) 542, 551 (1879); s. c. 58 How. (N. Y.) Pr. 156, 163; Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847); Patty v. Pease, 8 Paige Ch. (N. Y.) 277, 285 (1840); s. c. 35 Am. Dec. 683; Stuyvesant v. Hone, 1 Sandf. Ch. (N. Y.) 419, 423 (1844).

[2] Ellison v. Pecare, 29 Barb. (N. Y.) 333 (1859); VanSlyke v. Van Loan, 26 Hun (N. Y.) 344 (1882); Meacham v. Steele, 93 Ill. 135 (1879); Lausman v. Drahos, 8 Neb. 457 (1879).

[3] Foster v. Union Nat. Bank of

Where land which has been mortgaged is subsequently sold in parcels under executions issued upon various judgments, upon a foreclosure of the mortgage, the parcels should be liable to sale in the inverse order of the dates when the respective judgments became liens, and not of the dates of the actual sales and the times when the conveyances were made.[1] But it would seem, where the administrator of a deceased mortgagor obtains an order of the probate court for the sale of a portion of the mortgaged premises to pay debts other than those secured by the mortgage, and which have been allowed against the estate, that the residue of the mortgaged premises owned by the heirs of the mortgagor must be first resorted to for the satisfaction of the mortgage, that portion held by the purchaser at an administrator's sale being only secondarily liable.[2]

§ 507. **Rights of successive subsequent mortgagees—New Jersey rule.**—It is held in New Jersey that the rule for selling in the inverse order of alienation does not apply to the holders of subsequent mortgages. Thus, where a party holds a second mortgage upon part of the premises embraced in a first mortgage, upon the remaining part whereof another person holds a second mortgage, he will be entitled to have the two parcels sold separately under proceedings to foreclose the first mortgage, if such a sale can be made without prejudice to the rights of the plaintiff; yet, if the property be sold in such a manner, the proceeds of the sales of the several parcels must pay their just proportion of the amount due on the first mortgage, besides the costs, according to their respective values.[3]

And it seems that where the plaintiff's mortgage covers several parcels of land, which have been conveyed by subsequent incumbrances, the decree of foreclosure of the first mortgage may direct the whole of the property to be sold, and the proceeds to be applied to satisfy the subsequent

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Rahway, 34 N. J. Eq. (7 Stew.) 48 (1881).

[1] Wood v. Spalding, 45 Barb. (N. Y.) 602 (1866). It would seem that a different rule prevails in Pennsylvania. See Carpenter v. Koons, 20 Pa. St. 222 (1852).

[2] Moore v. Chandler, 59 Ill. 466 (1871).

[3] Pancoast v. Duval, 26 N. J. Eq. (11 C. E. Gr.) 445 (1875).

incumbrances, after payment of the complainant's mortgage, and this may be done, although the complainant's mortgage be satisfied by the sale of only a part of the premises.[1]

Where a part of the mortgaged premises has been mortgaged a second time, and the residue thereof has been sold and conveyed absolutely, the mortgage being but a qualified conveyance of the property and the mortgagor still retaining an interest therein, the part mortgaged should be sold on the foreclosure of the prior mortgage before resorting to that part which was conveyed absolutely; and this is true whether the sale of a portion of the mortgaged premises was made prior or subsequent to the execution of the second mortgage.[2]

§ 508. Rights of purchaser of part of mortgaged premises subject to mortgage.—Where, in a conveyance of real estate, it is expressly stated that it is agreed by and between the parties to such conveyance, that the premises conveyed are subject to a mortgage, and to all sums due and to become due thereon, as between the grantor and the grantee, the entire mortgaged premises remain the primary fund for the payment of the mortgage debt. And should the grantee afterwards be compelled to pay the entire debt to the mortgagee, he will be entitled in equity to be subrogated to the rights of the latter and to re-imburse himself out of the whole mortgaged premises.[3]

And a subsequent purchaser of the premises thus conveyed will take them subject to the same equity, although his deed may not in terms refer to the lien of the mortgage, nor describe the lands as conveyed subject to such lien.[4] The purchaser of an equity of redemption, at a judicial sale, takes the land burdened with the mortgage, and he will have no right, therefore, to ask that some other

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[1] Ely v. Perrine, 2 N. J. Eq. (1 H. W. Gr.) 396 (1841).

[2] Kellogg v. Rand, 11 Paige Ch. (N. Y.) 59 (1844); Sager v. Tupper, 35 Mich. 134 (1876).

[3] Jumel v. Jumel, 7 Paige Ch. (N. Y.) 591 (1839).

[4] Jumel v. Jumel, 7 Paige Ch. (N. Y.) 591 (1839).

fund be applied to the discharge of the mortgage debt in order to relieve his estate.[1]

§ 509. **Order of sale in parcels where subsequent grantee of part has assumed mortgage.** — Where the owner of mortgaged premises sells a portion thereof to a purchaser who assumes and agrees to pay, as a part of the purchase price, the whole or a part of the mortgage debt, the purchaser is legally and equitably bound to pay off and to satisfy such mortgage;[2] by such assumption he becomes the principal debtor, and the part of the land conveyed to him the primary fund out of which the mortgage is to be paid, the mortgagor remaining simply a surety, and the remainder of the property being liable only secondarily.[3]

The purchaser, therefore, is bound to protect the mortgagor and his grantees from all liability on account of the mortgage debt.[4] And should the mortgagor or his grantee be compelled to pay the mortgage debt, or any part thereof, he will be entitled to an assignment of such mortgage to enable him to obtain satisfaction out of the land of the party who assumed the payment thereof.[5]

The grantee of a portion of the mortgaged premises, where a former grantee of the remainder thereof has assumed and agreed to pay the existing incumbrance, is not bound to take any notice of an action to foreclose the mortgage; it is the duty of the grantee who assumed and agreed to pay the mortgage to appear therein and to protect the interests of his surety, and if he fails to do so and a subsequent grantee of another portion of the premises is consequently deprived of his land, such purchaser will be liable to him in damages,[6] because the obligation on the part of the purchaser who assumed and agreed to pay the mortgage debt is not affected by the subsequent conveyance from the mortgagor.

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[1] Krueger v. Ferry, 41 N. J. Eq. (14 Stew.) 432 (1886).

[2] Torrey v. Bank of Orleans, 9 Paige Ch. (N. Y.) 649 (1842). See Warren v. Boynton, 2 Barb. (N. Y.) 13 (1847).

[3] Wilcox v. Campbell, 106 N. Y. 325 (1887); Michigan State Ins. Co. v. Soule, 51 Mich. 312 (1883).

[4] Wilcox v. Campbell, 106 N. Y. 325 (1887).

[5] Halsey v. Reed, 9 Paige Ch. (N. Y.) 446 (1842).

Where such purchaser fails to protect the residue of the land from sale under the mortgage, he will be liable alike to the mortgagor and to his grantee for the damages thus caused. The measure of damages will be the fair value of the land.[1]

In an action to foreclose a mortgage covering two farms, it appeared that L., the mortgagor, conveyed one of the farms to K., who agreed to pay $2,500 of the mortgage as part of the purchase money. L. had contracted to purchase a piece of land of B., who agreed to take the bond of K. secured by a mortgage on the farm so to be conveyed to him for part of the purchase price, and concurrent with the conveyance from L. to K. the latter executed his bond and mortgage to B. who conveyed to L. as agreed. B. knew, when he took his mortgage, of the existence of the prior mortgage and of K.'s assumption to pay a portion thereof. The court held that the judgment properly directed the sale first of the farm conveyed to K., and that the circumstances under which the mortgage to B. was given did not change the equitable rights of the parties.[2]

§ 510. **When rule for sale in inverse order does not apply.**—The rule that parcels of mortgaged property alienated subsequently to the execution of the mortgage, are to be sold in the inverse order of their alienation, does not apply where the purchaser of one of the parcels has assumed and agreed to pay the mortgage debt ;[3] and where a mortgagor sells a portion of the mortgaged premises, and in the deed of conveyance expressly stipulates, that it is "subject to the payment by the said grantee of the existing liens upon said premises," the rule does not apply.[4]

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[6] Wilcox v. Campbell, 106 N. Y. 325 (1887).

[1] Wilcox v. Campbell, 106 N. Y. 325 (1887).

[2] Bowne v. Lynde, 91 N. Y. 92 (1883).

[3] Warren v. Boynton, 2 Barb. (N. Y.) 13 (1847); Torrey v. Bank of Orleans, 9 Paige Ch. (N. Y.) 649 (1842); Halsey v. Reed, 9 Paige Ch. (N. Y.) 446 (1842); Ross v. Haines, 5 N. J. Eq. (1 Halst.) 632 (1847); Engle v. Haines, 5 N. J. Eq. (1 Halst.) 186 (1845); s. c. 43 Am. Dec. 624.

[4] Brisco v. Power, 47 Ill. 447 (1868); Hoy v. Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 563 (1868).

And if by the terms of the sale of a part of the mortgaged premises, the mortgage is to remain a common charge upon the whole premises, and is to be paid by the mortgagor and the purchaser, and there is no special agreement as to the proportion which each one shall pay, the parcels will be subject to their *pro rata* share of the incumbrance.[1] Where a purchaser of a portion of the mortgaged premises assumes and agrees to pay the mortgage debt, or a specified portion thereof, and afterwards conveys the part purchased to a person who has notice of his agreement and obligation, the equitable rights of such second purchaser will be as fully bound as are those of his vendor.[2]

Thus, where after the execution of a mortgage, a portion of the premises were sold to a party who assumed and agreed to pay the mortgage, and such purchaser afterwards mortgaged the part purchased to a party having notice of the assumption, it was held that such parcel remained the primary fund for the payment of the debt,[3] and that the remaining portion of the premises covered by the first mortgage, was merely security for the payment of the balance of the debt, if any, remaining after exhausting the primary fund.[4]

§ 511. **Contribution according to value—Valuation, when made.**—Where land which has been mortgaged is subsequently conveyed to different parties, the mortgage remaining a common charge upon the whole land so that each part will be required to bear its due proportion of the debt, equity will compel every part to a just contribution. Such contribution will be enforced *pro rata* according to the value of the several parcels. It has been said that in making the

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[1] Brisco v. Power, 47 Ill. 447 (1868); Hoy v. Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 563 (1868).

[2] Torrey v. Bank of Orleans, 9 Paige Ch. (N. Y.) 649 (1842); Ross v. Haines, 5 N. J. Eq. (1 Halst.) 632 (1847); Engle v. Haines, 5 N. J. Eq. (1 Halst.) 186 (1845); s. c. 43 Am. Dec. 624.

[3] Steere v. Childs, 15 Hun 511 (1878).

[4] Warfield v. Crane, 4 Abb. Ct. App. Dec. (N. Y.) 525 (1868); Woods v. Spalding, 45 Barb. (N. Y.) 607 (1866); Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847); Steere v. Childs, 15 Hun (N. Y.) 511, 518 (1878).

apportionment of the burden which each parcel should bear, due regard should be had to the relative value of each parcel at the date of the mortgage.[1]

But in some cases it is held that the distribution of the burden of paying the mortgage should be according to the value of the parcels when they are sold.[2] Chancellor Kent has held that the parcels are bound to contribute according to their actual relative value, and not according to the prices for which they are sold at the sheriff's sale,[3] from which it has been inferred by some courts that the relative value of the parcels is to be estimated at the time when they are called upon for contribution.[4]

§ 512. **Where the mortgagee has other securities and there are subsequent mortgagees.**—Where a mortgage has been executed upon a whole tract of land and subsequently another mortgage is executed upon a portion of the land, the first mortgagee will be required to exhaust that portion of the land not covered by the second mortgage before resorting to the latter portion.[5] And where a mortgagee holds a mortgage on two tracts of land securing his

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[1] Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425 (1815); s. c. 7 Am. Dec. 499; Morrison v. Beckwith, 4 T. B. Mon. (Ky.) 73 (1827); s. c. 16 Am. Dec. 736. See Lyon v. Robbins, 45 Conn. 513 (1878); Dickey v. Thompson, 8 B. Mon. (Ky.) 312 (1847); Hall v. Morgan, 79 Mo. 47 (1883).

[2] Burk v. Chrisman, 3 B. Mon. (Ky.) 50 (1842).

[3] Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409 (1815); s. c. 7 Am. Dec. 494.

[4] Dickey v. Thompson, 8 B. Mon. (Ky.) 312, 316 (1847).

[5] See Ingalls v. Morgan, 10 N. Y. 178 (1854); York & Jersey Steamboat Ferry Co. v. Associates of the Jersey Co., Hopk. Ch. (N. Y.) 460 (1824); Evertson v. Booth, 19 Johns. (N. Y.) 486 (1822); Hayes v. Ward, 4 Johns. Ch. (N. Y.) 123 (1819); s. c. 8 Am. Dec. 554; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425 (1815); s. c. 7 Am. Dec. 499; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409 (1815); s. c. 7 Am. Dec. 494; James v. Hubbard, 1 Paige Ch. (N. Y.) 228, 235 (1825); Terry v. Rosell, 32 Ark. 478 (1877); Andreas v. Hubbard, 50 Conn. 351 (1882); Chicago & G. W. R. Co. v. Peck, 112 Ill. 408 (1885); Swift v. Conboy, 12 Iowa, 444 (1861); Sibley v. Baker, 23 Mich. 312 (1871); Trowbridge v. Harleston, Walk. Ch. (Mich.) 185 (1843); Warwick v. Ely, 29 N. J. Eq. (2 Stew.) 82 (1878); Ramsey's Appeal, 2 Watts (Pa.) 228 (1834); Fowler v. Barksdale, Harp. (S. C.) Eq. 164 (1824); Scott v. Webster, 44 Wis. 185 (1878). See also Lanoy v. Athol, 2 Atk. 444, 446 (1742); Wright v. Nutt, 1 H.

debt, and there have been subsequent conveyances or mortgages of one of the tracts, he will be required to exhaust his remedies against the portion which has not been mortgaged or conveyed before resorting to the other portion.[1]

If the mortgagee of the north half of a lot of land, having notice that it is equitably chargeable with, and of sufficient value for the payment of a prior mortgage upon the whole lot, becomes the purchaser of such prior mortgage, he can not, in equity, enforce it against the remainder of the lot.[2] In such a case the north half, being chargeable with the payment of the mortgage upon the whole lot, must first be applied to that purpose; and if it is sufficient to satisfy the debt in full, the mortgage will be held discharged as to the remainder of the premises.[3]

But a trustee mortgagee, whose mortgage is a senior lien on land, can not be deprived of such lien, merely because he may have a right to satisfy the mortgage debt out of a bond executed by his predecessor in the trust, by virtue of which the mortgage came to him.[4]

It has been held, where there are mortgages of lands and of chattels to secure the payment of the same debt, and the mortgagee seizes the chattels after condition broken, that a subsequent purchaser of the land from the mortgagor will have a right to compel the mortgagee to apply the value of the chattels seized to the satisfaction of the mortgage debt; and that if he loses the chattels by his neglect, he will be compelled to deduct their value from the amount due, and the mortgage can be foreclosed only for the balance remaining unpaid after such deduction.[5]

Bl. 150 (1789); Aldrich v. Cooper, 8 Ves. 382, 395 (1803); Averall v. Wade, Lloyd & Goold, Cas. Temp. Sugden, 252 (1835).

[1] Raun v. Reynolds, 11 Cal. 14 (1858); Andreas v. Hubbard, 50 Conn. 351 (1882); Burpee v. Parker, 24 Vt. 567 (1852).

[2] McIntire v. Parks, 59 N. H. 258 (1879).

[3] McIntire v. Parks, 59 N. H. 258 (1879).

[4] Shuey v. Latta, 90 Ind. 136 (1883).

[5] Moody v. Haselden, 1 S. C. (N. S.) 129 (1869). See Fowler v. Barksdale, Harp. (S. C.) Eq. 164 (1824); Gist v. Pressley, 2 Hill (S. C.) Eq. 318 (1835); Gadberry v. McClure, 4 Strob. (S. C.) Eq. 175 (1850); Bank of Hamburg v. Howard, 1 Strob. (S. C.) Eq. 173 (1846).

§ 513. Rule where portions alienated have been released.—From the equitable doctrine of the sale of mortgaged premises in the inverse order of alienation subsequent to the execution of the mortgage, it follows as a corollary that if the mortgagee, with actual notice of the fact of the subsequent conveyances of the parts of the mortgaged premises, releases from the mortgage one or more parcels of the premises primarily liable, he thereby releases *pro rata* the portion secondarily liable,[1] and he can not enforce his lien against the residue without deducting the value of the part released from the amount due on the mortgage.[2]

In case the value of the property released is equal to the full amount of the mortgage debt, the mortgagee will, of course, lose his debt so far as the lien of his mortgage is concerned. But it has been held that where the subsequent purchasers or mortgagees are not prejudiced by the release, as where the mortgagor had no title to the lot released at the time the first mortgage was executed, this rule will not apply.[3]

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[1] Iglehart v. Crane, 42 Ill. 261, 268 (1866).

[2] Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847); Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425 (1815); s. c. 7 Am. Dec. 499; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409 (1815); s. c. 7 Am. Dec. 494; Patty v. Pease, 8 Paige Ch. (N. Y.) 277 (1840); s. c. 35 Am. Dec. 683; Skeel v. Spraker, 8 Paige Ch. (N. Y.) 195 (1840); Guion v. Knapp, 6 Paige Ch. (N. Y.) 35 (1836); Birnie v. Main, 29 Ark. 591 (1874); Iglehart v. Crane, 42 Ill. 261, 268 (1866); Matteson v. Thomas, 41 Ill. 110 (1866); Taylor v. Short, Adm'r, 27 Iowa, 361 (1869); George v. Wood, 91 Mass. (9 Allen), 80 (1864); Chase v. Woodbury, 89 Mass. (6 Cush.) 143 (1850); Parkman v. Welch, 36 Mass. (19 Pick.) 231 (1837); James v. Brown, 11 Mich. 25 (1862); Harrison v. Guerin, 27 N. J. Eq. (11 C. E. Gr.) 219 (1876); Mount v. Potts, 23 N. J. Eq. (8 C. E. Gr.) 188 (1872); Hoy v. Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 563 (1868); Vanorden v. Johnson, 14 N. J. Eq. (1 McCar.) 376 (1862); Gaskill v. Sine, 13 N. J. Eq. (2 Beas.) 400 (1861); s. c. 78 Am. Dec. 105; Reilly v. Mayer, 12 N. J. Eq. (1 Beas.) 55 (1858); Blair v. Ward, 10 N. J. Eq. (2 Stockt.) 119 (1854); Mickle v. Rambo, 1 N. J. Eq. (1 Saxt.) 501 (1832); Shannon v. Marselis, 1 N. J. Eq. (1 Saxt.) 413 (1831); Taylor v. Maris, 5 Rawle (Pa.) 51 (1835); Miller v. Rogers, 49 Tex. 398 (1878); Lyman v. Lyman, 32 Vt. 79 (1859); Deuster v. McCamus, 14 Wis. 307 (1861). But see Stuyvesant v. Hone, 1 Sandf. Ch. (N. Y.) 419 (1844).

[3] Taylor v. Short's Adm'r, 27 Iowa, 361 (1869); s. c. 1 Am. Rep. 280.

A creditor having a lien upon two parcels of land may release the lien from one without impairing his legal claim upon the other, if he has no reason to suppose that such discharge will interfere with the equitable rights of any other person.[1] To affect the mortgagee, he must have actual notice of the subsequent transfer of a portion or portions of the mortgaged premises, before a release by him of a portion of such premises will bar his right to foreclose his mortgage upon the remaining portion.[2]

A mortgagee is not required to search the records from time to time to ascertain whether subsequent incumbrances have been placed upon the mortgaged premises, or whether a portion thereof has been transferred;[3] furthermore, the record is not constructive notice to the prior mortgagee of such incumbrance.[4] And where an attorney has been employed by a mortgagee to foreclose a mortgage upon a particular piece of property, and such attorney learns, from other sources, and not in connection with his business of foreclosing the mortgage on such property, that there are subsequent mortgages or conveyances of a part of the mortgaged premises, such knowledge of the attorney will not be deemed notice to his client, the prior mortgagee.[5]

§ 514. Rule for order of sale where the mortgage covers homestead and other lands.—Where the mortgage covers the homestead of a family, together with other

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[1] Stuyvesant v. Hone, 1 Sandf. Ch. (N. Y.) 419 (1844); Guion v. Knapp, 6 Paige Ch. (N. Y.) 35, 43 (1836).

[2] Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 (1847); King v. McVickar, 3 Sandf. Ch. (N. Y.) 192 (1846); Blair v. Ward, 10 N. J. Eq. (2 Stockt.) 119 (1854).

[3] Howard Ins. Co. v. Halsey, 8 N. Y. 271 (1853); Talmage v. Wilgers, 1 N. Y. Leg. Obs. 42 (1842). See Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409 (1815); s. c. 7 Am. Dec. 494; Stuyvesant v. Hone, 1 Sandf. Ch. (N. Y.) 419 (1844); Birnie v. Main, 29 Ark. 591 (1874); Ritch v. Eichelberger, 13 Fla. 169 (1869); Chase v. Woodbury, 60 Mass. (6 Cush.) 143 (1850); James v. Brown, 11 Mich. 25 (1862); Brown v. Simons, 44 N. H. 475 (1863); Shannon v. Marselis, 1 N. J. Eq. (1 Saxt.) 413 (1831); Taylor v. Maris, 5 Rawle (Pa.) 51 (1835); Lyman v. Lyman, 32 Vt. 79 (1859).

[4] Howard Ins. Co. v. Halsey, 8 N. Y. 271 (1853); Talmage v. Wilgers, 1 N. Y. Leg. Obs. 42 (1842).

[5] Howard Ins. Co. v. Halsey, 8 N. Y. 271 (1853).

lands, the mortgagor will have no right to require, and the court will not be warranted in granting, an order directing that the other lands be sold first and that the homestead be resorted to only in case there is a deficiency.[1] The mortgagee may release the other land and still retain his lien upon the homestead.[2] And this is true although the remainder of the property mortgaged, without the homestead, is sufficient to satisfy the mortgage.[3]

And it has been said that where the mortgage covers the homestead together with other lands, the mortgagor will have no right to require the latter property to be sold for the payment of the mortgage debt before resorting to the homestead.[4] The fact that a part of the property is a homestead does not alter the rule requiring a party having security on two funds first to exhaust his remedy against the fund upon which he alone is secured, if there is another party having security on the other part.[5]

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[1] Dodds v. Snyder, 44 Ill. 53 (1867); Chapman v. Lester, 12 Kan. 592 (1874); Searle v. Chapman, 121 Mass. 19 (1876); White v. Polleys, 20 Wis. 503 (1866); Jones v. Dow, 18 Wis. 241 (1864).

But a contrary rule prevails in some of the states. See McLaughlin v. Hart, 46 Cal. 639 (1873); Dickson v. Chorn, 6 Iowa, 19 (1858). It is said in the case of Hall v. Harris, 113 Ill. 410, 413 (1885), that on the foreclosure of such a mortgage there can be no sale until the homestead is assigned to the widow; and that a decree of foreclosure directing an assignment of the homestead before sale of the residue is not the granting of affirmative relief to her upon answer, but is for the benefit of the complainant, and is warranted under the prayer in the bill for "such other and further relief as equity may require."

[2] Chapman v. Lester, 12 Kan. 592 (1874). See Dodds v. Snyder, 44 Ill. 53 (1867); Searle v. Chapman, 121 Mass. 19 (1876).

[3] Searle v. Chapman, 121 Mass. 17 (1876).

[4] See Chapman v. Lester, 12 Kan. 592 (1874); Searle v. Chapman, 121 Mass. 19 (1876); White v. Polleys, 20 Wis. 503 (1866).

[5] *In re* Sauthoff, 7 Biss. C. C. 167 (1876).

CHAPTER XXV.

CONDUCT OF SALE.

PERSONAL ATTENDANCE OF REFEREE—DISCRETIONARY POWERS ON SALE—ADJOURNMENTS—WHO MAY PURCHASE—REPORT OF SALE BY REFEREE—CONFIRMATION THEREOF.

§ 515. Personal attendance of the officer conducting the sale.
516. Discretionary powers of referee to sell — Powers of loan commissioners.
517. Postponement and adjournment of sale.
518. Publishing notice of adjournment—Adjourning sale under statutory foreclosure.
519. Holding sale open.
520. Who may purchase on a foreclosure sale.
§ 521. Purchase by mortgagee.
522. Memorandum of sale.
523. Report of officer making sale.
524. What referee's report should show.
525. Confirmation of referee's report.
526. Referee's report should state amount of deficiency.
527. Substituted or supplemental report of referee — Notice to defendant.

§ 515. Personal attendance of the officer conducting the sale.—It is the duty of the referee appointed by the court to conduct the sale on a mortgage foreclosure, to attend the sale in person at the time and place appointed. The sale must be made at public auction, to the highest bidder, unless the court has otherwise directed. It must be made by the officer appointed by the decree of foreclosure and sale, or designated by the statute,[1] or under his immediate personal supervision and direction;[2] he must receive bids as long as they are offered, waiting a reasonable length of time after a bid is made for others, and if no other is made he must strike off the premises to the highest bidder.[3]

In Heyer v. Deaves,[4] it was held that all sales of mortgaged premises under a decree of the court must be made

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[1] Heyer v. Deaves, 2 Johns. Ch. (N. Y.) 154 (1816). See May v. May, 11 Paige Ch. (N. Y.) 201 (1844).

[2] Blossom v. Milwaukee & Chicago R. R. Co., 70 U. S. (3 Wall.) 196, 205 (1865); bk. 18 L. ed. 43.

[3] Bicknell v. Byrnes, 23 How. (N. Y.) Pr. 486 (1862).

[4] 2 Johns. Ch. (N. Y.) 154 (1816).

by a master,[1] or under his immediate direction,[2] and if such officer fails to be present and to direct such sale, it will be irregular and may be set aside upon motion. The court held in that case, that "the statute intended that such sales should be under the immediate direction of a known and responsible public officer. An under or deputy master is not an officer known in the law." The case of Heyer v. Deaves was distinguished in Connolly v. Belt,[3] where the court held that "neither the New York statute nor that case is applicable to the present case, which is a sale under a common deed of trust. The time, place, terms and conditions were such as were deemed by the trustee most for the interest of the parties concerned in the said sale, as appears by the answer of the trustee; and a sale made by an agent of the trustee, according to the terms and conditions at the time and place prescribed, is a sale by the trustee, there being no law requiring him to be present personally at the auction." The distinction, it seems, is between what involves a discretion and a power to do a certain specific act. In the former case the trustee must act in person; in the latter case he was authorized to delegate his power.[4]

§ 516. Discretionary powers of referee to sell—Powers of loan commissioners.—The reason for requiring the presence and personal supervison of the officer delegated to make the sale, is said to be that the statute imposes a duty upon such officer, and presupposes that he will ascertain the

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[1] The old master in chancery has been supplanted by the modern referee.

[2] See Reynolds v. Wilson, 15 Ill. 394 (1854); Blakey v. Abert, 1 Dana (Ky.) 185 (1833); Meyer v. Bishop, 27 N. J. Eq. (12 C. E. Gr.) 145 (1876); Blossom v. Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 205 (1865); bk. 18 L. ed. 43, 46; Williamson v. Berry, 49 U. S. (8 How.) 495, 544 (1850); bk. 12 L. ed. 1170, 1191.

[3] 5 Cr. C. C. 405, 408 (1838).

[4] Powell v. Tuttle, 3 N. Y. 396 (1850). Thus, where an administrator is authorized by a decree of court to sell land for the payment of debts, the sale must be made by him personally or by his agent in his presence. Sebastian v. Johnson, 72 Ill. 283 (1874); s. c. 22 Am. Rep. 145. See Berger v. Duff, 4 Johns. Ch. (N. Y.) 368 (1820); Taylor v. Hopkins, 40 Ill. 442 (1866).

situation of the property before the time of the sale, and will sell it as the best interests of the parties may require. Again, there may be cases in which the exercise of his discretionary powers will become necessary, in which case the honest exercise of such discretion is said to be as final as a decision in like cases of any judicial tribunal.[1] And in such cases it seems that the parties have a legal right to whatever possible benefit may follow from the honest exercise of such discretion.[2]

The exercise of such discretion can not be delegated, and for that reason a sale made by a person delegated by the referee, or other officer, in his absence, may be set aside as irregular, on a direct application made in the course of the proceedings, although a deed made by the officer will pass the title to the premises and will be valid and effective in collateral proceedings, as the act of an officer *de facto*.[3]

Thus, it has been held that the New York statute, creating the office of loan commissioners, and investing such officers with certain discretionary powers and providing for the loaning of moneys on mortgage security and for the foreclosure of such mortgages on failure to pay the interest or principal, invests them with a special authority and must be strictly pursued;[4] consequently the sale of mortgaged premises made by one loan commissioner in the absence of his associates has been held to be irregular, and to be ineffective to pass the title of the premises to the purchaser.[5]

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[1] O'Donnell v. Lindsey, 38 N. Y. Supr. Ct. (7 J. & S.) 523, 529 (1873), citing Litchfield v. Register, 76 U. S. (9 Wall.) 577 (1869); bk. 19 L. ed. 682; The Secretary v. McGarrahan, 76 U. S. (9 Wall.) 311 (1868); bk. 19 L. ed. 64; Gaines v. Thompson, 74 U. S. (7 Wall.) 349 (1868); bk. 19 L. ed. 62.

[2] O'Donnell v. Lindsey, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 529, 530 (1873). See Russell v. Conn, 20 N. Y. 81 (1859).

[3] Meyer v. Patterson, 28 N. J. Eq. (1 Stew.) 239 (1877); Meyer v. Bishop, 27 N. J. Eq. (12 C. E. Gr.) 141 (1876). See also People v. Collins, 7 Johns. (N. Y.) 549 (1811); Potter v. Luther, 3 Johns. (N. Y.) 431 (1808); Wilcox v. Smith, 5 Wend. (N. Y.) 231 (1830); s. c. 21 Am. Dec. 213; State v. Carroll, 38 Conn. 449 (1871); 9 Am. Rep. 409.

[4] Powell v. Tuttle, 3 N. Y. 396, 400 (1850). See Sherwood v. Reade, 7 Hill (N. Y.) 431 (1844); Sharpe v. Speir, 4 Hill (N. Y.) 76 (1843); Downing v. Rugar, 21 Wend. (N. Y.) 178 (1839); s. c. 34 Am. Dec. 223.

In the case of King v. Stow,[1] it was said that the assent of the absent commissioner was to be presumed, as no dissent was afterwards expressed by him, and he united in the deed to the purchaser, and that though it was the duty of both commissioners to be present at the sale, yet the absence of one of them from necessity or just cause would not affect the validity of a sale otherwise regular and fair. But this case was directly overruled by the decision in Powell v. Tuttle.[2]

§ 517. Postponement and adjournment of sale.—The sale of mortgaged premises may be postponed from time to time, or an adjournment may be had to another place, unless the place of sale is fixed by the decree of foreclosure,[3] in the discretion of the referee or other officer making the sale, either for want of bidders or for any other reasonable cause, inducing him to believe that a future day or another place will be more favorable for making an advantageous sale.[4]

The application for a postponement or adjournment generally comes from some one or more of the interested parties and is not infrequently made by the plaintiff's attorney; but the referee possesses a discretionary power in the matter and should not be governed by the directions of the plaintiff's attorney, nor by the request of other parties; there may be occasions when it will be the duty of the officer to adjourn the sale without the request of any one, and even against the express wishes of a party in interest.[5] The referee is not a

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[1] York v. Allen, 30 N. Y. 104, 111 (1864); Pell v. Ulmar, 18 N. Y. 139, 144 (1858); s. c. 21 Barb. (N. Y.) 500; Olmstead v. Elder, 5 N. Y. 144, 147 (1851); Powell v. Tuttle, 3 N. Y. 396 (1850).

[2] 6 Johns. Ch. (N. Y.) 323 (1822).

[3] 3 N. Y. 396 (1850).

[4] Richards v. Holmes, 59 U. S. (18 How.) 143 (1855); bk. 16 L. ed. 320. The Maryland courts have gone so far as to confirm a sale adjourned to a place different from that named in the decree. Farmers' Bank of Maryland v. Clarke, 28 Md. 145 (1867).

[4] Tinkom v. Purdy, 5 Johns. (N. Y.) 345 (1810); Russell v. Richards, 11 Me. (2 Fairf.) 371 (1834); s. c. 25 Am. Dec. 254; Warren v. Leland, 9 Mass. 265 (1812); Strong v. Catton, 1 Wis. 471 (1853); Richards v. Holmes, 59 U. S. (18 How.) 143 (1855); bk. 16 L. ed. 320.

[5] Tinkom v. Purdy, 5 Johns. (N. Y.) 345 (1810); Astor v. Romayne, 1 Johns. Ch. (N. Y.) 310 (1814); McGown v. Sandford, 9 Paige Ch.

mere agent of the plaintiff, but an officer of the court, having a legal duty to perform and a quasi-judicial discretion to exercise. In case he acts unreasonably, the sale may be set aside and a resale ordered.[1]

It was held by the supreme court of the United States in Blossom v. Milwaukee and Chicago Railroad Company,[2] where the decree was to the effect that the premises should be sold at a certain time, unless the mortgagor should previously pay the mortgage debt, that a few brief adjournments for the purpose of enabling the mortgagor to make arrangements to pay the amount due on the mortgage, were allowed for a sufficient cause, although made at the request of the plaintiff's solicitor.

§ 518. Publishing notice of adjournment—Adjourning sale under statutory foreclosure.—In case a sale is postponed or adjourned, the statute requires that a notice of such postponement must be published in the paper or papers wherein the notice of sale was published.[3] The day to which the sale is adjourned should be announced at the time of the adjournment;[4] but if this can not be done on account of an injunction, or for other reasons, a general adjournment may be made and the day to which the sale is adjourned subsequently advertised.[5] But where the defendant has procured a stay of proceedings which is vacated on the day of the sale, because such stay was improperly granted, the sale will not be set aside and a resale ordered, simply because the party procuring the stay had made no preparation to attend the sale.[6]

(N. Y.) 290 (1841); Ward v. James, 8 Hun (N. Y.) 526 (1876); Russell v. Richards, 11 Me. (2 Fairf.) 371 (1834); s. c. 26 Am. Dec. 532; Richards v. Holmes, 59 U. S. (18 How.) 143, 147 (1855); bk. 16 L. ed. 320.

[1] Breese v. Bushby, 13 How. (N. Y.) Pr. 485, 489 (1855).

[2] 70 U. S. (3 Wall.) 196 (1865); bk. 18 L. ed. 43.

[3] N. Y. Code Civ. Proc. § 1678. See also LaFarge v. VanWagenen, 14 How. (N. Y.) Pr. 54 (1857).

[4] LaFarge v. VanWagenen, 14 How. (N. Y.) Pr. 54 (1857).

[5] LaFarge v. VanWagenen, 14 How. (N. Y.) Pr. 54 (1857).

[6] Peck v. New Jersey & N. Y. R. Co., 22 Hun (N. Y.) 129 (1880).

The proceedings in the statutory foreclosure of a mortgage will not be void because the day of sale specified in the advertisement happens to be on Sunday. The mortgagee or the officer having charge of the sale may postpone it before the advertised day of such sale to a subsequent day without affecting the regularity thereof.[1] And where the day, not a legal holiday, fixed for the sale of the mortgaged premises, is afterwards appointed to be a legal holiday, the referee, or other officer making the sale, may adjourn the sale to another day.[2]

Where, upon a statutory foreclosure, the mortgagee attends upon the day of sale mentioned in the advertisement and the sale is adjourned to another day, it must be made on the day to which it is adjourned; and if there is a variance between the day announced at the adjournment and the day published in the newspapers, the sale will be irregular.[3] It is questionable whether a sale can be postponed before the day upon which it is advertised to occur.[4] And it has been held that where a notice of postponement of sale has been given prior to the day on which it is advertised to occur, and the sale is afterwards made on the day originally advertised, such sale will be irregular and void.[5]

§ 519. **Holding sale open.**—A defendant to a foreclosure bid off the premises at the sale and asked for time to produce the money, and two days' time was given him for that purpose. The sale was held open for that length of time, and

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[1] Sayles v. Smith, 12 Wend. (N. Y.) 57 (1834); s. c. 27 Am. Dec. 117; Westgate v. Handlin, 7 How. (N. Y.) Pr. 372 (1853). See Bunce v. Reed, 16 Barb. (N. Y.) 347, 349 (1853).

[2] White v. Zust, 28 N. J. Eq. (1 Stew.) 107 (1877).

[3] Miller v. Hull, 4 Den. (N. Y.) 104 (1847); LaFarge v. VanWagenen, 14 How. (N. Y.) Pr. 54, 58 (1857); Lantz v. Worthington, 4 Pa. St. 153 (1846). As to commissions and expenses, in the case of an adjournment made at the request of the owner of the equity of redemption, see Neptune Ins. Co. v. Dorsey, 3 Md. Ch. 334 (1850).

[4] See Jackson v. Clark, 7 Johns. (N. Y.) 217 (1810); Frederick v. Wheelock, 3 T. & C. (N. Y.) 210 (1874).

[5] See Jackson v. Clark, 7 Johns. (N. Y.) 217 (1810); Frederick v. Wheelock, 3 T. &. C. (N. Y.) 210 (1874). See Miller v. Hull, 4 Den. (N. Y.) 104 (1847); LaFarge v. Van Wagenen, 14 How. (N. Y.) Pr. 54 (1857).

a public announcement thereof was made at the time. The party failed to make good his bid, and a new sale was thereupon made at the time to which it was held open; such sale was held to be regular and could not be set aside as a matter of right at the instance of the defendant who first bid off the premises, where he had no equities entitling him to a resale.[1]

It has been held, where property on a foreclosure is struck off to a purchaser who offers to pay in good bank bills, but specie is demanded, that it is the duty of the officer making the sale to hold it open a sufficient length of time to enable such purchaser to obtain specie instead of bank bills.[2]

§ 520. **Who may purchase on a foreclosure sale.**—The Code of Civil Procedure[3] provides that a referee or other officer conducting the sale in a mortgage foreclosure, or a guardian of an infant party to the action shall not, nor shall any person for his benefit, directly or indirectly, purchase, or be interested in the purchase of, any of the property sold, except that a guardian may, when he is lawfully authorized so to do, purchase for the benefit of his ward.[4]

Under the provisions of the rules of practice,[5] the decree of foreclosure and sale must contain a clause providing that the plaintiff or any other party to the suit may become the purchaser of the premises on such sale; this rule, however, will not permit one defendant to bid in premises belonging to another and to hold them against the latter contrary to equity.[6]

A person other than the debtor, who has become the owner of the land which is subject to the lien of the mortgage, may become the purchaser at a foreclosure sale, and as such purchaser acquire a valid title;[7] but one who, as

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[1] Isbell v. Kenyon, 33 Mich. 63 (1875).

[2] Baring v. Moore, 5 Paige Ch. (N. Y.) 48 (1835).

[3] N. Y. Code Civ. Proc. § 1679.

[4] Lefevre v. Laraway, 22 Barb. (N. Y.) 167 (1856).

[5] N. Y. Supreme Court Rule 61.

[6] Bennett v. Austin, 81 N. Y. 308 (1880).

[7] Chautauqua Bank v. Risley, 19 N. Y. 369 (1859); s. c. 75 Am. Dec. 347.

trustee, holds the legal title to the lands, subject to a mortgage, can not individually acquire an interest therein by taking an assignment of the bid of the purchaser on a foreclosure sale under such mortgage and by taking a deed from the referee, because a trustee can not gain an advantage to himself to the detriment of those for whom he is trustee.[1] Until the sale to the original purchaser is consummated by payment and delivery of the deed, the disability of the trustee to take title, individually, is absolute.[2]

A tenant in common with the plaintiff, having no duties towards him other than such as necessarily arise from the co-tenancy, is not prevented from purchasing the premises for his own benefit at a foreclosure sale.[3] Any of the defendants may purchase the mortgaged property of a co-defendant;[4] the plaintiff's attorney may become a purchaser at such sale, and when he bids off the property in his own name, and takes the certificate from the referee in his own name, the presumption will be that the purchase was on his own account.[5]

§ 521. **Purchase by mortgagee.**—By the general rules of practice in New York,[6] it is required that a provision shall be inserted in every decree of foreclosure and sale of mortgaged property, allowing the plaintiff or any other party to

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[1] Toole v. McKiernan, 48 N. Y. Supr. Ct. (16 J. & S.) 163 (1882); TenEyck v. Craig, 62 N. Y. 406, 420 (1875); Willcox v. Smith, 26 Barb. (N. Y.) 352 (1858); New York Cent. Ins. v. National Protection Ins. Co., 20 Barb. 470 (1854); Conger v. Ring, 11 Barb. (N. Y.) 364 (1851); Chapin v. Weed, Clarke Ch. (N. Y.) 464 (1841); Fellows v. Fellows, 4 Cow. (N. Y.) 698 (1825); Matthewson v. Johnson, Hoff. Ch. (N. Y.) 564 (1840); Rogers v. Rogers, Hopk. Ch. (N. Y.) 525 (1825); Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 407 (1821); Levy v. Brush, 1 Sweeney (N. Y.) 663 (1869); Wright v. Ross, 36 Cal. 432 (1868); Phelan v. Boylan, 25 Wis. 679 (1870); Piatt v. Oliver, 2 McL. C. C. 313 (1840).

[2] Toole v. McKiernan, 48 N. Y. Supr. Ct. (16 J. & S.) 163 (1882).

[3] Streeter v. Shultz, 45 Hun (N. Y.) 406 (1887), explaining Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 388, 407 (1821).

[4] Neilson v. Neilson, 5 Barb. (N. Y.) 565 (1849).

[5] Chappell v. Dann, 21 Barb. (N. Y.) 17 (1855). But see Gardiner v. Ogden, 22 N. Y. 327 (1860); s. c. 78 Am. Dec. 192; Squier v. Norris, 1 Lans. (N. Y.) 282 (1869).

[6] N. Y. Supreme Court Rule 61.

become a purchaser at such sale; and the plaintiff may also buy in any outstanding title and hold it against the mortgagor.[1] This privilege is frequently necessary, in order to prevent a sacrifice of the mortgagee's interests.[2] Where, by statutory provision, or by the permission of the court, the mortgaged premises are purchased by the mortgagee or his assignee under a decree of foreclosure, such purchase does not extinguish the mortgage debt nor any balance that may remain unpaid.[3]

In those cases where, on the sale of mortgaged premises, the mortgagee becomes the purchaser, he is presumed to take the title with notice of the defects, if any, in the foreclosure proceedings.[4] And the mortgagee who becomes a purchaser under a decree of foreclosure will not be allowed to object to the title, on the ground that persons in possession of the property without title were not made parties to the action.[5]

In Alabama, where it is intended to give the owner of a reversionary or other interest in the land, who is a party to the record, the right to become a bidder at the sale of such real estate, a provision to that effect must be inserted in the decree of foreclosure and sale. Where a purchaser of real estate executes to his vendor a purchase money mortgage, and afterwards sells the land to a third person who assumes and agrees to pay the balance due to the vendor on the purchase money mortgage, and agrees further that the land shall remain bound by the mortgage, such purchaser will not be within the rule prohibiting a mortgagee from purchasing at his own sale.[6]

Where a rule prevails against a purchase by the mortgagee at his own sale, if the mortgagee, through an agent,

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[1] TenEyck v. Craig, 62 N. Y. 406, 421 (1875); Williams v. Townsend, 31 N. Y. 415 (1865); Cameron v. Irwin, 5 Hill (N. Y.) 280 (1843); Shaw v. Bunny, 2 DeG., J. & S. 468 (1864); s. c. 13 W. R. 374.

[2] Holcomb v. Holcomb, 11 N. J. Eq. (3 Stockt.) 281 (1857).

[3] Edwards v. Sanders, 6 S. C. 316 (1875).

[4] Boyd v. Ellis, 11 Iowa, 97, 102 (1860); Corriell v. Doolittle, 2 G. Greene (Iowa), 385, 389 (1849).

[5] Ostrom v. McCann, 21 How. (N. Y.) Pr. 431, 433 (1860).

becomes the purchaser at the sale under the mortgage, the mortgagor may avoid such sale, although no other person can.[1]

§ 522. **Memorandum of sale.**—It is not essential to the validity of a sale of premises on mortgage foreclosure, that the purchaser sign a memorandum of sale.[2] If the officer making the sale signs the memorandum, it will be sufficient to make the sale valid under the statute of frauds.[3] Should the purchaser sign the memorandum of sale, by which he agrees to comply with the conditions thereof, such memorandum does not constitute a contract, either with the officer making the sale or with the plaintiff in the foreclosure, and no action can be maintained upon it.[4] The purchaser by signing the memorandum of sale simply subjects himself to the jurisdiction and control of the court for the purpose of enforcing the specific performance of the purchase according to the terms thereof, or of making him answer in damages for non-compliance therewith.[5]

§ 523. **Report of officer making sale.** — The general requirement that a judicial sale of real estate shall be reported to the court on the oath of the person making the same, and confirmed by the court before a conveyance is executed, does not apply to mortgage foreclosures.[6] The referee or officer who makes the sale in a mortgage foreclosure acts simply as the agent of the court; and after he has disposed

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[6] McNeill v. McNeill, 36 Ala. 109 (1860); s. c. 76 Am. Dec. 320.

[1] Edmondson v. Welsh, 27 Ala. 578 (1855).

[2] Bicknell v. Byrnes, 23 How. (N. Y.) Pr. 486 (1862). See Wadsworth v. Lyon, 93 N. Y. 201, 219 (1883); 45 Am. Rep. 109; Miller v. Collyer, 36 Barb. (N. Y.) 250 (1862); Willets v. VanAlst, 26 How. (N. Y.) Pr. 325 (1863); National Fire Ins. Co. v. Loomis, 11 Paige Ch. (N. Y.) 431 (1847).

[3] Bicknell v. Byrnes, 23 How. (N. Y.) Pr. 486 (1862).

[4] Miller v. Collyer, 36 Barb. (N. Y.) 250 (1862); Willets v. VanAlst, 26 How. (N. Y.) Pr. 325, 346 (1863).

[5] Miller v. Collyer, 36 Barb. (N. Y.) 250 (1862); Willets v. VanAlst, 26 How. (N. Y.) Pr. 325 (1863). *In re* Davis, 7 Daly (N. Y.) 1, 8 (1877); Miller v. Burke, 6 Daly (N. Y.) 171, 179 (1875); Graham v. Bleakie, 2 Daly (N. Y.) 55 (1866).

[6] Agricultural Ins. Co. v. Barnard, 96 N. Y. 525 (1884).

of the mortgaged premises and distributed the proceeds thereof according to the directions of the judgment, he must make a report of the sale and his proceedings to the court.

The report should be prepared and filed by the officer making the sale as soon as practicable after the disposition of the proceeds of the sale, as directed by the judgment. The report of the referee may be excepted to. An error in reciting the date of a decree of foreclosure in such report of sale is immaterial, where the record furnishes the means of correcting it.[1] To sustain a report of sale as against exceptions filed to it, affidavits showing that the terms of sale were different from those reported, are inadmissible.[2]

§ 524. **What referee's report should show.** — The referee's report should be a complete history of his proceedings, and should show that every direction given in the judgment has been fully executed. It should contain a statement of his fees and of the necessary expenses connected with the sale, and should be accompanied by proper receipts or vouchers for all payments and disbursements. All receipts and vouchers should be attached to the report and filed with the clerk, and a note of the day of filing the report should be entered by the clerk in the proper book under the title of the cause. The report will become absolute and stand in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of filing the same.[3]

Where the judgment directs the officer making the sale to report any deficiency that may arise, and the proceeds of the sale are not sufficient to satisfy the mortgage, with the costs and expenses, his report should set forth that fact and specify the amount of such deficiency.

Where there is a surplus, a report of the sale can not be filed or confirmed unless accompanied by a proper voucher for the surplus moneys, showing that they have

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[1] Ruggles v. First Nat. Bank of Centreville, 43 Mich. 192 (1880).
[2] Koch v. Purcell, 45 N. Y. Supr. Ct. (13 J. & S.) 162 (1879).
[3] N. Y. Supreme Court Rule 30.

been paid to the proper parties or deposited pursuant to the directions of the judgment.[1]

§ 525. **Confirmation of referee's report.**—In some states no title passes to the purchaser until the sale is confirmed by the court.[2] It seems, however, that where a deed has been executed and delivered without a confirmation of the sale by the court, long continued possession under it will render the title valid.[3]

When the report of the referee, or other officer making the sale, is filed, any party to the action may enter an order, of course, confirming the same, unless cause against the same is shown within eight days; if no exceptions are filed and served within that time, the report of sale will become absolute, without notice or further order.[4] An order of confirmation is appealable.[5] Until the report of the sale is confirmed, any person aggrieved may make a summary application to the court for a resale, provided he has just grounds to sustain such application.[6]

Under the New York practice, it seems that it is not necessary for the plaintiff to give notice to any party of the filing of the report of the officer making the sale; neither is it necessary for him to obtain an order confirming the report, preliminary to the issuing of an execution to collect any deficiency specified in the report, and which is provided for in the decree of foreclosure and sale;[7] yet it certainly is the safer practice to give notice of the filing of the report, and after waiting eight days for the filing of exceptions thereto,

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[1] New York Supreme Court Rule 61.

[2] Mills v. Ralston, 10 Kan. 206 (1872); Young v. Keogh, 11 Ill. 642 (1850); Busey v. Hardin, 2 B. Mon. (Ky.) 407 (1842); Allen v. Poole, 54 Miss. 323 (1877); Gowan v. Jones, 18 Miss. (10 Smed. & M.) 164 (1848); Hays' Appeal, 51 Pa. St. 58 (1865).

[3] Gowan v. Jones, 18 Miss. (10 Smed. & M.) 164 (1848). See *post* chap. xxvii.

[4] Tarrans v. Hicks, 32 Mich. 307 (1875). See N. Y. Supreme Court Rule 30.

[5] Kochler v. Ball, 2 Kan. 160 (1863); Detroit Fire & Marine Ins. Co. v. Renz, 33 Mich. 298 (1876).

[6] Brown v. Frost, 10 Paige Ch. (N. Y.) 243 (1843). See Strong v. Dollner, 2 Sandf. (N. Y.) 444, 448 (1849).

[7] Moore v. Shaw, 15 Hun (N. Y.) 428 (1878); aff'd 77 N. Y. 512 (1879).

to move the court upon the usual notice at a special term for an order confirming the report.[1]

In some states, however, confirmation of a sale can be regularly made only after due notice of motion to the parties adversely interested, that they may show cause against it.[2] It is said in Williamson v. Berry,[3] that "notice of the motion is given to the solicitors in the cause, and confirmation *nisi* is ordered by the court — to become absolute in a time stated—unless cause is shown against it. Then, unless the purchaser calls for an investigation by the master, it is the master's privilege and duty to draw the deed for the purchaser, reciting in it the decree for the sale, his approval of it, and the confirmation by the court of the sale in the manner that such confirmation has been ordered." The supreme court of the United States say in the case last quoted, that "before a purchaser can get a title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made, either privately or at auction."[4]

But in the more recent case of Blossom v. Milwaukee and Chicago Railroad Company,[5] the same court held that a bidder at a public auction, whose bid has not been accepted, —the sale being adjourned for a sufficient cause, and finally discontinued—can not insist on leave to pay the amount of his bid, and on an order confirming the sale to him, even though his bid was the highest and best bid, and covered the full amount of the decree, together with the costs of such sale.

The question of usury can not be raised on a motion for confirmation.[6]

§ 526. **Referee's report should state amount of deficiency.**—It seems that where a judgment in an action to

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[1] Moore v. Shaw, 15 Hun (N. Y.) 428 (1878). See *post* chap. xxvii.

[2] Branch Bank of Mobile v. Hunt, 8 Ala. 876 (1845).

[3] 49 U. S. (8 How.) 495, 546 (1850); bk. 12 L. ed. 1170.

[4] Williamson v. Berry, 49 U. S. (8 How.) 495, 496 (1850); bk. 12 L. ed. 1170.

[5] 70 U. S. (3 Wall.) 196 (1865); bk. 18 L. ed. 43.

[6] Smith v. Myers, 41 Md. 425, 434 (1874).

foreclose a mortgage provides, "that if the proceeds of the sale be insufficient to pay the amount so reported to be due to the plaintiff, that said referee specify the amount of such deficiency in his report of the sale, and that the defendant pay the same to the plaintiff," it is not necessary to apply to the court for an order confirming the report of the referee before issuing execution against the defendant for the amount of the deficiency; nor does it appear to be necessary to enter any further judgment upon the filing of said report.[1] But the better practice appears to be to have the report of the referee confirmed and to enter judgment for the deficiency.[2]

It was formerly the practice in New York to have the report of the referee or other officer making the sale confirmed before issuing an execution for any deficiency; but that practice was the result of a rule of chancery and is not provided for by the present Code.[3] A failure under the present practice to procure a confirmation before issuing execution for a deficiency, is a mere irregularity at most, and being purely a question of practice, the decision of the court below will be final.[4]

§ 527. Substituted or supplemental report of referee—Notice to defendant.—After the report of the referee or other officer making the sale has been duly confirmed, leave to file a substituted report of the sale, the original report having been lost, and to enter a personal judgment for any deficiency not realized by the sale, should not be allowed, except upon notice to the defendant or some one entitled to represent him.[5]

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[1] Moore v. Shaw, 15 Hun (N. Y.) 428 (1878); aff'd 77 N. Y. 512 (1879). See N. Y. Code Civ. Proc. § 1627.

[2] Springsteene v. Gillett, 30 Hun (N. Y.) 260 (1883); Moore v. Shaw, 77 N. Y. 512 (1879), aff'g 15 Hun (N. Y.) 428 (1878).

[3] See Moore v. Shaw, 15 Hun (N. Y.) 428 (1878); aff'd 77 N. Y. 512 (1879).

[4] N. Y. Code Civ. Proc. § 721, sub. 12; Moore v. Shaw, 77 N. Y. 512 (1879), aff'g 15 Hun (N. Y.) 428.

[5] Chicago & G. W. R. L. Co. v. Peck, 112 Ill. 408 (1885).

CHAPTER XXVI.

SETTING SALE ASIDE AND RESALE.

GENERAL PRINCIPLES — WHO MAY APPLY FOR — GROUNDS FOR — EFFECT OF — TERMS IMPOSED — RESALE.

§ 528. General principles — When sale will not be set aside.
529. Discretion of court.
530. Who may have sale set aside.
531. How sale may be set aside.
532. Time of making application for resale.
533. When application for resale will be granted — When denied.
534. When sale may be set aside where plaintiff is purchaser.
535. What advance must be bid on resale.
536. What sufficient grounds for setting sale aside.
537. Irregularity in conduct of sale.
538. Not set aside because of few bidders.
539. Inadequacy of price.
540. Motion to set sale aside for inadequacy of price.
§ 541. Accident and surprise grounds for setting sale aside.
542. Fraud and misconduct.
543. False statements generally.
544. Misleading statements and representations by referee or plaintiff.
545. Negligence in objecting, and acquiescence in sale.
546. Objections waived by delay.
547. Excusable mistakes as grounds for setting sale aside.
548. Terms imposed.
549. Effect upon purchaser of order setting sale aside.
550. Setting sale aside for benefit of infants.
551. Appeal from order on application for resale.
552. Proceedings on resale.

§ 528. **General principles—When sale will not be set aside.**—A sale made in a mortgage foreclosure will not, as a rule, be disturbed where it was fairly made and is free from fraud, and there is an absence of all circumstances which would justify setting it aside.[1] Some good reason must always be shown to justify an interference with the sale. If there is no legal right to relief,[2] as a matter of course, the application

[1] McCotter v. Jay, 30 N. Y. 80 (1864); Lefevre v. Laraway, 22 Barb. (N. Y.) 167 (1856); Gardiner v. Schermerhorn, Clarke Ch. (N. Y.) 101 (1839); Whitbeck v. Rowe, 25 How. (N. Y.) Pr. 403 (1862); White v. Coulter, 1 Hun (N. Y.) 357, 364 (1874); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 496 (1842); s. c. 38 Am. Dec. 561; Duncan v. Dodd, 2 Paige Ch. (N. Y.) 99 (1830).

[2] It is said in McCotter v. Jay, 30

will be addressed to the sound discretion of the court, and the court must consider the equities of all parties interested, in order that substantial justice may be done.[1]

It has been said that a foreclosure sale should not be set aside merely because some irregularity was committed in its conduct, such as selling a homestead together with other mortgaged premises without inquiring whether the homestead could be sold separately, unless it is clearly shown that some injury was sustained because of such irregularity.[2]

Where a foreclosure sale is regular, it will not be set aside because the newspaper in which the notice of the sale was published, was one of limited circulation and not calculated to give that general information which should be afforded in such cases;[3] and the facts that a party to the suit, who is entitled to the surplus money arising on a sale of the mortgaged premises, is so far deprived of his eye-sight as not to be able to read a newspaper, and that he did not for that reason see the advertisement of the sale, and consequently did not attend such sale, and the property was sold at a sacrifice, do not constitute a sufficient ground for setting the sale aside.[4]

Where the plaintiff in an action for foreclosure was described as an administrator, and as such prosecuted the action to judgment, after proper service on all the defendants, it was held that the judgment and a sale under it could not be assailed because of an irregularity, or even want of jurisdiction, in granting the letters of administration to him.[5] It has also been held that a sale should not be set aside, because the officer conducting it failed to make his report thereof at the next term of the court after the sale;[6] nor because the

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N. Y. 80 (1864), that where foreclosure proceedings are entirely regular and free from fraud, they can not be disturbed or set aside without some legal reason.

[1] Wiley v. Angel, Clarke Ch. (N. Y.) 217 (1840). See Tripp v. Cook, 26 Wend. (N. Y.) 143 (1841); Cole v. Miller, 60 Ind. 463 (1878).

[2] Lloyd v. Frank, 30 Wis. 306 (1872). See Warren v. Foreman, 19 Wis. 35 (1865).

[3] Wake v. Hart, 12 How. (N. Y.) Pr. 444 (1855).

[4] Parkhurst v. Cory, 11 N. J. Eq. (3 Stockt.) 233 (1856).

[5] Abbott v. Curran, 98 N. Y. 665 (1885).

[6] Walker v. Schum, 42 Ill. 462 (1867).

judgment was entered for too large an amount,[1] for, on an application to set aside a sale made in a foreclosure, the court can not inquire into the regularity of such action, nor whether the sum for which judgment was entered is greater or less than it should have been.[2]

The fact that the original mortgagee, who assigned his mortgage and guaranteed its payment, and who was made a party to the foreclosure, did not know of the time and place of the sale, will not be a good ground for setting it aside, because such mortgagee was bound to use due diligence in ascertaining the day of the sale in order to protect his rights.[3]

§ 529. **Discretion of court.**—The supreme court, having control over its own judgments and all proceedings thereunder, and having power to exercise this control at the instance of any person whose rights are injuriously affected by such proceedings,[4] has power to set aside and vacate a sale of land made under a judgment upon a foreclosure of a mortgage by an officer thereof, and to order a resale, although there may be no fraud, and the sale was regular in all respects.[5]

An application for a resale is always addressed to the sound discretion of the court of original jurisdiction, and an order granting or denying such a resale is not appealable.[6] The court held in Wakeman v. Price,[7] that "such relief, where the proceedings have been regular, can not be claimed as a matter of right, but simply as a matter of favor. It must, therefore, rest in the discretion of the

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[1] Young v. Bloomer, 22 How. (N. Y.) Pr. 383 (1861); Bullard v. Green, 10 Mich. 268 (1862).

[2] Bullard v. Green, 10 Mich. 268 (1862).

[3] McCotter v. Jay, 30 N. Y. 80 (1864).

[4] Goodell v. Harrington, 76 N. Y. 547 (1879); Kellogg v. Howell, 62 Barb. (N. Y.) 280 (1872); Gould v. Mortimer, 26 How. (N. Y.) Pr. 167 (1863).

[5] Hale v. Clauson, 60 N. Y. 339, 341 (1875).

[6] Goodell v. Harrington, 76 N. Y. 547 (1879); Hale v. Clauson, 60 N. Y. 339, 341 (1875); Crane v. Stiger, 58 N. Y. 625 (1874); Buffalo Sav. Bank v. Newton, 23 N. Y. 160 (1861); Wakeman v. Price, 3 N. Y. 334 (1850); Bergen v. Snedeker, 8 Abb. (N. Y.) N. C. 50 (1879); Nugent v. Nugent, 54 Mich. 557 (1884); Adams v. Haskell, 10 Wis. 123 (1859).

[7] 3 N. Y. 334, 335 (1850).

court to grant or refuse it. It is simply a question of practice in the lower court—as clearly so as an order granting or denying a motion to open a default, to dissolve an injunction, or to allow costs."

Where a sale is reported by the referee and the purchaser refuses to comply with its terms, the court may, upon an application by the plaintiff, or by other persons interested, order that cause be shown why the terms of the sale should not be complied with; and if sufficient cause is not shown, the court, after considering all the circumstances of the sale, may either ratify or set it aside, as justice in the case may seem to require.[1] If the sale is ratified and the party still fails to comply with its terms, the court may proceed summarily to direct a resale of the property at the risk of the first purchaser.[2]

But the first sale having been reported by the referee, or other officer making it, no order affecting the rights of the purchaser should be granted without notifying him and affording him an opportunity of opposing the motion for a resale.[3] Parties desiring to have a mortgage foreclosure sale set aside must move promptly after they become aware of the facts of which they complain.[4]

§ 530. **Who may have sale set aside.**—Every person whose rights are injuriously affected by a judgment of foreclosure or by a proceeding thereunder, has a right to have it set aside or amended on motion, even though he is not a party to the suit; and hence, he may apply to the court for a resale of the premises.[5] To be entitled to apply for a resale, the party need not have a specific lien upon the land;[6] it will be sufficient if he has an interest or right in

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[1] Schaefer v. O'Brien, 49 Md. 253 (1878).

[2] Schaefer v. O'Brien, 49 Md. 253 (1878).

[3] Schaefer v. O'Brien, 49 Md. 253 (1878).

[4] Lyon v. Brunson, 48 Mich. 194 (1882).

[5] Goodell v. Harrington, 76 N. Y. 547 (1879); Kellogg v. Howell, 62 Barb. (N. Y.) 280 (1872); Gould v. Mortimer, 26 How. (N. Y.) Pr. 167 (1863); s. c. 16 Abb. (N. Y.) Pr. 448; Fuller v. Brown, 35 Hun (N. Y.) 162 (1885).

[6] Goodell v. Harrington, 76 N. Y. 547 (1879).

the property, which may be affected by the sale.[1] A creditor of the mortgagor, whose debt will be affected,[2] a judgment creditor whose lien will be destroyed,[3] a subsequent judgment creditor whose judgment would be rendered worthless, if the judgment under which the sale was made is fraudulent,[4] a junior incumbrancer whose right of action accrues subsequently to the commencement of the foreclosure under which the sale is made, and who is not a party to such action,[5] or a party who is primarily liable for the payment of the mortgage debt or of any deficiency, who is not made a party to the suit, may move to have the sale set aside, if it did not produce enough to satisfy his claim or to relieve him from personal liability.[6]

It has been held that a party who has no interest in the mortgaged premises, but who is personally liable for any deficiency arising upon the sale, has no right to ask for a resale, if he and the representatives of his surety are discharged from liability for the deficiency to the extent of the full value of the premises, over and above the amount brought at the former sale.[7] An owner of the equity of redemption in mortgaged lands, who has made a general assignment for the benefit of his creditors, still retains an interest in the land, and may apply to have a sale of the lands made under a foreclosure set aside, notwithstanding such assignment.[8]

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[1] Goodell v. Harrington, 76 N. Y. 547 (1879). See Rohrback v. Germania Ins. Co., 62 N. Y. 47 (1875).

[2] Fuller v. Brown, 35 Hun (N. Y.) 162, 165 (1885).

[3] Kellogg v. Howell, 62 Barb. (N. Y.) 280, 284 (1872); Fuller v. Brown, 35 Hun (N. Y.) 162, 165 (1885); May v. May, 11 Paige Ch. (N. Y.) 201 (1844). See American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841).

[4] See Kellogg v. Howell, 62 Barb. (N. Y.) 280, 283 (1872); Chappel v. Chappel, 12 N. Y. 215 (1855).

[5] See Brown v. Frost, 10 Paige Ch. (N. Y.) 243 (1843); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841).

[6] Bodine v. Edwards, 2 N. Y. Leg. Obs. 231 (1843); s. c. 3 Ch. Sent. 46. See Shuler v. Maxwell, 38 Hun (N. Y.) 240 (1885).

[7] Bodine v. Edwards, 2 N. Y. Leg. Obs. 231 (1843); s. c. 3 Ch. Sent. 46.

[8] Delaware, L. & W. R. Co. v. Scranton, 34 N. J. Eq. (7 Stew.) 429 (1881).

Each case will be governed by its own peculiar circumstances,[1] but it may be stated as a general rule on which courts act in setting aside sales made on mortgage foreclosures and in ordering resales of the property, that equity will not allow fraud or unfairness on the part of any person connected with the sale,[2] nor on the part of the purchaser.[3]

But where property is regularly advertised and fairly sold by a referee, or other officer of the court, such sale will not be set aside, and a resale ordered, on motion of parties interested in the proceeds of the sale, in order to protect them against the consequences of their own negligence, where they are adults and were competent to protect their rights on the sale.[4] Where the party making the motion has been guilty of laches, he can not have relief; and where the period prescribed by statute, within which an action in equity to redeem from a mortgage can be brought, has been permitted to expire, the court has no power to set the sale aside.[5]

§ 531. **How sale may be set aside.**—When it would be inequitable to permit the sale to stand, the proper remedy for the party aggrieved is by a summary application to the court on motion in the original suit, for an order setting the sale aside and directing a resale of the premises.[6] Notice of the motion for a resale should be given to all persons who have appeared in the suit, and to all persons who have any interest in the property sold or in the proceeds of the sale, as well as to the purchaser at the sale which it is sought to set aside.[7]

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[1] Francis v. Church, Clarke Ch. (N. Y.) 475 (1841). See Lefevre v. Laraway, 22 Barb. (N. Y.) 167 (1856).

[2] Stahl v. Charles, 5 Abb. (N. Y.) Pr. 348 (1857).

[3] Murdock v. Empie, 19 How. (N. Y.) Pr. 79 (1860).

[4] American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841); s. c. 38 Am. Dec. 561. See McCotter v. Jay, 30 N. Y. 80 (1864).

[5] Depew v. Dewey, 2 T. & C. (N. Y.) 515 (1874); s. c. 46 How. (N. Y.) Pr. 441. See Francis v. Church, Clarke Ch. (N. Y.) 475 (1841); Nicholl v. Nicholl, 8 Paige Ch. (N. Y.) 349 (1840); Warren v. Foreman, 19 Wis. 35 (1865).

[6] McCotter v. Jay, 30 N. Y. 80 (1864); Kellogg v. Howell, 62 Barb. (N. Y.) 280, 283 (1872); Gould v. Mortimer, 26 How. (N. Y.) Pr. 167 (1863); s. c. 16 Abb. (N. Y.) Pr. 448.

[7] Robinson v. Meigs, 10 Paige Ch. (N. Y.) 41 (1843).

It seems that where a party was so connected with a foreclosure, that he could have moved in that action to set the sale aside, he can not subsequently maintain a suit to accomplish the same object.[1] And while it may be questionable whether, after a sale on foreclosure, the defendants can have such sale set aside in opposing the purchaser's motion for confirmation, yet there will be no error in setting such sale aside upon an order procured by a defendant requiring the purchaser to show cause why a resale should not be had.[2]

In the early case of Brown v. Frost,[3] it was held that an original bill in chancery can not be filed by a party to a foreclosure to set aside a master's sale under a decree, when the same relief could have been obtained by a summary application to the court in the action for foreclosure.[4] Chancellor Walworth held in this case, that it would seriously affect the interests of those whose property was to be sold by a referee on a mortgage foreclosure, if it was understood that questions affecting the rights of the parties to the suit could be litigated and determined in collateral suits, "for," said the chancellor, "no man of ordinary prudence would bid what he believed to be the fair cash value of the property, at a master's sale, if he might be subjected to the expense and delay of a protracted chancery suit to determine whether the proceedings of the master had been strictly regular."[5]

This doctrine seems to be questioned in Hackley v. Draper;[6] and in the case of Vandercook v. Cohoes Savings Institution,[7] it is said that an action may be brought to set

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[1] Gould v. Mortimer, 26 How. (N. Y.) Pr. 167, 169 (1863); s. c. 16 Abb. (N. Y.) Pr. 448.

[2] Hubbard v. Taylor, 49 Wis. 68 (1880).

[3] 10 Paige Ch. 243 (1843).

[4] The same doctrine is held in Mc Cotter v. Jay, 30 N. Y. 80 (1864); Kellogg v. Howell, 62 Barb. (N. Y.) 280 (1872); Libby v. Rosekrans, 55 Barb. (N. Y.) 202, 219, 220 (1869); Smith v. American Ins. Co., Clarke Ch. (N. Y.) 307 (1840); Vandercook v. Cohoes Sav. Institution, 5 Hun (N. Y.) 641 (1875); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841); Nicholl v. Nicholl, 8 Paige Ch. (N. Y.) 349 (1840); Requa v. Rea, 2 Paige Ch. (N. Y.) 339 (1831); Collier v. Whipple, 13 Wend. (N. Y.) 224 (1834). Compare Hackley v. Draper, 60 N. Y. 88, 93 (1875).

[5] See Brown v. Frost, Hoff. Ch. (N. Y.) 41 (1839).

[6] 60 N. Y. 88, 93 (1875).

[7] 5 Hun (N. Y.) 641 (1875).

aside a sale made under a decree of foreclosure, if the sale was fraudulently conducted to the prejudice of any party interested in the property, even though such person may have a concurrent remedy by motion.

It was held in an early case, where the officer making the sale neglected to give security for the faithful discharge of his duties, as required by law, and assumed to act as such officer and to sell the premises under a decree of foreclosure, and the report of the sale was confirmed by the court, that the remedy of the party aggrieved was by an application in the action for foreclosure, to have the sale set aside for irregularity. But such an objection, when raised in a foreclosure, can not be heard unless promptly made.[1]

§ 532. **Time of making application for resale.**—An objection to a sale should be made promptly; if made after a great lapse of time, a good excuse must be shown for the delay.[2] As a general rule, the proper time for making an application for a resale is before the confirmation of the report of the officer who conducted the sale;[3] but under special circumstances the court may set the sale aside and order a resale, even after the confirmation of the report.[4]

Where a party moving for a resale has been guilty of laches, relief will not be granted in the absence of a good excuse or of an explanation of the delay;[5] and if the period prescribed by the statute, within which an action in equity

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[1] Nicholl v. Nicholl, 8 Paige Ch. (N. Y.) 349 (1840).

[2] Lockwood v. McGuire, 57 How. (N. Y.) Pr. 266 (1879); Nicholl v. Nicholl, 8 Paige Ch. (N. Y.) 349 (1840); Hoyt v. Pawtucket Inst. of Savings, 110 Ill. 390 (1884). See McHany v. Schenk, 88 Ill. 357 (1878); Bush v. Sherman, 80 Ill. 160 (1875); Munn v. Burges, 70 Ill. 604 (1873); Dempster v. West, 69 Ill. 613 (1873); Burr v. Borden, 61 Ill. 389 (1871); Beach v. Shaw, 57 Ill. 17 (1870); Hamilton v. Lubukee, 51 Ill. 415 (1869); Cox v. Montgomery, 36 Ill. 396 (1864).

[3] Brown v. Frost, 10 Paige (N. Y.) 243 (1843). See Strong v. Dollner, 2 Sandf. (N. Y.) 444 (1849); Morice v. Durham, 11 Ves. 57 (1805); Watson v. Birch, 2 Ves. 52 (1793).

[4] See Lansing v. McPherson, 3 Johns. Ch. (N. Y.) 424 (1818); Ryder v. Gower, 6 Bro. P. C. 306 (1766); Price v. Moxon, cited 2 Dan. Ch. Pr. 1290 (1754); Watson v. Birch, 2 Ves. 52 (1793).

[5] Lockwood v. McGuire, 57 How. (N. Y.) Pr. 266 (1879).

may be brought to redeem from a mortgage, has expired, the court will not set the sale aside;[1] because, as has been said, "the courts have found it to be a duty, where a party has lost his rights by lapse of time under statutory provisions relating to them, to deny a motion made for relief after the time for affording the redress claimed has been allowed to expire without an application being made to secure it. Any other course would result in a nullification of the statutes, for it would be doing by indirect means, what in substance the legislature has provided should not be done by any means."[2]

It was held in the case of Fuller v. Brown,[3] that the statutory limitation of one year has no application to a motion to set a sale aside and for a resale, and that "the question of laches and its effect are dependent upon the circumstances of each particular case involving the consideration of them. It would be more strictly applied, as against a purchase in good faith, by a stranger to the proceedings, than to a party privy to it and not a *bona fide* purchaser. Also when the rights of third parties had intervened, which would be affected by giving relief." If there has been no substantial change in the situation, which would make the granting of the relief asked result to the injury of the purchaser, the question of laches will have less importance.[4]

A mortgagor should avail himself without delay of all irregularities in a sale of the mortgaged premises, whether made by an officer of the court under a decree of foreclosure and sale, or by the mortgagee under a power in the mortgage. Thus, it has been held where the former owner

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[1] Depew v. Dewey, 46 How. (N. Y.) Pr. 441 (1874); s. c. 2 T. & C. (N. Y.) 515.

[2] Depew v. Dewey, 46 How. (N. Y.) Pr. 441, 446 (1874); s. c. 2 T. & C. (N. Y.) 515. See Salles v. Butler, 27 N. Y. 638 (1863); Wait v. Van Allen, 22 N. Y. 319 (1860); Fry v. Bennett, 16 How. (N. Y.) Pr. 385 (1858); Marston v. Johnson, 13 How. (N. Y.) Pr. 93 (1856); Humphrey v. Chamberlain, 11 N. Y. 274 (1854).

[3] 35 Hun (N. Y.) 162, 166 (1885).

[4] See *In re* Woolsey, 95 N. Y. 135, 144 (1884); McMurray v. McMurray, 66 N. Y. 176 (1876); Lockwood v. McGuire, 57 How. (N. Y.) Pr. 266 (1879); Viele v. Judson, 15 Hun (N. Y.) 328 (1878).

knew of the sale shortly after it was made, and neglected to redeem the property by paying the sum due from him, that a delay of four years in filing a bill to set such sale aside on the ground of alleged irregularities and inadequacy of price, was such laches as to bar the relief sought.[1]

§ 533. **When application for resale will be granted—When denied.**—A resale of mortgaged premises may be ordered in case the sale was improperly, unfairly or unlawfully conducted, and that fact is made to appear to the court.[2] A resale may also be ordered if there was a defect of parties to the suit,[3] or if several parcels were sold in a lump,[4] because the parties interested in such sale have a right to expect and to require that the property shall be offered and sold in the usual manner, and in accordance with the requirements of law. If it appears that the property has been sacrificed by the failure of the officer making the sale to comply with such requirements, the parties injured will be entitled to relief by a resale.[5]

A resale will be ordered where there were no bidders present at the sale except the auctioneer;[6] or where the purchaser refuses to comply with the terms of sale.[7] But if the purchaser is financially responsible, the court may make an absolute order that he complete the purchase, or that an

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[1] Hoyt v. Pawtucket Inst. of Savings, 110 Ill. 390 (1884); Hamilton v. Lubukee, 51 Ill. 415 (1869).

[2] King v. Platt, 37 N. Y. 155 (1867); s. c. 35 How. (N. Y.) Pr. 23; 3 Abb. (N. Y.) Pr. N. S. 434; Marsh v. Ridgway, 18 Abb. (N. Y.) Pr. 262 (1864); Lefevre v. Laraway, 22 Barb. (N. Y.) 167 (1856); Griffith v. Hadley, 10 Bosw. (N. Y.) 587 (1862); Wolcott v. Schenck, 23 How. (N. Y.) Pr. 385 (1862): Lents v. Craig, 13 How. (N. Y.) Pr. 72 (1855); s. c. 2 Abb. (N. Y.) Pr. 294.

[3] Verdin v. Slocum, 71 N. Y. 345 (1877).

[4] Ames v. Lockwood, 13 How. (N. Y.) Pr. 555 (1856).

[5] Brown v. Frost, 10 Paige Ch. (N. Y.) 243 (1843). See Lansing v. McPherson, 3 Johns. Ch. (N. Y.) 424 (1818); Billington v. Forbes, 10 Paige Ch. (N. Y.) 487 (1843); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841); Requa v. Rea, 2 Paige Ch. (N. Y.) 339 (1831); Tripp v. Cook, 26 Wend. (N. Y.) 146 (1841); Bixly v. Mead, 18 Wend. (N. Y.) 611 (1836); Groff v. Jones, 6 Wend. (N. Y.) 522 (1831).

[6] Campbell v. Swan, 48 Barb. (N. Y.) 109 (1865).

[7] Graham v. Bleakie, 2 Daly (N. Y.) 55, 60 (1866).

attachment issue against him.[1] If the sale is ratified and the purchaser still refuses to complete his purchase, the court may proceed in a summary way by an order, and direct a resale of the property at the risk of the purchaser at the first sale.[2]

Upon an application for a resale of property in a mortgage foreclosure, all the facts connected with the sale and with the equitable interests of the various parties will be taken into consideration by the court.[3] When a mortgage foreclosure sale is fair and free from fraud, accident or surprise, a resale will not be ordered; especially, if the equities of the case are in favor of the purchaser, as where he has a subsequent lien which will be imperiled by a resale.[4]

In Haines v. Taylor,[5] the court held that "the rule is distinctly and clearly laid down in numerous cases, that the court will not interfere except in very special cases; and never when the mortgagor is an adult and has an opportunity of attending the sale and taking care of his interests, and the sale is fairly made."[6] Where foreclosure proceedings are entirely regular and free from fraud, the sale will not be set aside without some legal reason. Mere want of knowledge of the time and place of the sale on the part of one who was a party to the foreclosure, and who was bound for that reason to use due diligence in obtaining information of the sale in order to protect his rights, affords no sufficient reason for a resale.[7]

A resale in a mortgage foreclosure will not be ordered merely because the property was not sold in separate parcels,

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[1] Graham v. Bleakie, 2 Daly (N. Y.) 55, 60 (1866). See Miller v. Collyer, 36 Barb. (N. Y.) 250 (1862); Saunders v. Gray, 4 Myl. & C. 515 (1811); Lansdown v. Elderton, 14 Ves. 512 (1808).

[2] Schaefer v. O'Brien, 49 Md. 253 (1878).

[3] Wiley v. Angle, Clarke Ch. (N. Y.) 217 (1840).

[4] Gardiner v. Schermerhorn, Clarke Ch. (N. Y.) 101 (1839).

[5] 3 How. (N. Y.) Pr. 206, 207 (1848).

[6] See McCotter v. Jay, 30 N. Y. 80 (1864); White v. Coulter, 1 Hun (N. Y.) 357 (1874); Livingston v. Byrne, 11 Johns. (N. Y.) 555 (1814); Billington v. Forbes, 10 Paige Ch. (N. Y.) 487 (1843); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841); Duncan v. Dodd, 2 Paige Ch. (N. Y.) 101 (1830).

[7] McCotter v. Jay, 30 N. Y. 80 (1864).

if it appears that no request to sell in parcels was made of the referee, and that the premises, although consisting of several lots, have been so built upon as really to constitute but one parcel.[1] The transfer of a bid made at foreclosure sale is not a good ground for a resale.[2]

§ 534. **When sale may be set aside where plaintiff is purchaser.**—A mortgagee has an equal right with disinterested parties to purchase the mortgaged premises, and the mere fact that he purchased the premises at a low price, will constitute no ground for setting the sale aside where it was fair and open, and the bidders were in no way deceived.[3] Yet a sale will be set aside and a resale ordered upon less evidence of fraud, surprise, accident or misconduct of the officer conducting the sale, if the plaintiff or mortgagee is the purchaser, and the rights of third parties or *bona fide* purchasers do not intervene, than where a stranger to the suit is the purchaser.[4]

In the case of Tripp v. Cook,[5] the court held that "where the mortgagee or complainant himself becomes the purchaser, the court has not always held the sale so conclusive as where the property has been purchased by one who was an entire stranger to the suit, who had bid for the purpose of investment merely." Where the mortgagee becomes the purchaser of the premises at a sum less than the amount of his mortgage, the sale may be opened on motion of the person who is bound to make good the deficiency, upon the payment of a reasonable advance upon the price at which the premises were publicly sold.[6]

§ 535. **What advance must be bid on resale.**—Before a sale made in pursuance of a judgment of foreclosure has been confirmed, the court may open the biddings and order

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[1] McLaughlin v. Teasdale, 9 Daly (N. Y.) 23 (1880).

[2] Culver v. McKeown, 43 Mich. 322 (1880).

[3] Mott v. Walkley, 3 Edw. Ch. (N. Y.) 590 (1842). See N. Y. Supreme Court Rule 61.

[4] Kellogg v. Howell, 62 Barb. (N. Y.) 280 (1872); Tripp v. Cook, 26 Wend. (N. Y.) 143 (1841). See Nugent v. Nugent, 54 Mich. 557 (1884); Campbell v. Gardner, 11 N. J. Eq. (3 Stock.) 423 (1857).

[5] 26 Wend. (N. Y.) 143, 145 (1841).

[6] Littell v. Zuntz, 2 Ala. 256 (1841); s. c. 36 Am. Dec. 415. See Mott

a resale, at the instance of any one who is liable for the deficiency, on his offering a sufficient advance over the sum received, and paying the costs of the former sale.[1] Under the English practice it seems that while the court does not confine itself to a particular rate per centum, ten pounds per centum has been adopted as the prevailing rule.[2] But this practice has never been generally adopted in this country,[3] because its tendency is considered prejudicial to the fair conduct of judicial sales.[4] In this country, neither before nor after the confirmation of the report of sale, will a resale be ordered merely upon an offer of an increase of price.[5]

But in Alabama, where property is sold under a decree of foreclosure and is purchased by the mortgagee, the biddings will be opened and a resale ordered before a confirmation of the sale, if an advance of not less than ten per centum upon

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v. Walkley, 3 Edw. Ch. (N. Y.) 590 (1842); Woodhull v. Osborne, 2 Edw. Ch. (N. Y.) 614 (1836); Lansing v. McPherson, 3 Johns. Ch. (N. Y.) 424 (1818).

[1] See Lansing v. McPherson, 3 Johns. Ch. (N. Y.) 424 (1818); Farlow v. Weildon, 4 Madd. 460 (1819). It is said in a note to Farlow v. Weildon, that "when biddings are opened, the person who opens them pays all the costs of the former purchaser; and I am informed that he has been allowed the costs of an agent who traveled a considerable distance for the purpose of buying for his principal."

[2] Garstone v. Edwards, 1 Sim. & Stu. 20 (1822). In this case it is said that the cases of Brooks v. Snaith, 3 Ves. & B. 144 (1814), and White v. Wilson, 14 Ves. 151 (1807), and *Ex parte* Partington, 1 Ball. & B. 209 (1809), establish the fact that where an advance so large as five hundred pounds is offered, the court will act upon it though it be less than ten pounds per centum.

[3] Woodhull v. Osborne, 2 Edw. Ch. (N. Y.) 614 (1836). See Lefevre v. Laraway, 22 Barb. (N. Y.) 167, 173 (1856); Lansing v. McPherson, 3 Johns. Ch. (N. Y.) 424 (1818); Williamson v. Dale, 3 Johns. Ch. (N. Y.) 290 (1818); Duncan v. Dodd, 2 Paige Ch. (N. Y.) 99 (1830); Collier v. Whipple, 13 Wend. (N. Y.) 224 (1834); Jackson v. Warren, 32 Ill. 331 (1863); Forman v. Hunt, 3 Dana (Ky.) 614 (1835); Delaware, L. & W R. Co. v. Scranton, 34 N. J. Eq. (7 Stew.) 429, 432 (1881); Adams v Haskell, 10 Wis. 123 (1859).

[4] Delaware, L. & W. R. Co. v. Scranton, 34 N. J. Eq. (7 Stew.) 429 (1881); Conover v. Walling, 15 N. J. Eq. (2 McCar.) 173, 178 (1852).

[5] Lefevre v. Laraway, 22 Barb. (N. Y.) 167, 173 (1856). See Brown v. Frost, 10 Paige Ch. (N. Y.) 243, 249 (1843); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841); Tripp v. Cook, 26 Wend. (N. Y.) 143 (1841); Collier v. Whipple, 13 Wend. (N. Y.) 224 (1834); Adams v. Haskell, 10 Wis. 123 (1859).

the former sale is offered and the money is deposited in court; but it seems that a resale will not be ordered where the deposit is less than two hundred dollars.[1]

§ 536. What sufficient grounds for setting sale aside. —It has been said that equity is ready to receive the excuses of the mortgagor, not only to allow him time to procure the money due on the mortgage before foreclosure, but also to open the foreclosure, if he shows any good reason why he did not appear.[2] If the referee sells the property under a decree of foreclosure at an improper time, or in such a manner as to prevent a fair competition, or if from any other cause it is inequitable that such sale should be permitted to stand, the sale will be set aside on motion.[3]

Thus, where a sale under a statutory foreclosure was made when no person was present, except the officer conducting the sale who bid in the property on behalf of the mortgagee, the sale was set aside.[4] And where the officer making the sale disregards the written request and instructions of the plaintiff and sells the property at a great sacrifice, the sale may be set aside, if the purchaser knew of such written instructions.[5] A sale may be set aside, especially before confirmation, for fraud, unfairness or irregularity,[6] or for want of notice;[7] but it seems not for mere inadequacy of price,[8] unless it results in a clear sacrifice.[9]

The confirmation of the referee's report, it seems, will cure all irregularities in proceedings for the sale of mortgaged

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[1] Littell v. Zuntz, 2 Ala. 256 (1841); s. c. 36 Am. Dec. 415.

[2] Golden v. Fowler, 26 Ga. 451, 463 (1858).

[3] Marsh v. Ridgway, 18 Abb. (N. Y.) Pr. 262 (1864); Lefevre v. Laraway, 22 Barb. (N. Y.) 167 (1856); Griffith v. Hadley, 10 Bosw. (N. Y.) 587 (1862); Wolcott v. Schenck, 23 How. (N. Y.) Pr. 385 (1862); Brown v. Frost, 10 Paige Ch. (N. Y.) 243 (1843).

[4] Campbell v. Swan, 48 Barb. 109 (1865).

[5] Requa v. Rea, 2 Paige Ch. (N. Y.) 339 (1831).

[6] Forman v. Hunt, 3 Dana (Ky.) 614 (1835).

[7] Nugent v. Nugent, 54 Mich. 557 (1884).

[8] American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841); s. c. 38 Am. Dec. 561; Henderson v. Lowry, 5 Yerg. (Tenn.) 240 (1833); Hill v. Hoover, 5 Wis. 354 (1856); s. c. 68 Am. Dec. 70; Strong v. Catton, 1 Wis. 471 (1853); West v. Davis, 4 McL. C. C. 241 (1847).

premises and in the conduct of such sale; but it will not cure a defect arising from want of jurisdiction of the court, either over the cause of action or the parties interested. Mere accident or mistake, which will generally invalidate a contract, may be a good ground for setting a sale aside even after confirmation.[1] But clearer and stronger evidence of fraud or misconduct, or of other causes for rendering the sale invalid, will be required to set a sale aside after than before confirmation.[2]

§ 537. **Irregularity in conduct of sale.**—Any irregularity by the referee in the conduct of a mortgage sale under a decree of foreclosure, will be a sufficient ground for setting it aside.[3] Where the officer making the sale sells upon terms other than those authorized by the decree, the sale will be irregular, and for that reason may be set aside on the application of any injured party.[4] A sale will also be set aside where its terms are very different from the usual terms of statutory sales, or are unjust and oppressive towards the mortgagor, as where the officer making the sale requires full payment and performance by the purchaser within an hour's time after the sale, or requires that the payment shall be made in specie.[5]

The parties interested in the property to be sold under a mortgage foreclosure, have the right to expect that it will be offered and sold in the usual manner, and in a way that will produce a fair competition among the bidders. If the property consists of several parcels, which, under the rule, ought to be sold separately, and they are sold together, the sale may be set aside on the application of any person aggrieved.[6]

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[1] Garrett v. Moss, 20 Ill. 549 (1858).

[1] See Jackson v. Warren, 32 Ill. 331 (1863).

[2] Lansing v. McPherson, 8 Johns. Ch. (N. Y.) 424 (1818).

[3] See Forman v. Hunt, 3 Dana (Ky.) 614 (1835).

[4] Hotchkiss v. Clifton Air Cure, 4 Keyes (N. Y.) 170 (1868).

[5] Goldsmith v. Osborne, 1 Edw. Ch. (N. Y.) 560, 562 (1833); Lents v. Craig, 13 How. (N. Y.) Pr. 72 (1855); s. c. 2 Abb. (N. Y.) Pr. 294.

[6] Cunningham v. Cassidy, 17 N. Y. 276 (1858); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841); s. c. 38 Am. Dec. 561; Merchants' Ins. Co. of New York City v. Hinman, 3 Abb. (N. Y.) Pr.

§ 538. **Not set aside because of few bidders.**—It seems that the facts, that the day on which a sale was advertised to take place was rainy and inclement, and that parties who would have bid on the premises, or a portion thereof, were consequently kept away and that only a few bidders were present, do not constitute an adequate cause for setting the sale aside.[1]

But, in the case of Roberts v. Roberts,[2] it was held where the day on which a sale was advertised to take place was so inclement as to deter bidders from attending, and there was but one bidder present, who lived at the place of sale and to whom the premises were sold, that the sale should be set aside without inquiring into the sufficiency of the price for which the land was sold.

And it was held in Campbell v. Swan,[3] where no bidders were present at the sale, except the auctioneer, who bid in the property on behalf of the mortgagee, that the sale was void. The court held that "sales at public auction are regulated by certain well-known rules, which are necessary to create competition and enhance bids for the property. No one would regard a sale at auction as a fair sale, if the auctioneer should cry off the property to himself. It is going far enough to allow the attorney to become the auctioneer when his client is a bidder at the sale. But if the sale was unobjectionable for the reason that the attorney cried off the property to his client, who was not present, then I think it should be held void, upon the ground that it was not a sale of the premises at public auction within the meaning of the statute. It might have been good if the plaintiff had been present to bid in the property; but it does not satisfactorily appear, nor is it found by the referee, that any one was present when the attorney offered the property for sale and struck it off to himself on behalf

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455 (1856); Griffith v. Hadley, 10 Bosw. (N. Y.) 587 (1862); Wolcott v. Schenck, 23 How. (N. Y.) Pr. 385 (1862); Breese v. Busby, 13 How. (N. Y.) Pr. 485 (1855); Quaw v. Lameraux, 36 Wis. 626 (1875).

[1] Fairfax v. Muse, 4 Munf. (Va.) 124 (1813).

[2] 13 Gratt. (Va.) 639 (1857).

[3] 48 Barb. (N. Y.) 109 (1865).

of his client who was absent. There can be no legal auction if no one is present but the auctioneer, and the sale should be postponed."

§ 539. **Inadequacy of price.**—Mere inadequacy of the price brought by the mortgaged premises on a foreclosure sale is not a sufficient ground for ordering a resale of the premises, unless the inadequacy is so great as to be evidence of unfairness or fraud.[1] It was held by the supreme court of Illinois, in the case of Cleaver v. Green,[2] that it is not to be expected that property will bring as much at a forced sale as if sold privately by judicious advertising and management, and the fact that it does not, is not a sufficient reason for setting a sale aside, where there is no unfairness or fraud, and where there is no such inadequacy of price as to raise a presumption of fraud.

In the case of O'Donnell v. Lindsay,[3] it is said that "to set a sale aside, there must, in addition to inadequacy of consideration, be some other excuse, such as surprise, ignorance,

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[1] O'Donnell v. Lindsay, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 532 (1873). See Howell v. Mills, 53 N. Y. 322 (1873); King v. Morris, 2 Abb. (N. Y.) Pr. 296, 298 (1855); Kellogg v. Howell, 62 Barb. (N. Y.) 280 (1872); Lefevre v. Laraway, 22 Barb. (N. Y.) 167 (1856); Francis v. Church, Clarke Ch. (N. Y.) 475, 478 (1841); Gardiner v. Schermerhorn, Clarke Ch. (N. Y.) 101 (1839); Mott v. Walkley, 3 Edw. Ch. (N. Y.) 590 (1842); Woodhull v. Osborne, 2 Edw. Ch. (N. Y.) 614 (1836); Gould v. Gager, 24 How. (N. Y.) Pr. 440 (1863); s. c. 18 Abb. (N. Y.) Pr. 32; Murdock v. Empie, 19 How. (N. Y.) Pr. 79 (1860); s. c. 9 Abb. (N. Y.) Pr. 283; *In re* Rider, 23 Hun (N. Y.) 91 (1880); Livingston v. Byrne, 11 Johns. (N. Y.) 555 (1814); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841); s. c. 38 Am. Dec. 561; Duncan v. Dodd, 2 Paige Ch. (N. Y.) 99 (1830); March v. Ludlum, 3 Sandf. Ch. (N. Y.) 35 (1845); Tripp v. Cook, 26 Wend. (N. Y.) 143 (1841); Collier v. Whipple, 13 Wend. (N. Y.) 224 (1834); Central Pac. R. R. Co. v. Creed, 70 Cal. 497 (1886); Garrett v. Moss, 20 Ill. 549 (1858); Wing v. Hayford, 124 Mass. 249 (1878); King v. Bronson, 122 Mass. 122 (1877); Lalor v. McCarthy, 24 Minn. 417 (1878); Kline v. Vogel, 11 Mo. App. 211 (18—); Wetzler v. Schaumann, 24 N. J. Eq. (9 C. E. Gr.) 60 (1873); Henderson v. Lowry, 5 Yerg. (Tenn.) 240 (1833); Klein v. Glass, 53 Tex. 37 (1880); Hill v. Hoover, 5 Wis. 354 (1856); Strong v. Catton, 1 Wis. 471 (1853); Dryden v. Stephens, 19 W. Va. 1 (1881); West v. Davis, 4 McL. C. C. 241 (1847).

[2] 107 Ill. 67 (1883).

[3] 39 N. Y. Supr. Ct. (7 J. & S.) 523, 532 (1873).

mistake or inadvertence. It will be seen, however, from the cases that a great inadequacy has refined the ingenuity of the learned judges in extracting from the facts of the cases. sufficient to justify annulling the sale."[1]

§ 540. Motion to set sale aside for inadequacy of price.—In an application to set aside a sale of mortgaged premises and for a resale, on the ground of inadequacy of consideration, the moving party should show the true market value of the property and not its speculative value.[2] A motion to set aside a sale made in a mortgage foreclosure is addressed

[1] See King v. Platt, 37 N. Y. 155 (1867); McCotter v. Jay, 30 N. Y. 80 (1864); O'Donnell v. Lindsay, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 533 (1873); Dwight's Case, 15 Abb. (N. Y.) Pr. 259 (1862); King v. Morris, 2 Abb. (N. Y.) Pr. 296 (1855); Lefevre v. Laraway, 22 Barb. (N. Y.) 167 (1856); Griffith v. Hadley, 10 Bosw. (N. Y.) 588 (1862); Francis v. Church, Clarke Ch. (N. Y.) 475 (1841); Gardiner v. Schermerhorn, Clarke Ch. (N. Y.) 105 (1839); Whitbeck v. Rowe, 25 How. (N. Y.) Pr. 403 (1862); Murdock v. Empie, 19 How. (N. Y.) Pr. 79 (1860); Soule v. Ludlow, 3 Hun (N. Y.) 503 (1875); Howell v. Baker, 4 Johns. Ch. (N. Y.) 118 (1819); Lansing v. McPherson, 3 Johns. Ch. (N. Y.) 426 (1818); Williamson v. Dale, 3 Johns. Ch. (N. Y.) 292 (1818); Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 23 (1816); Jencks v. Alexander, 11 Paige Ch. (N. Y.) 619 (1845); May v. May, 11 Paige Ch. (N. Y.) 203 (1844); Billington v. Forbes, 10 Paige Ch. (N. Y.) 487 (1843); Brown v. Frost, 10 Paige Ch. (N. Y.) 244 (1843); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 259 (1841); s. c. 38 Am. Dec. 561; Requa v. Rea, 2 Paige Ch. (N. Y.) 340 (1831); Duncan v. Dodd, 2 Paige Ch. (N. Y.) 99 (1830); Hoppock v. Conklin, 4 Sandf. Ch. (N. Y.) 582 (1847); White v. Coulter, 3 T. & C. (N. Y.) 608 (1874); Mulks v. Allen, 12 Wend. (N. Y.) 253 (1834); Ontario Bank v. Lansing, 2 Wend. (N. Y.) 261 (1829); Littell v. Grady, 38 Ark. 584 (1882); Webber v. Curtiss, 104 Ill. 309 (1882); Montague v. Dawes, 96 Mass. (14 Allen), 369 (1867); Vail v. Jacobs, 62 Mo. 130 (1876); Delaware, L. & W. R. Co. v. Scranton, 34 N. J. Eq. (8 Stew.) 429, 432 (1881); Kloepping v. Stellmacher, 21 N. J. Eq. (6 C. E. Gr.) 328 (1871); Marlatt v. Warwick, 18 N. J. Eq. (3 C. E. Gr.) 108 (1866); Smith v. Duncan, 16 N. J. Eq. (1 C. E. Gr.) 240 (1863); Eberhart v. Gilchrist, 11 N. J. Eq. (3 Stockt.) 167 (1856); Howell v. Hester, 4 N. J. Eq. (3 H. W. Gr.) 266 (1843); Mercereau v. Prest, 3 N. J. Eq. (2 H. W. Gr.) 460 (1836); Seaman v. Riggins, 2 N. J. Eq. (1 H. W. Gr.) 214 (1839); Crane v. Conklin, 1 N. J. Eq. (Saxt.) 346 (1831); Simmons' Ex'rs v. Vandergift, 1 N. J. Eq. (Saxt.) 55 (1830); Bank of New Brunswick v. Hassert, 1 N. J. Eq. (Saxt.) 1 (1830); Peacock v. Evans, 16 Ves. 512 (1809); How v. Weldon, 2 Ves. Sr. 516 (1754).

[2] Barnes v. Stoughton, 2 T. & C. (N. Y.) 675 (1874). See White v. Coulter, 3 T. & C. (N. Y.) 608 (1874); s. c. 1 Hun (N. Y.) 357.

to the sound discretion of the court, and in the absence of evidence of an abuse of such discretion, the order granted on the application will not be appealable;[1] and it has been said that where an order is made in a foreclosure suit setting aside a sale, and directing a reference to ascertain the equities of the parties, reserving to either party the right to move for confirmation on the coming in of the report, such order is not appealable.[2]

§ 541. **Accident and surprise grounds for setting sale aside.**—Surprise is one of the grounds upon which courts will interfere and order a resale, if a party has suffered loss in consequence of the property's having been sold at a sacrifice;[3] but, as a general rule, where the surprise is due to the person's own negligence, and is of such a character that it could have been avoided by the exercise of ordinary prudence, the court will not interfere; neither will it interfere where the surprise was not caused by the misconduct or inadvertence of the complainant or of a third person, but was due to the negligence and inattention of the party complaining.[4]

Accident is also one of the causes for ordering a resale. A sale of mortgaged premises will be set aside and a resale ordered, where the owner of the equity of redemption appealed in good faith from the judgment of foreclosure and sale, but owing to the imperfect justification of his sureties in the undertaking given on appeal, the sale was not stayed, and the plaintiff proceeded and sold the premises

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[1] Buffalo Savings Bank v. Newton, 23 N. Y. 160 (1861); Wakeman v. Price, 3 N. Y. 334 (1850); Hazleton v. Wakeman, 3 How. (N. Y.) Pr. 357 (1848); White v. Coulter, 1 Hun (N. Y.) 357 (1874). See *post* §551.

[2] Dows v. Congdon, 28 N. Y. 122 (1863). The court held that "it neither, in effect, determines the action in which it was made, nor prevents a judgment from which an appeal might be taken. It is substantially an order for resale on the ground of mistake and surprise. Such an order, when it involves no strict legal right, is within the discretionary power of the court." See Bergen v. Sneddeker, 8 Abb. (N. Y.) N. C. 50 (1879).

[3] Parkhurst v. Cory, 11 N. J. Eq. (3 Stockt.) 233 (1856).

[4] Parkhurst v. Cory, 11 N. J. Eq. (3 Stockt.) 233 (1856). See Francis v. Church, Clarke Ch. (N. Y.) 475, 478 (1841); Brown v. Frost, 10 Paige Ch. (N. Y.) 243 (1843).

without notifying the owner, or returning the undertaking, bidding off the property himself for much less than its real value, and entering a judgment for deficiency against the owner.[1]

The court will interfere to set aside a judicial sale for inadequacy of price where there was accident or surprise upon one side and advantage taken of it on the other, and where, unless the court affords relief, the loss will be irreparable.[2] Thus, where the owner of the premises covered by the mortgage was a non-resident of the state, and was ignorant of the proceedings to foreclose such mortgage until after the sale of the premises under the decree, and the agent to whom he had confided the care of the property had become insane, in consequence of which the premises were sold at a price far below their value, the sale was set aside and a resale ordered.[3]

The defendant in a foreclosure is not required to exercise more than ordinary prudence and diligence in protecting his interests at the sale; and if he uses as much diligence as is reasonably practicable under all the circumstances, he will be excusable. Thus, where a defendant intends to be present at the sale and is prepared to bid for his protection, but is prevented through unforeseen circumstances from attending, and the property is sold to the complainants for less than its value, the sale will be vacated.[4]

§ 542. **Fraud and misconduct.**—A sale under a decree of foreclosure will be set aside and a resale ordered, where there has been fraud or misconduct on the part of the purchaser or of any person connected with or directing the sale, or where any party in interest has been misled or surprised by the misconduct of the purchaser or of the person directing the sale.[5] But where a sale is set aside on account of the mere constructive fraud of the purchaser, both he and the mortgagor

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[1] Gould v. Libby, 24 How. (N. Y.) Pr. 440 (1863).

[2] Gould v. Gager, 18 Abb. (N. Y.) Pr. 32 (1863).

[3] Thompson v. Mount, 1 Barb. Ch. (N. Y.) 607 (1846).

[4] Hoppock v. Conklin, 4 Sandf. Ch. (N. Y.) 582, 586 (1847).

[5] Gardiner v. Schermerhorn, Clarke Ch. (N. Y.) 101 (1839).

are entitled to be re-instated in the same position they occupied before the sale.[1]

It was held in the case of King v. Platt,[2] that while the law secures to the creditor his just demand and sequestrates the property of the debtor to satisfy it, still it sedulously guards his interests in all the various steps taken leading to a sale of the property, and it will not tolerate the slightest undue advantage over him even by pursuing the strictest form of the law; and that, occupying the position of advantage, it behooves the complainants to pursue their remedy with scrupulous care lest they should inflict an injury on one who is comparatively powerless; and further, that "a court of equity justly scrutinizes the conduct of a party placed by the law in a position where he possesses the power to sacrifice the interests of another in a manner which may defy detection, and stands ready to afford relief on very slight evidence of unfair dealing, whether it is made necessary by moral turpitude or only by a mistaken estimate of others' rights."

Where a purchaser at a foreclosure sale, by misrepresentation and deception, misleads the owner, and assuming to act for him, obtains an adjournment of the sale, inducing the parties to remain away therefrom, and he thereby becomes the purchaser at a nominal price, the sale will be set aside at the expense of such purchaser.[3]

§ 543. **False statements generally.**—Where a plaintiff or his agent, by an oral promise which he refused to keep, induced the defendant to refrain from bidding, and was thereby enabled to purchase the property for a price less than its value, the sale was set aside.[4] And in Murdock v. Empie,[5] where a person who had been the agent of the owner, acting in the interests of the person who afterwards purchased the property, made statements to the junior mortgagees which induced them to remain away from the

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[1] Trotter v. White, 26 Miss. 88 (1853).

[2] 37 N. Y. 155, 160 (1867).

[3] See Slocum v. Slocum, 3 How. (N. Y.) Pr. 178 (1847).

[4] Banta v. Maxwell, 12 How. (N. Y.) Pr. 479 (1855).

[5] 19 How. (N. Y.) Pr. 79 (1859); s. c. 9 Abb. (N. Y.) Pr. 283.

sale, so that the property sold for less than its value, the sale was set aside.

A sale will generally be set aside if the complainant misleads the defendants by false statements and by promising to have the sale adjourned, and afterwards becomes the purchaser of the property at a price much less than its value.[1] And in Billington v. Forbes,[2] where a co-defendant took an improper advantage of the illness of the mortgagor, which prevented him from attending the sale and obtaining a postponement thereof, and became the purchaser of the mortgaged premises at less than one-third of their real value, the sale was set aside and a resale ordered.

In another case,[3] where the plaintiff bid off a parcel of land and another parcel was subsequently put up by his direction, and he then canceled his bid on the first parcel directing the two parcels to be sold together, and became the purchaser thereof, the sale was set aside. And in May v. May,[4] where the property was sold for a tenth of its value, bidding having been discouraged by some one, though there was no evidence connecting the purchaser with the fraud, the sale was set aside on the application of a judgment creditor whose lien was foreclosed and barred by the action.

§ 544. Misleading statements and representations by referee or plaintiff.—A sale of mortgaged premises may be set aside where judgment creditors were prevented from attending and bidding at the sale, in consequence of an impression received from the master that the sale was not to take place on the day appointed, although there was no collusion between the officer conducting the sale and the purchaser, provided the judgment creditors will make an advance at the resale upon the bid at which the property was struck off, to an amount sufficient to cover their demands.[5]

And where the premises were sold to the mortgagee at a price greatly below their value, if the mortgagor or

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[1] Francis v. Church, Clarke Ch. (N. Y.) 475 (1841).

[2] 10 Paige Ch. (N. Y.) 487 (1843). See May v. May, 11 Paige Ch. (N. Y.) 201 (1844).

[3] Woodruff v. Bush, 8 How. (N. Y.) Pr. 117 (1853).

[4] 11 Paige Ch. (N. Y.) 201 (1844).

[5] Collier v. Whipple, 13 Wend. (N. Y.) 224 (1834).

those standing in his place were misled by the mortgagee or by a third person even, in reference to the foreclosure of the mortgage, in consequence of which they did not attend the sale, a resale will be ordered.[1] And if the notice of the place where the sale is to be held is so indefinite that the agents of the parties, who are present in the building for the purpose of attending and bidding at the sale, do not know where it is to be held, and are not aware of its progress, the sale will be set aside.[2]

A sale may be set aside on the ground of surprise and misapprehension created by the conduct of the purchaser or of some person interested in the sale,[3] or by the conduct of the officer who has charge of the sale,[4] or where such officer makes an announcement at the sale which is calculated to deter bidders, and to impair the price that might otherwise be offered. Where the officer making the sale disobeyed his instructions through ignorance of his duty, and sold the property to parties who were acquainted with his instructions, for much less than its real value, the court set the sale aside and refused to indemnify the purchasers.[5]

It is intimated in Gardiner v. Schermerhorn,[6] that where the defendant misunderstands his liability, this will in some instances be a sufficient ground for vacating the sale. This was a case in which the mortgaged premises had been sold under a new court rule, which changed the practice as to the publication of the notice of sale and with which the mortgagee was not familiar.

§ 545. **Negligence in objecting, and acquiescence in sale.**—Although a sale may be unauthorized or irregular, yet the defendant by failing to object thereto within a

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[1] Tripp v. Cook, 26 Wend. (N.Y.) 143 (1841).

[2] Kellogg v. Howell, 62 Barb. (N. Y.) 280 (1872).

[3] Lefevre v. Laraway, 22 Barb. (N. Y.) 167, 173 (1856). See Gould v. Gager, 18 Abb. (N. Y.) Pr. 32 (1863).

[4] Stahl v. Charles, 5 Abb. (N. Y.) Pr. 348 (1857); Lefevre v. Laraway, 22 Barb. (N. Y.) 167, 173 (1856). See also Lansing v. McPherson, 3 Johns. Ch. (N. Y.) 424 (1818); Brown v. Frost, 10 Paige Ch. (N. Y.) 243 (1843); Tripp v. Cook, 26 Wend. (N. Y.) 143 (1841); Collier v. Whipple, 13 Wend. (N. Y.) 224, 227 (1834).

[5] Requa v. Rea, 2 Paige Ch. (N. Y.) 339 (1831).

[6] Clarke Ch. (N.Y.) 101, 104 (1839).

reasonable time, may lose his right to have it set aside, acquiescence in the sale operating as an estoppel. Thus, in a case where the sale of a portion of the premises was not authorized by the judgment, but the owner of the equity of redemption acquiesced therein and neglected to object to the proceedings had for the distribution of the surplus, it was held that such owner was estopped from questioning the validity of the title acquired by the purchaser under such sale.[1]

In a recent California case,[2] it appeared that the party knew of the time and place of the sale, but that he neglected to give any instructions to his agent in reference thereto until the day preceding the sale, when he telegraphed to him and wrote to the officer of the court deputized to make the sale, offering to purchase the property for the amount of the judgment and costs, and instructing them to make a bid to that effect at the sale. Because of atmospheric disturbances neither the telegram nor the letter was received by the parties to whom they were sent until after the sale. The sale was made to the respondent for a less price than that offered by the plaintiff; but the plaintiff accepted the purchase money and kept it for five months, when, without offering to return the money, he moved to set the sale aside on the ground of surprise; the motion was held to have been properly denied.

§ 546. **Objections waived by delay.**—The law presumes all sales valid and effectual.[3] Where a sale made under a judgment of foreclosure is irregular or voidable for any reason, the party aggrieved must move to have the sale set aside within a reasonable time, for it will not be disturbed if he becomes guilty of laches.[4] And where the period prescribed by statute, within which an action may be brought in equity to redeem the premises, has been allowed to

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[1] McBride v. Lewisohn, 17 Hun (N. Y.) 525 (1879).

[2] Central Pac. R. Co. v. Creed, 70 Cal. 497 (1886).

[3] Rigney v. Small, 60 Ill. 416 (1871).

[4] Depew v. Dewey, 46 How. (N. Y.) Pr. 441 (1874); Rigney v. Small, 60 Ill. 416 (1871); Roberts v. Fleming, 53 Ill. 196 (1870); Hamilton v. Lubukee, 51 Ill. 415 (1869).

expire without an application for a resale, the court will have no power to set the sale aside.[1] But mere delay on the part of the plaintiffs in asserting their rights, where the action is commenced within the time limited for the commencement of such actions and where the defendant has not been prejudiced by the delay, will not affect or defeat the plaintiff's right of action.[2]

A delay of four years after the mortgagor had knowledge of the sale, has been held to preclude him from maintaining against subsequent purchasers, a bill to redeem on the alleged ground of a defective notice of the sale and inadequacy of price.[3] Where between seven and eight years had elapsed, the court declined to inquire whether the price bid was inadequate, or whether the premises should have been sold in parcels.[4] And where exceptions to the report of the officer making the sale of the mortgaged premises were taken ten years after the approval and confirmation of the report of sale, they were held to come too late, unless it was made to appear that some positive injury had resulted.[5]

Where a mortgagor informs another person that he has no title to the mortgaged premises and that a foreclosure had been held and the time for redemption had expired, and thereby induces such other person to buy the certificate of foreclosure sale, he will be estopped from afterwards questioning the regularity of the sale as against such purchaser.[6]

§ 547. **Excusable mistakes as grounds for setting sale aside.**—The excusable mistake of a party in interest is a ground for vacating a sale and ordering a resale, if such mistake caused the property to bring a less price than it

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[1] Depew v. Dewey, 46 How. (N. Y.) Pr. 441 (1874). See also Salles v. Butler, 27 N. Y. 638 (1863); Wait v. VanAllen, 22 N. Y. 319 (1860); Humphrey v. Chamberlain, 11 N. Y. 274 (1854); Fry v. Bennett, 16 How. (N. Y.) Pr. 385 (1858); Marston v. Johnson, 13 How. (N. Y.) Pr. 93 (1856).

[2] McMurray v. McMurray, 66 N. Y. 175 (1876).

[3] Hamilton v. Lubukee, 51 Ill. 415 (1869).

[4] Roberts v. Fleming, 53 Ill. 196 (1870).

[5] Garrett v. Moss, 20 Ill. 549 (1858).

[6] Curyea v. Berry, 84 Ill. 600 (1877).

otherwise would.[1] Thus, where the owner of an equity of redemption appealed in good faith from a judgment of foreclosure, but owing to the imperfect justification of the sureties to the undertaking given on the appeal, the sale was not stayed, and the plaintiff proceeded to sell the premises without notifying the owner, or returning the undertaking to him, bidding off the premises himself for one-third less than their real value, and taking a decree against the owner for the deficiency, the sale was set aside and a resale ordered.[2]

And where the proper undertaking to stay proceedings pending an appeal from a judgment of foreclosure, was served and filed some time after the service of the notice of appeal, and was returned on the ground that it was not served in time and was not in due form, and the defendant thereupon made a special motion to stay the proceedings founded on such undertaking, which motion was denied on the ground that it was not necessary, and the plaintiff proceeded to sell the premises, the sale was vacated on terms and the proceedings stayed until decision upon the appeal.[3]

It has been said that where an undertaking given to stay proceedings, pending an appeal from a decree of foreclosure, is in substantial, though not exact, compliance with the requirements of the Code, the plaintiff should move to set it aside; and if, without doing so or giving notice of the defect, he proceeds to sell the premises under the judgment, the sale must be set aside and a resale ordered.[4]

In Williamson v. Dale,[5] where the executors of the mortgagor were innocently misled and induced to believe that the sale of the mortaged premises would not take place on the day appointed, there being no culpable

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[1] Williamson v. Dale, 3 Johns. Ch. (N. Y.) 290 (1818). See Parfitt v. Warner, 13 Abb. (N. Y.) Pr. 471 (1861); King v. Morris, 2 Abb. (N. Y.) Pr. 296 (1855); Gould v. Gager, 24 How. (N. Y.) Pr. 440 (1863); Smith v. Heermance, 18 How. (N. Y.) Pr. 261 (1859).

[2] Gould v. Libby, 24 How. (N. Y.) Pr. 440 (1863); s. c. *sub nom.* Gould v. Gager, 18 Abb. (N. Y.) Pr. 32. See *post* § 551.

[3] Smith v. Heermance, 18 How. (N. Y.) Pr. 261 (1859).

[4] Parfitt v. Warner, 13 Abb. (N. Y.) Pr. 471 (1861). See *post* § 551.

[5] 3 Johns. Ch. (N. Y.) 290 (1818).

negligence on their part, the court, under all the circumstances of the case, ordered the sale to be set aside on the ground of surprise, though the sale was perfectly regular and open and no unfair intention was imputed to the mortgagee or his solicitors; but the court added, as a condition, that the defendant should pay to the purchaser all his costs and expenses, and the costs of the application for a resale.

§ 548. **Terms imposed.**—A sale of mortgaged premises made under the directions of the court in a mortgage foreclosure will be set aside and a resale ordered only upon terms. The proper terms to be imposed depend, of course, upon the circumstances of each particular case.[1] Where the conditions and circumstances are such that the court is compelled to set a sale aside and to order that the property be resold, the former purchaser must be fully and liberally indemnified for all damages, costs and expenses to which he has been subjected.[2] These include the deposit or percentage paid by him on the sale, the expense of investigating the title, the costs of the motion for repayment, if he is compelled to make a motion,[3] the interest on his deposit and on as much of the purchase money as he has kept on hand ready for payment, together with all the reasonable costs and expenses which he has paid or been subject to in opposing the application for a resale.[4]

But where a purchaser employs counsel and instructs him to insist upon his right to retain an unconscientious advantage obtained by him in the sale and purchase of the premises, through the fraud of some one, he can not have costs allowed him for an unsuccessful resistance of the motion to set the sale aside.[5]

§ 549. **Effect upon purchaser of order setting sale aside.**—On becoming a purchaser at a foreclosure sale, a party submits himself to the jurisdiction of the court as to

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[1] Francis v. Church, Clarke Ch. (N. Y.) 475 (1841).

[2] Duncan v. Dodd, 2 Paige Ch. (N. Y.) 99 (1830). See May v. May, 11 Paige Ch. (N. Y.) 201, 204 (1844).

[3] Raynor v. Selmes, 52 N. Y. 579 (1873).

[4] Duncan v. Dodd, 2 Paige Ch. (N. Y.) 99, 102 (1830).

all matters connected with the sale or relating to him in the character of purchaser.[1] And all persons who acquire title from and under him, take it subject to the same jurisdiction. A conveyance to a *bona fide* purchaser does not take away or affect the jurisdiction of the court, although it may be a circumstance which will influence the court in the exercise of its discretion in granting an order to set the sale aside; because a grantee takes the place of his grantor and consents to the same jurisdiction, under and subject to which the title is held. He has notice of the source of his grantor's title and knowledge of the power of the courts over a title thus acquired, and takes no better nor more perfect title as against the interference of the court than his grantor had.[2]

An order setting aside a sale made under a decree of foreclosure destroys the title of the purchaser at such sale, and consequently that of his grantees.[3] In all cases where the sale is set aside, the purchaser is entitled to be restored to the same position he occupied before the purchase, and is entitled to be re-imbursed for the amount paid on the purchase.[4]

It has been held, where the purchaser took possession of the property and made improvements thereon, after being informed by the officer making the sale that the facts would be submitted to the court, and without waiting for the confirmation of the report of sale, that he was not entitled to indemnity therefor.[5] If the purchaser enters into possession before the sale is set aside, he will be required to account

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[5] May v. May, 11 Paige Ch. (N. Y.) 201, 204 (1844).

[1] Hale v. Clauson, 60 N. Y. 341 (1875); Cazet v. Hubbell, 36 N. Y. 677 (1867); Miller v. Collyer, 36 Barb. (N. Y.) 250, 254 (1862); *In re* Davis, 7 Daly (N. Y.) 1, 8 (1877); Willets v. VanAlst, 26 How. (N. Y.) Pr. 325, 344 (1864); Brasher's Exr's v. Cortlandt, 2 Johns. Ch. (N. Y.) 505 (1817); Requa v. Rea, 2 Paige Ch. (N. Y.) 339 (1831); Crane v. Stiger, 2 T. & C. (N. Y.) 577, 579 (1874); Casamojor v. Strode, 1 Sim. & S. 381 (1823); Lansdown v. Elderton, 14 Ves. 512 (1808).

[2] Hale v. Clauson, 60 N. Y. 341 (1875).

[3] Freeman v. Munns, 15 Abb. (N. Y.) Pr. 468 (1862); affirmed 30 How. (N. Y.) Pr. 592; Insurance Co. v. Sampson, 38 Ohio St. 672 (1883); McBain v. McBain, 15 Ohio St. 337 (1864).

[4] Trotter v. White, 26 Miss. 88 (1853). See *ante* § 548.

[5] Requa v. Rea, 2 Paige Ch. (N. Y.) 339 (1831).

for the rents and profits received by him while in possession, for the benefit of the mortgagor or the owner of the equity of redemption.[1]

In the case of Fort v. Roush,[2] where a portion of the mortgaged premises was purchased by the mortgagee, and the sale as to him was set aside on account of his fraudulent conduct, and the mortgagor sought to charge him with the value of the use and occupation of such part while it was in his possession under such purchase, and also with damages for waste, the supreme court of the United States held that a judgment should be rendered against him only for so much of the sum found to be due for such use and damages as exceeded the amount necessary to satisfy the decree.

Where a person interested in the property is not made a party to the foreclosure, but subsequently to the sale redeems the property, the purchaser will be liable to account for the rents and profits, and he will be under a like obligation in case of the foreclosure of an outstanding incumbrance in another suit, acquiring in such case only the rights of a mortgagee in possession.[3]

§ 550. **Setting sale aside for benefit of infants.**—Infant owners will be relieved by a resale, where their property has been sacrificed through the misapprehension or neglect of their natural or statutory guardian.[4] And where it is apparent that a resale will benefit the infant owners, such order may be made on the motion of the court in its capacity of universal guardian of all infants, and by virtue of its obligation to exercise a general superintendence and protective jurisdiction over their persons and property.[5]

In Duncan v. Dodd,[6] where the property, which was the only estate belonging to two infant children, had been sold under

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[1] Raun v. Reynolds, 15 Cal. 459 (1860); s. c. 18 Cal. 275 (1861); Fort v. Roush, 104 U. S. (14 Otto), 142 (1881); bk. 26 L. ed. 664.

[2] 104 U. S. (14 Otto), 142 (1881); bk. 26 L. ed. 664.

[3] Walsh v. Rutgers Fire Ins. Co., 13 Abb. (N. Y.) Pr. 33 (1861).

[4] Lefevre v. Laraway, 22 Barb. (N. Y.) 167 (1856); Gardiner v. Schermerhorn, Clarke Ch. (N. Y.) 101 (1839).

[5] Lefevre v. Laraway, 22 Barb. (N. Y.) 167 (1856).

[6] 2 Paige Ch. (N. Y.) 99 (1830).

a decree of foreclosure for half its value to satisfy a debt nearly equal to the amount of the bid, a resale was ordered upon security being given that the premises should produce fifty per centum advance upon such resale, and that interest on the whole purchase money should be paid to the purchaser, together with the reasonable costs and expenses which he had incurred in consequence of the purchase.

Where the property rights of infants are concerned, the courts will exercise a most vigilant care in protecting their interests and will hold their guardians, and all who are engaged in managing or disposing of their property, not only to a rigid adherence to principles of good faith, but to the strict performance of every duty; and where there is a collusive arrangement to prevent competition at a judicial sale, such a sale will be injurious to the interests of the infants, and will be a fraud in equity, and relief will be granted against such fraud by ordering a resale.[1]

But it seems that the court will not set aside a judicial sale on the ground that the guardian of the infants who are interested, failed to attend the sale, unless it is shown that in consequence of such non-attendance the property sold at a less price than it would have brought if the guardian had been present; and, where the sale was well attended and fairly conducted, it should not be set aside, even at the instance of the infants, unless it is made to appear that upon the resale, their share of the proceeds, after indemnifying the purchaser at the first sale, will be materially increased.[2]

§ 551. **Appeal from order on application for resale.**— The granting of an order for a sale of mortgaged premises is a matter resting in the sound discretion of the judge who hears the motion;[3] but it is thought that, notwithstanding this fact, the order granting or denying the motion for a resale is appealable to the general term,[4] though not to the

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[1] Howell v. Mills, 53 N. Y. 322 (1873).

[2] Stryker v. Storm, 1 Abb. (N. Y.) Pr. N. S. 424 (1866).

[3] See Howell v. Mills, 53 N. Y. 322, 332 (1873).

[4] See Fisher v. Hersey, 78 N. Y. 387 (1879). But it was held in Young

court of appeals.[1] By the section of the Code,[2] providing for appeals from orders of a judge to the general term, one of the cases in which an appeal may be taken is where the order involves the merits of the action or some part thereof, or affects a substantial right. It is thought that an order granting or refusing a resale affects the substantial rights of the parties to the action, and that any party considering himself aggrieved is entitled to appeal to the general term from such order.[3]

A motion in the supreme court to vacate a sale of real estate made on a mortgage foreclosure, where the sale was regularly made, is addressed to the sound discretion and favor of the court, and the order made on such a motion is not therefore appealable beyond the general term.[4] Where fraud is alleged, upon facts casting such a degree of suspicion upon the fairness of the sale as to render it, in the judgment

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v. Bloomer, 22 How. (N. Y.) Pr. 383, that where no irregularity is alleged against the judgment or sale such an order is not appealable to the general term.

[1] Hale v. Clauson, 60 N. Y. 341 (1875); Dows v. Congdon, 28 N. Y. 122 (1863); Briggs v. Bergen, 23 N. Y. 162 (1861); Wakeman v. Price, 3 N. Y. 334 (1850); Bergen v. Snedecker, 8 Abb. (N. Y.) N. C. 50 (1879), reversing 18 Hun (N. Y.) 355; Hazleton v. Wakeman, 3 How. (N. Y.) Pr. 357 (1848).

[2] N. Y. Code Civ. Proc. §§ 1347, 1348.

[3] See Central Nat. Bank v. Clark, 34 N. Y. Supr. Ct. (2 J. & S.) 487 (1872); Dollard v. Taylor, 33 N. Y. Supr. Ct. (1 J. & S.) 496 (1871); People v. New York Cent. R. Co., 29 N. Y. 418, 421 (1864); *In re* Duff, 41 How. (N. Y.) Pr. 350 (1870); s. c. 10 Abb. (N. Y.) N. S. Pr. 416.

[4] Buffalo Sav. Bank v. Newton, 23 N. Y. 160 (1861); Wakeman v. Price, 3 N. Y. 334 (1850); Hazleton v. Wakeman, 3 How. (N. Y.) Pr. 357 (1848); McReynolds v. Munns, 2 Keyes (N. Y.) 214 (1865). See Peck v. New York & N. J. R. Co., 85 N. Y. 246 (1881); Goodell v. Harrington, 76 N. Y. 547 (1879); Hale v. Clauson, 60 N. Y. 339 (1875); Crane v. Stiger, 58 N. Y. 625 (1874); Dows v. Congdon, 28 N. Y. 122 (1863). In King v. Platt, 2 Abb. App. Dec. (N. Y.) 527 (1867), it is said that an appeal may be taken to the court of appeals from an order of the general term, affirming an order of the special term denying a motion to set aside a judicial sale made under a judgment; that such an order is final and affects a substantial right; and that it is an order made upon a summary application in an action after judgment; that such an order is not purely discretionary with the court below in such a sense as to prevent it from being reversed.

of the court, expedient to order a resale, although the alleged fraud may not be clearly established, the order of the special term setting aside a sale under such circumstances will be reviewable at general term; but as a rule, when only the rights of the parties to the action are involved, no appeal can be taken from the order granting or denying a motion for a resale.[1] It is well established that orders for resales made upon grounds which are discretionary, will not be reviewed by the court of appeals;[2] but it is thought that where orders granting or refusing resales involve matters of legal right, they may be reviewed in the court of appeals, the same as if presented upon exceptions.[3]

§ 552 **Proceedings on resale.**—Where a sale in a mortgage foreclosure is set aside and a resale is ordered, the proceedings upon the resale will be the same as those upon the original sale.[4] The proceedings should be commenced *de novo*, as though the first sale had never taken place.

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[1] Fisher v. Hersey, 78 N. Y. 387 (1879).

[2] Howell v. Mills, 53 N. Y. 322, 331 (1873). See Dows v. Congdon, 28 N. Y. 122 (1863); Wakeman v. Price, 3 N. Y. 334 (1850); Candee v. Lord, 2 N. Y. 269 (1849); Rogers v. Holly, 18 Wend. (N. Y.) 350 (1837); Rowley v. VanBenthuysen, 16 Wend. (N. Y.) 370 (1836).

[3] See Howell v. Mills, 53 N. Y. 322 (1873).

[4] 3 Wait's Pr. 378. See Williamson v. Dale, 3 Johns. Ch. (N. Y.) 290 (1818).

CHAPTER XXVII.

CONFIRMING SALE AND ENFORCING PURCHASE.

CONFIRMATION OF SALE—ENFORCING BID AGAINST PURCHASER—DEFECTS IN TITLE—MARKETABLE TITLE—WHEN PURCHASER WILL BE EXCUSED FROM COMPLETING PURCHASE.

§ 553 Every foreclosure sale must be confirmed.

554. Practice of confirming sales in New York.

555. Notice and application for confirmation — Objections to and corrections of referee's report.

556. Effect of confirmation of sale—Lapse of time equivalent to confirmation.

557. Setting aside confirmation of sale — Discretion of the court.

558. Enforcing sale against purchaser.

559. Proceedings where purchaser refuses or neglects to complete his purchase.

560. Enforcing sale by attachment against purchaser.

561. When bidder will be excused from completing his purchase.

562. Defects of title unknown to purchaser at time of sale.

§ 563. Defects of title existing prior to the mortgage under foreclosure.

564. When purchaser presumed to know condition of title.

565. Irregularities prior to judgment excusing purchaser.

566. Enforcement of purchase where there are lunatic defendants.

567. Enforcement of purchase where there are infant defendants.

568. Formal irregularities no excuse to purchaser.

569. Reference to investigate title.

570. Purchaser entitled to marketable title.

571. Partial failure of title will excuse purchaser.

572. Rights of assignee of purchaser's bid.

573. Right of bidder to have sale completed.

§ 553. **Every foreclosure sale must be confirmed.**—It is a general rule in this country,[1] as well as in England,[2] that a sale made under a decree of foreclosure, is not complete

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[1] See Wells v. Rice, 34 Ark. 346 (1879); Dills v. Jasper, 33 Ill. 262 (1864); Allen v. Poole, 54 Miss. 323 (1877); Gowan v. Jones, 18 Miss. (10 Smed. & M.) 168 (1848); Tooley v. Gridley, 11 Miss. (3 Smed & M.) 514 (1844); s. c. 41 Am. Dec. 628; Hay's Appeal, 51 Pa. St. 61 (1865); Allen v. Elderkin, 62 Wis. 627 (1885); Welp v. Gunther, 48 Wis. 543 (1880); Woehler v. Endter, 46 Wis. 301 (1879).

[2] Twigg v. Fifield, 13 Ves. 517 (1807). *In re* Minor, 11 Ves. 559 (1805).

until it has been confirmed by the court.[1] At such a sale the bidder merely agrees to purchase the property, provided the sale shall be approved by the court;[2] and until the sale is reported to and confirmed by the court, it will be incomplete, and the bidder will be under no obligation to accept the deed of the officer conducting the sale.[3]

The acceptance of the bid confers no title on the purchaser,—not even an absolute right to have the purchase completed. The bidder is nothing more than a preferred purchaser, or proposer for the purchase, subject to the approval of the court.[4] It seems, however, where the purchaser enters into possession under a deed of the officer making the sale, that continued possession thereunder will be equivalent to a confirmation of the sale by the court.[5]

In Illinois a somewhat different doctrine prevails. It was held in the case of Jackson v. Warren,[6] that on a sale of mortgaged premises under a decree of foreclosure, a valid and binding contract is made when the hammer falls; that in the absence of fraud, mistake or some irregularity, the bidder is entitled to a deed on the payment of the purchase money; and that a person holding such a deed is *prima facie* the legal owner of the premises. This is also the doctrine and the practice in New York.

§ 554. **Practice of confirming sales in New York.**— Under the present practice in New York, and in some other states, if the proceedings in an action for foreclosure have

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[1] Formerly in Wisconsin, however, the purchaser was entitled to possession on producing the deed of the officer making the sale. See Loomis v. Wheeler, 18 Wis. 524 (1864).

[2] Dills v. Jasper, 33 Ill. 272 (1864); Blossom v. Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 196 (1865); bk. 18 L. ed. 43.

[3] See Dills v. Jasper, 33 Ill. 272 (1864); Martin v. Kelly, 59 Miss. 652 (1882).

[4] See Wells v. Rice, 34 Ark. 346 (1879); Dills v. Jasper, 33 Ill. 262 (1864); Young v. Keogh, 11 Ill. 642 (1850); Mills v. Ralston, 10 Kan. 206 (1872); Busey v. Hardin, 2 B. Mon. (Ky.) 407 (1842); Allen v. Poole, 54 Miss. 323 (1877); Gowan v. Jones, 18 Miss. (10 Smed. & M.) 164 (1848); Tooley v. Gridley, 11 Miss. (1848); (3 Smed. & M.) 493 (1844); s. c. 41 Am. Dec. 628; Blossom v. Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 196 (1865); bk. 18 L. ed. 43.

[5] Gowan v. Jones, 18 Miss. (10 Smed. & M.) 164 (1848).

[6] 32 Ill. 331 (1863).

been regular, the title to the property passes to the purchaser upon the delivery of the usual referee's deed,[1] and the purchaser will be entitled to possession of the premises on the production of such deed.[2] A formal confirmation of the sale is not required, a supreme court rule[3] providing that the report of the referee shall become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of said report.[4]

§ 555. **Notice and application for confirmation—Objections to and corrections of referee's report.**—In some states a confirmation of the sale in mortgage foreclosure proceedings can be regularly made only after notice to the parties adversely interested, in order that they may show cause against it.[5] On an application for the confirmation of a referee's report of sale, the court should be satisfied that the sale was made in accordance with the requirements of the decree of foreclosure.[6] Where it appears from an examination of the report of the sale, that the proceedings of the officer making it were in all respects in conformity with the judgment and the provisions of the statute, and no extrinsic circumstances of equity appear, it is the duty of the court to confirm the sale.[7] The usual order *nisi*, providing that the sale stand confirmed, unless cause for setting it aside be shown within a specified time, is a sufficient order

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[1] Stimson v. Arnold, 5 Abb. (N. Y.) N. C. 377 (1878); Fort v. Burch, 6 Barb. (N. Y.) 60 (1849); Fuller v. VanGeesen, 4 Hill (N. Y.) 171 (1843); aff'd 1 How. App. Cas. (N. Y.) 240 (1847). *Compare* Terpenning v. Agricultural Ins. Co., 14 Hun (N. Y.) 299 (1878).

[2] Mitchell v. Bartlett, 51 N. Y. 447 (1873); Stimson v. Arnold, 5 Abb. (N. Y.) N. C. 377 (1878); N. Y. Supreme Court Rule 61; Brown v. Marzyck, 19 Fla. 840 (1883); Petty v. Mays, 19 Fla. 652 (1883). The same doctrine formerly prevailed in Wisconsin. Loomis v. Wheeler, 18 Wis. 524 (1864).

[3] N. Y. Supreme Court Rule 30.

[4] It is suggested in Moore v. Shaw, 15 Hun (N. Y.) 428 (1878), that it may be necessary to have the report confirmed, in order to perfect the title as between the mortgagor and the purchaser.

[5] Branch Bank v. Hunt, 8 Ala. 876 (1845).

[6] Moore v. Titman, 33 Ill. 358, 366 (1864).

[7] New England Mortgage Security Co. v. Smith, 25 Kan. 622, 624

of confirmation ;[1] and where there is no fraud or collusion, it can not be attacked collaterally,[2] although it may be appealed from.[3]

Where exceptions are filed to the report of the sale made by the referee under a decree of foreclosure, it is not good practice in directing the correction of such report, to order that on filing the corrected report the said sale be in all respects confirmed ; yet such an order of confirmation will not render the proceedings void.[4] A foreclosure sale will not become absolute, so long as objections duly taken to the report of the referee, or other officer making the sale, are on file and undisposed of.[5]

§ 556. **Effect of confirmation of sale—Lapse of time equivalent to confirmation.**—The report of a sale made under a decree of foreclosure in New York, may be confirmed by the court at special term.[6] A referee's report of sale becomes the act of the court when confirmed.[7] It seems that the confirmation of a sale made under a foreclosure, cures all irregularities in the proceedings to obtain the decree of sale, and in the conduct of the sale itself ; but it will not make good a defect arising from a want of jurisdiction of the court, either of the cause of action or of any of the parties interested ; and in every instance such an accident or mistake as would generally invalidate a contract, will be a sufficient ground for setting a sale aside even after confirmation.[8]

It has been suggested that the lapse of a long period of time will be equivalent to a confirmation by the court of a

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(1881). See Moore v. Pye, 10 Kan. 246 (1872); White-crow v. Whitewing, 3 Kan. 276 (1865); Challiss v Wise, 2 Kan. 193 (1863); Koehler v. Ball, 2 Kan. 160 (1863).

[1] Torrans v. Hicks, 32 Mich. 307 (1875).

[2] Torrans v. Hicks, 32 Mich. 307 (1875); McKeighan v. Hopkins, 14 Neb. 361 (1883).

[3] Koehler v. Ball, 2 Kan. 160 (1863); Detroit F. & M. Ins. Co. v. Renz, 33 Mich. 298 (1876).

[4] Ruggles v. National Bank of Centreville, 43 Mich. 192 (1880).

[5] Howard v. Bond, 42 Mich. 131 (1879).

[6] See Swarthout v. Curtis, 4 N. Y. 415 (1850); s. c. 45 Am. Dec. 345; 5 How. (N. Y.) Pr. 198.

[7] McGowan v. Newman, 4 Abb. (N. Y.) N. C. 80 (1878).

[8] See Dills v. Jasper, 33 Ill. 262 (1864).

sale made under a decree of foreclosure, where the purchaser has entered into possession of the property under the deed of the officer making the sale;[1] so that even in those states where confirmation by the court is required to complete the sale, if a deed is executed and delivered without confirmation, and the purchaser enters into possession, long continued possession under such deed will render the title valid. The confirmation of a sale of mortgaged premises on which there are growing crops, relates back to the date of the sale and entitles the purchaser to control the crops from that time, if no equities intervene, and if due notice has been given to interested parties.[2]

§ 557. **Setting aside confirmation of sale—Discretion of the court.**—It is discretionary with the court whether a sale of mortgaged premises under a decree of foreclosure shall be set aside or confirmed;[3] and this power will be exercised as the circumstances of the case and the interests of the parties may demand. Where an application is made for the confirmation of a sale, it must appear to the satisfaction of the court that the sale was conducted in accordance with the requirements of the decree,[4] and that due notice of the sale was given.[5] It must also appear that notice of the application for confirmation has been given to all parties who have appeared in the action, in order that they may have an opportunity to oppose it.[6]

It has been held under the Kansas statute, that upon an application for the confirmation of a sale in foreclosure proceedings, if it appears that the proceedings of the officer have, in all respects, been in conformity with the decree of the court and the provisions of the statute, and that there are no

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[1] See Gowan v. Jones, 18 Miss. (10 Smed. & M.) 164 (1848).

[2] Ruggles v. First Nat. Bank of Centreville, 43 Mich. 192 (1880).

[3] Goodell v. Harrington, 76 N. Y. 547 (1879); Hale v. Clawson, 60 N. Y. 339 (1875); Crane v. Stiger, 58 N. Y. 625 (1874); Buffalo Savings Bank v. Newton, 23 N. Y. 160 (1861). See *ante* chap. xxvi.

[4] Moore v. Titman, 33 Ill. 358, 366 (1864).

[5] Perrien v. Fetters, 35 Mich. 233 (1876).

[6] Branch Bank v. Hunt, 8 Ala. 876 (1845); Williamson v. Berry, 49 U. S. (8 How.) 495, 546 (1850); bk. 12 L. ed. 1170.

extrinsic circumstances of an equitable character requiring the interference of the court, the sale should be confirmed;[1] and that the court has no right against sound discretion to release the purchaser from his bid or to permit a tender to be made by the mortgagor after the sale.[2]

§ 558. **Enforcing sale against purchaser.**—Where there is no defect in the title to property sold under a decree of foreclosure, if the purchaser refuses or neglects to pay the purchase money and to take the title, or otherwise to comply with the terms of sale, he may be compelled to do so by an order of the court, for the purchaser at a foreclosure sale becomes a *quasi* party to the suit, and subjects himself to the jurisdiction of the court, so far as the completion of the sale is concerned.[3]

In a case where the judgment of sale was in the ordinary form, making no reference, however, to contingent outstanding interests, but a notice thereof was given at the sale, which was made subject to such interests, it was held that an order compelling the purchaser to complete such purchase was proper; that an amendment of the judgment was not necessary, inasmuch as it furnished adequate authority for the sale of the property covered by the mortgage; and that no wrong was done to the purchaser in compelling him to pay for exactly what he bought.[4]

The fact that the party making the purchase acted merely as the agent of another person, will not relieve him from liability, if he made the bid in his own name.[5] By becoming a

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[1] New England Mortgage Security Co. v. Smith, 25 Kan. 622 (1881); Moore v. Pye, 10 Kan. 246, 250 (1872); Challiss v. Wise, 2 Kan. 193 (1863).

[2] New England Mortgage Security Co. v. Smith, 25 Kan. 622 (1881).

[3] Cazet v. Hubbell, 36 N. Y. 677 (1867). See Miller v. Collyer, 36 Barb. (N. Y.) 250 (1862); Graham v. Bleakie, 2 Daly (N. Y.) 55 (1866); Brasher v. Cortlandt, 2 Johns. Ch. (N. Y.) 505 (1817); Requa v. Rea, 2 Paige Ch. (N. Y.) 339 (1831); Coulter v. Henderson, 27 Miss. 685, 689 (1854); Ogilvie v. Richardson, 14 Wis. 157 (1861); Wood v. Mann, 3 Sumn. C. C. 318 (1838); Casamajor v. Strole, 1 Sim. & S. 381 (1823); Lansdown v. Elderton, 14 Ves. 512 (1808).

[4] Cromwell v. Hull, 97 N. Y. 209 (1884).

[5] Ogilvie v. Richardson, 14 Wis. 157 (1861).

purchaser at a foreclosure sale, the bidder subjects himself to the jurisdiction of the court and may be compelled to comply with the conditions of the sale; and neither mere lapse of time nor the death of one of the parties will be a bar to such relief, if the purchaser has taken possession of the premises.[1] In some states, before a party purchasing at a foreclosure sale can be required to complete his purchase, he must be accepted as a purchaser by the court and the sale must be confirmed.[2]

The proper tribunal to enforce the purchaser's undertaking to complete his purchase, is the court which made the decree of sale.[3] The application for that purpose may be made by motion. Where the purchaser neglects to comply with the terms of the sale within a reasonable time, the court will not give him the benefit of his purchase if a resale will be more beneficial to the parties;[4] neither will the court compel him to take the title where the parties to the action have delayed the completion of the sale so long that he will lose the benefit of his purchase.[5]

§ 559. **Proceedings where purchaser refuses or neglects to complete his purchase.**—Where the purchaser at a mortgage foreclosure sale neglects or refuses to complete his contract according to the terms of sale, a resale may be ordered, in which case such purchaser will be liable for the costs of such resale, and for the deficiency, if any.[6] Where a resale is ordered on refusal of the purchaser to complete his contract because of irregularities in the foreclosure, he will not be charged with the expenses of correcting such irregularities.[7]

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[1] Cazet v. Hubbell, 36 N. Y. 677 (1867). See Merchants' Bank v. Thomson, 55 N. Y. 7 (1873).

[2] Schaefer v. O'Brien, 49 Md. 253 (1878).

[3] See Wood v. Mann, 3 Sumn. C. C. 318 (1838).

[4] Jackson v. Edwards, 7 Paige Ch. (N. Y.) 386 (1839).

[5] Jackson v. Edwards, 7 Paige Ch. (N. Y.) 386 (1839). See Merchants' Bank v. Thomson, 55 N. Y. 7 (1873).

[6] Riggs v. Pursell, 74 N. Y. 370 (1878); Miller v. Collyer, 36 Barb. (N. Y.) 250 (1862); Graham v. Bleakie, 2 Daly (N. Y.) 55 (1866); Wood v. Mann, 3 Sumn. C. C. 318 (1838).

[7] Knight v. Moloney, 4 Hun (N. Y.) 33 (1875).

A resale ordered in such a case should be upon the same terms upon which the first sale was made; and where the terms of the resale differ materially from those of the first sale, the purchaser at the first sale will be relieved from all liability for any deficiency on the second sale.[1] A purchaser who neglects to complete his contract, or who wrongfully refuses to do so, will be chargeable with the taxes imposed subsequently to his refusal to complete the purchase and before the resale, such taxes being within the spirit and the letter of the contract which throws upon such purchaser the "difference in costs and expenses on the resale," because such additional taxes are legitimately a part of the difference between the sums realized.[2]

§ 560. Enforcing sale by attachment against purchaser.—Where the purchaser is responsible, the court may summarily order him to complete his purchase; and on his neglect or refusal so to do, it may issue an attachment against his person on motion in the action in which the decree of sale was granted.[3] This is the proper practice where there is reason to believe that the purchaser is acting in collusion with the mortgagor to hinder or prevent the sale.[4]

The fact that the plaintiff is entitled to have the property resold on failure of the purchaser to complete the purchase, or that he may bring an action against the purchaser for damages, will not deprive the court of the right to enforce the performance of the terms of sale by attachment; and while there is an option as to remedy, such

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[1] Riggs v. Pursell, 74 N. Y. 370 (1878).

[2] Ruhe v. Law, 8 Hun (N. Y.) 251 (1876). See also Chase v. Chase, 15 Abb. (N. Y.) N. C. 91 (1884).

[3] Merchants' Bank v. Thomson, 55 N. Y. 7 (1873); Cazet v. Hubbell, 36 N. Y. 677 (1867); Miller v. Collyer, 36 Barb. (N. Y.) 250 (1862); Graham v. Bleakie, 2 Daly (N. Y.) 55 (1866); Brasher v. Cortlandt, 2 Johns. Ch. (N. Y.) 505 (1817); Requa v. Rea, 2 Paige Ch. (N. Y.) 339 (1831); Andersen v. Foulke, 2 Harr. & G. (Md.) 346 (1828); Richardson v. Jones, 3 Gill. & J. (Md.) 163 (1831); s. c. 22 Am. Dec. 393; Wood v. Mann, 3 Sumn. C. C. 318 (1838); Lansdown v. Elderton, 14 Ves. 512 (1808); Savile v. Savile, 1 P. Wms. 745 (1721).

[4] Graham v. Bleakie, 2 Daly (N. Y.) 55, 60 (1866).

option lies with the court or with the mortgagee, and not with the purchaser.[1] And it has ever been held, where the purchaser has made the cash payment required and given a bond or other security for the deferred payments, and the sale has been confirmed by the court, that upon the failure of the purchaser to pay the bond, he may be required to show cause why the land should not be resold for the payment of the purchase money; and upon the return of such order a decree may be made for the sale of the land.[2]

§ 561. **When bidder will be excused from completing his purchase.**—It is a well established rule that a purchaser at a foreclosure sale will not be compelled to accept a doubtful title,[3] or a mere equitable estate.[4] The court will not compel him to take a title which may expose him to a suit either at law or in equity.[5] A marketable title must be offered to him. Consequently, if there is a defect in the title which can not be remedied, or if there is a well-founded doubt as to the validity of the title, the court will not require a purchaser to complete his purchase.[6] But if the defects in

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[1] Wood v. Mann, 3 Sumn. C. C. 318 (1838). See Cazet v. Hubbell, 36 N. Y. 677 (1867).

[2] Clarkson v. Read, 15 Gratt. (Va.) 288 (1859). But see Richardson v. Jones, 3 Gill. & J. (Md.) 163; s. c. 22 Am. Dec. 393, decided in 1831, where it was held that when a bond has been given and the sale confirmed, the purchaser and his sureties can not be compelled to pay the bond in a summary way under an order by the court of chancery. The court held the bond to be a legal contract to be enforced in an action at law.

[3] See Beckenbaugh v. Nally, 32 Hun (N. Y.) 160 (1884); Piser v. Lockwood, 30 Hun (N. Y.) 6 (1883); Lockman v. Reilley, 29 Hun (N. Y.) 434 (1882); Morris v. Mowatt, 2 Paige Ch. (N. Y.) 586 (1831); s. c. 22 Am. Dec. 661; Turner v. Clay, 3 Bibb (Ky.) 52 (1813); Perkins v. Wright, 3 Harr. & McH. (Md.) 326 (1793); Butler v. O'Hear, 1 Desaus. (S. C.) Eq. 382 (1794); s. c. 1 Am. Dec. 671; Thompson v. Tod, 1 Pet. C. C. 389 (1817); Stapylton v. Scott, 16 Ves. 272 (1809); Shapland v. Smith, 1 Bro. C. C. 75 (1780); Cooper v. Denne, 1 Ves. Jr. 565 (1792); s. c. 4 Bro. C. C. 80; Lowes v. Lush, 14 Ves. 547 (1808); Franklin v. Brownlow, 14 Ves. 550 (1808).

[4] Abel v. Heathcote, 2 Ves. Jr. 98 (1793).

[5] Morris v. Mowatt, 2 Paige Ch. (N. Y.) 586 (1831); s. c. 22 Am Dec. 661; Cooper v. Dennie, 1 Ves. Jr. 565 (1792); s. c. 4 Bro. C. C. 80, 86.

[6] Seymour v. DeLancy, Hopk. Ch. (N. Y.) 436 (1824); s. c. 16 Am. Dec. 552; Morris v. Mowatt, 2 Paige Ch. (N. Y.) 586 (1831); s. c. 22 Am. Dec. 661; Jackson v. Edwards, 22 Wend. (N. Y.) 498, 509

the title can be corrected, and the purchaser is tendered a confirmatory deed which remedies such defects, he can not refuse to accept the title.[1]

The purchaser at a foreclosure sale can not be compelled to complete his purchase, if the court had no jurisdiction of the subject matter of the action, or the proceedings are for any reason void, or a necessary defendant has not been properly served with the summons.[2] Where by the terms of a sale under a decree of foreclosure the property was to be sold free from all incumbrances, and all taxes and assessments were to be paid out of the purchase money, but it afterwards appeared that an assessment for a large amount against the property for opening and macadamizing an avenue through the premises had not in fact been confirmed by the city at the time of the sale, although the work had been completed more than three years before the sale; it was held that the purchasers at the sale, who had bid off the property under the belief that such assessment had been confirmed, and that they would receive their lots discharged of the expenses thereof, were not bound to take the property subject to the assessment for such improvements.[3]

And it has been held that where land is sold by a referee under a decree of foreclosure, the court will not require the purchaser to complete the purchase unless he will obtain such an interest in the premises and in the buildings thereon, as he had a right to expect from the terms of the sale.[4]

It is said to be the correct practice in Illinois for the officer exposing the property for sale to report the largest bid to the court for its approval, and that although the bid

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(1839). See Graham v. Bleakie, 2 Daly (N. Y.) 55 (1866); Banister v. Way, Dick. 686 (1787); Harding v. Harding, 4 Myl. & C. 514 (1839); Saunders v. Grey, 4 Myl. & C. 515 (1811); Tanner v. Radford, 4 Myl. & C. 518 (1834); Hodder v. Ruffin, 1 Ves. & B. 544 (1813).

[1] Graham v. Bleakie, 2 Daly (N. Y.) 55 (1866).

[2] Verdin v. Slocum, 71 N. Y. 345 (1877), reversing 9 Hun (N. Y.) 150; Cook v. Farren, 34 Barb. (N. Y.) 95 (1861); s. c. 21 How. (N. Y.) Pr. 286; 12 Abb. (N. Y.) Pr. 359. See Alexander v. Greenwood, 24 Cal. 505 (1864); McKernan v. Neff, 43 Ind. 503 (1873).

[3] Post v. Leet, 8 Paige Ch. (N. Y.) 337 (1840).

[4] Seaman v. Hicks, 8 Paige Ch. (N. Y.) 655 (1841).

may have been accepted by the officer making the sale, yet a resale of the property and the approval by the court of such resale will operate as a rejection of the first bid, and end the liability of the bidder.[1]

§ 562. **Defects of title unknown to purchaser at time of sale.**—When there is a defect in the title to the premises, which is unknown to the purchaser at the time of the sale, he will not ordinarily be compelled to complete the purchase.[2] An outstanding inchoate right of dower in the premises is such a defect as will excuse a purchaser from completing the sale.[3] So also is a prior mortgage or other lien or charge upon the premises.[4] When a purchaser is discharged from all liability to complete his purchase, because of defects in the title of which he had no knowledge at the time of the sale, he will be entitled to be re-imbursed for all proper disbursements connected with his purchase, which include the deposit made by him at the time of his purchase, with interest from the time it was made, and the expenses of examining the title, together with the costs of the motion for repayment, if he was put to such costs.[5]

This payment is to be made out of the funds of the case, if there are any.[6] If there are no funds of the case in court, the plaintiff will be ordered to pay the purchaser the amount of such disbursements;[7] he may also recover the amount thereof in a direct suit or upon a resale.[8] It has been said that this doctrine rests upon the ground suggested by Lord

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[1] Dills v. Jasper, 33 Ill. 262 (1864).

[2] Fryer v. Rockefeller, 63 N. Y. 268 (1875); Merchants' Bank v. Thomson, 55 N. Y. 7 (1873).

[3] Simar v. Canaday, 53 N. Y. 298 (1873); s. c. 13 Am. Rep. 523; Mills v. VanVoorhies, 20 N. Y. 412 (1859); Shiveley's Admrs. v. Jones, 6 B. Mon. (Ky.) 274 (1845); Fitts v. Hoitt, 17 N. H. 530 (1845).

[4] Hirsch v. Livingstone, 3 Hun (N. Y.) 9 (1874); s. c. 48 How. (N. Y.) Pr. 243; Seaman v. Hicks, 8 Paige Ch. (N. Y.) 655 (1841).

[5] Raynor v. Selmes, 52 N. Y. 579 (1873); Morris v. Mowatt, 2 Paige Ch. (N. Y.) 586, 593 (1831); s. c. 22 Am. Dec. 661.

[6] Reynolds v. Blake, 2 Sim. & S. 117 (1824); Attorney-General v. Newark, 8 Sim. 71 (1836).

[7] Smith v. Nelson, 2 Sim. & S. 557 (1826).

[8] Berry v. Johnson, 2 Younge & Coll. 564 (1837).

Eldon in Lechmere v. Brasier,[1] that the suitor must pay for the mistakes of the court.[2] But when a defect in the proceedings results from the plaintiff's negligence in omitting to make all persons interested in the mortgaged property parties to the suit, such expenses can not be deducted from the surplus money arising from a second sale, but must be paid by the party at fault.[3]

§ 563. **Defects of title existing prior to the mortgage under foreclosure.**—A purchaser at a sale under a decree of foreclosure will not be relieved from his bid on account of defects in the title to the property, of which he had notice at the time of such sale; and the court will not permit him to abandon his bid, if the title of which he had knowledge is delivered to him.

In the case of Riggs v. Pursell,[4] the court held that if "every minute and critical objection to a judicial sale is suffered to prevail, it will be attended with much inconvenience and embarrassment. A purchaser claiming to be discharged from his contract, should, therefore, make out a fair and plain case for relief, and it is not every defect in the subject sold, or variation from the description, that will avail him. He will not be suffered to speculate at such sales and, if he happens to make a bad bargain, to repudiate it or abandon his purchase on some nice but immaterial objection. If he gets substantially what he bargains for, he must complete the purchase and take his deed; and in some cases the court will compel him to take a compensation for any deficiency; the court will weigh the object and inducement of the purchaser, and looking to the merits and substantial justice of each case, if the sale be fair, relieve or not from the purchase according as the character of the transaction and circumstances may appear to require."[5]

§ 564. **When purchaser presumed to know condition of title.**—A purchaser buys the title of the mortgagor as

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[1] 2 Jac. & W. 287 (1821).

[2] See Raynor v. Selmes, 52 N. Y. 579 (1873).

[3] Raynor v. Selmes, 52 N. Y. 579 (1873), reversing s. c. 7 Lans. 440.

[4] 66 N. Y. 193 (1876).

[5] See King v. Bardeau, 6 Johns. Ch. (N. Y.) 38 (1822); s. c. 10 Am. Dec. 312; Weems v. Brewer, 2 Harr. & G. (Md.) 390 (1828).

it existed at the time of the execution of the mortgage, and nothing more; and, since the foreclosure cuts off only the equity of redemption, the purchaser acquires only the title of the mortgagee and the mortgagor at the time of the execution of the mortgage. The purchaser takes the risk as to all claims affecting the title to the property which existed prior to the execution of the mortgage under foreclosure.[1]

Where a mortgage purports to cover an estate in fee, while in fact it covers only a leasehold interest, and the judgment, following the terms of the mortgage, erroneously directs a sale of the fee title, the purchaser will be held bound by such sale, if he had notice of the leasehold title of the mortgagor at the time of the sale, because the sale under the judgment of foreclosure can transfer only the title which the mortgagor had.[2]

The purchaser at a foreclosure sale is presumed to know the condition of the title on which he bids. Where a mortgage, which contains no covenant of warranty, is foreclosed, and the relation of mortgagor and mortgagee is extinguished by a sale of the mortgaged premises, the mortgagor will be under no obligation to protect the title of the purchaser; nor will he be precluded from subsequently acquiring an outstanding or paramount title.[3] The purchaser is chargeable with notice of all the defects and irregularities in the foreclosure proceedings which appear of record, and is bound to take notice of the fact that a junior mortgagee, or other subsequent lienholder of record, was not made a party to the foreclosure, and that for that reason he has a right to redeem from the sale.[4]

And where a purchaser at a sale under a decree of foreclosure has paid the purchase money and the sale has been

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[1] See Riggs v. Pursell, 66 N. Y. 193 (1876); Fryer v. Rockefeller, 63 N. Y. 268 (1875), affirming 4 Hun (N. Y.) 800; Holden v. Sackett, 12 Abb. (N. Y.) Pr. 473 (1861); Strong v. Waddell, 56 Ala. 471 (1876); Boggs v. Fowler, 16 Cal. 559 (1869); s. c. 76 Am. Dec. 561; Osterberg v. Union Trust Co., 93 U. S. (3 Otto), 424 (1876); bk. 23 L. ed. 964. See N. Y. Code Civ. Proc. § 1632.

[2] Graham v. Bleakie, 2 Daly (N. Y.) 55 (1866).

[3] Jackson v. Littell, 56 N. Y. 108 (1874).

[4] McKernan v. Neff, 43 Ind. 503 (1873). See Piel v. Baryer, 30 Ind.

confirmed, he can not call upon the mortgagee, in the absence of any express covenants by him, to return the money received in satisfaction of the mortgage debt, or any part of it, on the ground that the title to the property was defective, and that he has been forced to pay a large sum of money to perfect it; his only remedy will be on the covenants in the several conveyances preceding the conveyance to the mortgagee.[1]

§ 565. Irregularities prior to judgment excusing purchaser.—When all persons having any claim upon the property are made parties to the action and the court has jurisdiction of the case, the purchaser will be required to take the title, even though the court may have made an erroneous decision upon the merits, for the reason that no one except the parties to the action could, in such a case, question the purchaser's title, and they are bound by the judgment.[2] Where a purchaser at a sale under a decree of foreclosure is himself a party to the action, he can not question the regularity of the decree. If such a decree is irregular, so that the purchaser can not obtain a good title to the premises, his most direct remedy will be an application to the court on motion to have the decree set aside.[3]

After the confirmation of the sale, errors in the decree or in the proceedings under it, will afford no ground for relief.[4] But where the court had no jurisdiction of the action, the purchaser may have relief, even after confirmation, because of the defect arising out of such want of jurisdiction.[5] After a decree and sale in a mortgage foreclosure, the validity of

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353 (1868); Alexander v. Greenwood, 24 Cal. 505 (1864).

[1] McMurray v. Brassfield, 10 Heisk. (Tenn.) 529 (1873).

[2] DeForest v. Farley, 62 N. Y. 628 (1875); Blakeley v. Calder, 15 N. Y. 617 (1857); Gaskin v. Anderson, 55 Barb. (N. Y.) 259 (1869); s. c. 7 Abb. (N. Y.) N. S. 1; Graham v. Bleakie, 2 Daly (N. Y.) 55 (1866); Ogden v. Walters, 12 Kan. 282 (1873); Mills v. Ralston, 10 Kan. 206 (1872).

[3] Concklin v. Hall, 2 Barb. Ch. (N. Y.) 136 (1847).

[4] Daniel v. Leitch, 13 Gratt. (Va.) 195 (1856); Worsham v. Hardaway's Adm'r, 5 Gratt. (Va.) 60 (1848); Threlkelds v. Campbell, 2 Gratt. (Va.) 198 (1845); s. c. 44 Am. Dec. 384.

[5] Boggs v. Hargrave, 16 Cal. 559 (1860); s. c. 76 Am. Dec. 561.

the mortgage can not be questioned,[1] for where the decree is valid and the sale of the land and the execution of the deed are regular, the purchaser at a foreclosure sale acquires a good title to the premises, although, as against the mortgagor, the decree under which the sale was made may be erroneous.[2]

Where the order of sale under a decree of foreclosure was issued without authority, this irregularity will not affect the title of a purchaser without notice thereof, if he has paid the purchase money and received his deed.[3]

§ 566. **Enforcement of purchase where there are lunatic defendants.**—A decree of foreclosure, rendered upon the personal service of the summons in the action upon persons alleged to be insane,[4] but against whom no proceedings have been instituted to ascertain their mental condition, is neither erroneous nor irregular,[5] and a purchaser at a sale made pursuant to such a decree will not be excused from taking the title,[6] because an obligation entered into by an insane person to secure borrowed money of which he has had the benefit is valid, when the mortgagee acted in good faith and without knowledge or information of the mental condition of the mortgagor.[7]

Thus, it was held in Prentiss v. Cornell,[8] that a purchaser at a foreclosure sale will be compelled to accept the title, although two of the defendants were lunatics for whom no committees had been appointed, if it does not appear from the record that they are lunatics. The court said: "Assuming

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[1] Gest v. Flock, 2 N. J. Eq. (1 H. W. Gr.) 108 (1838).

[2] Splahn v. Gillespie, 48 Ind. 397 (1874).

[3] Splahn v. Gillespie, 48 Ind. 397 (1874).

[4] It would seem that the same principle applies also to those cases where persons have been adjudged to be lunatics. See Sternbergh v. Schoolcraft, 2 Barb. (N. Y.) 153 (1848); Robertson v. Lain, 19 Wend. (N. Y.) 649 (1839).

[5] Crippen v. Culver, 13 Barb. (N. Y.) 424 (1852); Sternbergh v. Schoolcraft, 2 Barb. (N. Y.) 153 (1848).

[6] Prentiss v. Cornell, 96 N. Y. 665 (1884), aff'g 31 Hun (N. Y.) 167.

[7] Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541 (1880), aff'g 14 Hun (N. Y.) 169. Legal obligations may be enforced against lunatics and idiots whether their mental capacity has been judicially determined or not. Sanford v. Sanford, 62 N. Y. 553 (1875).

[8] 31 Hun (N. Y.) 167 (1883).

that these defendants were *non sui juris* at the commencement of this action, they were, nevertheless, liable to be sued. The mental incapacity, or incompetency, of parties presents no interference with the enforcement of legal liabilities. The institution of legal proceedings against lunatics is not inhibited. They may be sued and actions may be maintained against them, and whether their insanity will constitute a defence depends on the circumstances of the case."[1] The question relates solely to the jurisdiction of the court and to the regularity of the proceedings. The personal service of the summons and complaint conferred jurisdiction of these persons and the judgment rendered was held to be not even erroneous.[2]

§ 567. Enforcement of purchase where there are infant defendants.—Where, in an action brought to foreclose a mortgage, an infant defendant was not served with the summons, but a *guardian ad litem*, whom his mother procured to be appointed for him, appeared in the action and put in an answer, and the purchaser at the sale refused to complete his purchase because the infant defendant had not been served, the court held that there was too much doubt about the validity of the proceedings to warrant an order compelling the purchaser to accept the referee's deed.[3]

In an action brought in New York to foreclose a mortgage, one of the defendants who owned an interest in the premises, was an infant under the age of fourteen years, residing with his mother in New Jersey. The summons was not served upon him, either personally or by publication, but was personally served upon his mother in New York. The mother, after such service and upon her own application, was appointed *guardian ad litem* by order of the court, with authority to appear and defend. The infant and the mother both appeared and put in a general answer. Upon application to compel a purchaser at the sale made under the

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[1] Sanford v. Sanford, 62 N. Y. 553 (1875); Mutual Life Ins. Co. v. Hunt, 14 Hun (N. Y.) 169 (1878); aff'd 79 N. Y. 541.

[2] Crippen v. Culver, 13 Barb. (N. Y.) 428 (1852); Sternbergh v. Schoolcraft, 2 Barb. (N. Y.) 153 (1847).

[3] Ingersoll v. Mangam, 24 Hun (N. Y.) 202 (1881); aff'd 84 N. Y. 622.

judgment and decree to complete his purchase, it was held that the court had no jurisdiction over the infant defendant to appoint a *guardian ad litem*, as such infant had not been made a party to the action, that an appearance by the guardian was not an appearance by the infant, that the judgment therefore was not binding upon him, that the sale under such judgment did not convey a good title, and that the application to compel the purchaser to complete his purchase was properly denied.[1]

§ 568. **Formal irregularities no excuse to purchaser.** —In a mortgage foreclosure mere formal irregularities, which can not result in injury to the purchaser, do not constitute sufficient defects to justify him in refusing to complete the sale. Should he refuse to accept the title for such reasons, so that a resale is ordered, he will be charged with the expenses thereof and the deficiency, if any.[2] Thus, on a mortgage foreclosure, in which both the purchaser at the sale and his wife were parties, and the wife being an infant, appeared by an attorney, and the purchaser, after having paid the ten per centum required at the time of making his bid, refused to complete his contract on the ground that the interest of his wife in the premises was not foreclosed, it was held that as the effect of the conveyance to him would be to give the wife the same interest which would have been foreclosed had she properly appeared in the action, he was not injured by the irregularity complained of and was bound to complete the purchase.[3]

Where there are mere formal irregularities in a foreclosure, they will be deemed to be waived by a defendant who, with full notice thereof, surrenders possession of the premises to the purchaser at the sale for a valuable consideration.[4] Where irregularities occur, the proper remedy is by an appeal from the order of confirmation. Where a sale under a mortgage foreclosure is irregular, because made during a

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[1] Ingersoll v. Mangam, 84 N. Y. 622 (1881); N. Y. Code Civ. Proc. § 416.

[2] Knight v. Moloney, 4 Hun (N. Y.) 33 (1875).

[3] Knight v. Moloney, 4 Hun (N. Y.) 33 (1875).

[4] Trilling v. Schumitsch, 67 Wis. 186 (1886).

term of the county court instead of the circuit court, as required by law, it does not operate as an assignment of the mortgage debt itself to the purchaser, so that he can both hold the land and collect the residue of the debt from the mortgagor.

§ 569. **Reference to investigate title.**—Upon the return of an order requiring a purchaser at a sale in a mortgage foreclosure to show cause why he should not complete the purchase, the court may appoint a referee to ascertain whether a marketable title is offered; and if it appears from the referee's report that such a title is not offered, or is of doubtful validity, the court will not compel him to complete the purchase.[2] A purchaser will not be compelled to take a title where the proceedings are for any reason void, as where the court has not had jurisdiction of the action, or where a party in interest has not been served with the summons,[3] or a subsequent incumbrancer has not been made a party to the suit.[4]

Where the defects in the title to the premises sold can be corrected, and releases are procured within a reasonable time, or other things are done to remedy the defects in the title, the purchaser can not refuse to complete his purchase.[5] It has been said that while a purchaser, who has discovered a defect in his title at the proper time, may be relieved from his purchase by asking a rescission of the sale, yet he can not, while retaining his bid, ask to have his title perfected by the application of the proceeds of the sale to the claims of incumbrancers not parties to the action.[6]

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[1] Wells v. Lincoln County, 80 Mo. 424 (1883).

[2] Graham v. Bleakie, 2 Daly (N. Y.) 55, 58 (1866); Ormsby v. Terry, 6 Bush (Ky.) 553 (1869); Banister v. Way, Dick. 686 (1787); Saunders v. Grey, 4 Myl. & C. 515 (1811); Tanner v. Rapford, 4 Myl. & C. 518 (1834); Harding v. Harding, 4 Myl. & C. 514 (1839); Hodder v. Ruffin, 1 Ves. & B. 544 (1813).

[3] Cook v. Farren, 34 Barb. (N. Y.) 95 (1861); s. c. 12 Abb. (N. Y.) Pr. 359; 21 How. (N. Y.) Pr. 286.

[4] Verdin v. Slocum, 71 N. Y. 345 (1877), reversing 9 Hun (N. Y.) 150.

[5] Graham v. Bleakie, 2 Daly (N. Y.) 55 (1866). See Collin v. Cooper, 14 Ves. 205 (1807).

[6] Duvall v. Speed, 1 Md. Ch. Dec. 229, 235 (1848).

§ 570. **Purchaser entitled to marketable title.**—A purchaser of land under a decree of foreclosure is entitled to a marketable title,[1] and can not be compelled to accept a deed which gives him only a doubtful title, or leaves him to the hazards of a contest with other parties which may seriously affect the value of the property.[2] A title open to reasonable doubt is not a marketable title.[3]

A purchaser will not be compelled to accept a title which is so doubtful that it may expose him to litigation, even though such title may be considered good by the court. And if there is a reasonable chance that some third person may raise a question as to the title of the estate after the completion of the contract, the court will not compel a bidder to complete his purchase.[4]

It has been said that a title may be doubtful, that is to say, unmarketable, because of the uncertainty of some matter of fact appearing in the course of the examination of it; and that if, after all reasonable proofs have been produced, the court does not feel called upon to instruct the jury to find against the title, there is not a reasonable doubt as to its validity.[5] A mere possibility that the purchaser may be disturbed on account of some alleged defect in the title, is not a sufficient objection.[6]

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[1] Fleming v. Burnham, 100 N. Y. 1 (1885). Lord Eldon held in an early case, that a purchaser is entitled to demand not merely a marketable title, but one which he can take with reasonable certainty. Lowes v. Lush, 14 Ves. 547 (1808).

[2] Jordan v. Poillon, 77 N. Y. 518 (1879).

[3] Fleming v. Burnham, 100 N. Y. 1, 10 (1885); People v. Board of Stock Brokers, 92 N. Y. 98 (1883); Jordan v. Poillon, 77 N. Y. 518 (1879).

Andrews, J., says in Fleming v. Burnham, that it would be specially unjust to compel a purchaser to take a title, the validity of which depends upon a question of fact, when the facts presented upon the investigation might be changed by a new inquiry, or are open to opposing inferences.

[4] Post v. Bernheimer, 31 Hun (N. Y.) 247 (1883). See Shriver v. Shriver, 86 N. Y. 575 (1881); Lockman v. Reilley, 29 Hun (N. Y.) 434 (1883); Richmond v. Gray, 85 Mass. (3 Allen), 25 (1861); Garnett v. Macon, 6 Call. (Va.) 368 (1825); Christian v. Cabell, 22 Gratt. (Va.) 82 (1872); Emery v. Grocock, 6 Madd. 54 (1821); Smith v. Death, 5 Madd. 371 (1820); Lowes v. Lush, 14 Ves. 547 (1808).

[5] Shriver v. Shriver, 86 N. Y. 575, 584 (1881); Emery v. Grocock, 6 Madd. 54 (1821).

[6] Post v. Bernheimer, 31 Hun (N.

§ 571. **Partial failure of title will excuse purchaser.**—Where a purchaser does not obtain the same premises which he had reason to believe he would under the terms of the sale, he will not be required to complete his purchase.[1] Thus, in Beckenbaugh v. Nally[2] a purchaser was relieved from his bid, where the terms of sale stated that the premises would be sold "subject to the lease of the present upland of said property, to expire May 1, 1884," and at the time of the sale a brick building, claimed to be worth $5,000, was standing upon the upland, and by the terms of his lease the tenant was entitled to remove the building, of which right no notice was given at the time of the sale.

Where several parcels of real estate are sold upon foreclosure as an entirety, for an entire sum of money, and the purchaser obtains title to only a part of the parcels sold, the rule of *caveat emptor* is applicable, and no correct rule can be prescribed for the measure of the purchaser's damages, if such partial failure of title affords him any cause of action against the mortgagor or judgment defendant.[3]

§ 572. **Rights of assignee of purchaser's bid.**—A purchaser at a foreclosure sale may make a valid transfer of his bid to a third person before the execution of a deed of the premises; and, upon the application of the assignee, the court may direct the officer making the sale to execute a conveyance immediately to such assignee, subject to the equitable rights or liens of other persons, as against the original purchaser, which became vested prior to such assignment.[4]

Y.) 247 (1883); Hayes v. Harmony Grove Cemetery, 108 Mass. 400 (1871).

[1] Riggs v. Pursell, 66 N. Y. 193 (1876); Beckenbaugh v. Nally, 32 Hun (N. Y.) 160 (1884).

[2] 32 Hun (N. Y.) 160 (1884).

[3] Parker v. Rodman, 84 Ind. 256 (1882).

[4] Proctor v. Farnam, 5 Paige Ch. (N. Y.) 614 (1836). See McClure v. Englehardt, 17 Ill. 47 (1855); Splahn v. Gillespie, 48 Ind. 397 (1874); Ehleringer v. Moriarty, 10 Iowa, 78 (1859); Wood v. Mann, 3 Sumn. C. C. 318 (1838); Vale v. Davenport, 6 Ves. 615 (1802); Rigby v. McNamara, 6 Ves. 515 (1801).

Where a purchaser under a decree of foreclosure agreed to sell the property purchased to a third person and died before doing so, his heirs being abroad, the court ordered a conveyance to the substituted purchaser, and the payment of the money into court. Pearce v. Pearce, 7 Sim. 138 (1834).

If there is more than one assignee of the bid, upon motion in the action in which the sale was made, the court will decide between them which is entitled to the deed of conveyance.[1] But where the purchaser declines to take the title and requests the master to transfer his bid to the complainant, who had agreed to take his place, it has been held that the master should resell the property, and not allow the complainant to take it at the purchaser's bid and receive a deed.[2]

§ 573. **Right of bidder to have sale completed.**— Where a sale is made by a referee in a manner not authorized by the judgment, parties who in good faith have bid off the property upon the terms offered by the referee, and who have made a payment accordingly, can not be compelled to pay any sum in addition to the amount of such bid, upon the ground that such sum is required to make the bid correspond with the terms, upon which alone the referee was authorized to make the sale.[3] And it has been held, that where a referee, under a decree of foreclosure, with the consent of the parties in interest, sells the property on credit in order to obtain a larger price therefor, the purchaser will have the right to insist upon the terms of his purchase, and can not be compelled to pay cash.[4] Where a referee sells the premises upon terms not authorized by the decree, the remedy of parties aggrieved will be by motion to vacate the sale and for a resale.[5]

Where by reason of delay, arising from an imperfect title, the circumstances of the transaction and of the parties have materially changed, the purchaser will not be required to complete his purchase.[6] If a defective title causes delay in completing a sale, the purchaser will not be required to

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[1] Proctor v. Farnam, 5 Paige Ch. (N. Y.) 614 (1836).

[2] Thompson v. Dimond, 3 Edw. Ch. (N. Y.) 298 (1839).

[3] Hotchkiss v. Clifton Air Cure, 4 Keyes (N. Y.) 170 (1868).

[4] Rhodes v. Dutcher, 6 Hun (N. Y.) 453 (1876).

[5] Hotchkiss v. Clifton Air Cure, 4 Keyes (N. Y.) 170 (1868).

[6] Merchants' Bank v. Thomson, 55 N. Y. 7 (1873); Taylor v. Longworth, 39 U. S. (14 Pet.) 172 (1840); bk. 10 L. ed. 405.

pay interest upon the purchase money until the title is perfected.[1] If, however, he accepts the rents and profits of the premises from the day of sale, he will be chargeable with interest on the purchase money. But in such cases, it is at the option of the purchaser whether to take the rents and profits and pay interest, or to relinquish the rents and profits and to be exempt from the payment of interest.[2]

An appeal from an order refusing a resale of the premises will not interfere with the right of the purchaser to have the sale completed. And the appellant will not be entitled to an order staying the purchaser from completing his purchase and taking possession of the property, without giving security for the payment of the rents and profits of the premises in the meantime, and that no waste shall be committed.[3]

An application by a purchaser at a foreclosure sale to be relieved from his purchase, must be made within a reasonable time, and when so made, the application will ordinarily be granted, if the purchaser parted with his money under a mistaken notion of the law, although he may have had full knowledge of the facts.[4]

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[1] Merchants' Bank v. Thomson, 55 N. Y. 7 (1873).

[2] Merchants' Bank v Thomson, 55 N. Y. 17 (1873); Diar v. Glover, Hoff Ch. (N. Y.) 71 (1839). See Worrall v. Munn, 53 N. Y. 185 (1873).

[3] American Insurance Co. v. Oakley, 9 Paige Ch. (N. Y.) 496 (1842); s. c. 38 Am. Dec. 561.

[4] Barnard v. Wilson, 66 Cal. 251 (1884).

CHAPTER XXVIII.

DELIVERING DEED—PASSING TITLE—OBTAINING POSSESSION.

REFEREE'S DEED—ESTATE CONVEYED—REQUISITES OF DEED—TITLE OF PURCHASER — FIXTURES — EMBLEMENTS — RENTS — APPEAL AND REVERSAL — DELIVERY OF POSSESSION — WRIT OF ASSISTANCE—SUMMARY PROCEEDINGS.

§ 574. General principles.
575. Provisions for letting purchaser into possession — Rents.
576. Effect and force of referee's deed.
577. Estate conveyed and interests passed by referee's deed.
578. Execution and delivery of deed.
579. Requisites of sheriff's or referee's deed.
580. Error in description in mortgage—Correcting in deed.
581. Variance of description in mortgage, decree and deed.
582. Title of purchaser relates back to time of executing mortgage—Reserving casement.
583. Time for redemption—Effect on title of purchaser.
584. All fixtures pass to purchaser under referee's deed.
585. Exceptions to above rule.
586. All permanent improvements pass under referee's deed.
§ 587. All emblements pass under referee's deed.
588. Right of purchaser to rents.
589. Appeal and reversal—Effect on purchaser's title.
590. Delivering possession of premises to purchaser.
591. Possession obtained by summary process.
592. Provisions of Code for obtaining possession.
593. Writ of assistance — When granted.
594. Writ of assistance — How obtained.
595. Against whom possession delivered.
596. Who entitled to writ of assistance.
597. Writ of assistance improperly granted.
598. Writ against tenants in possession.
599. Writ of assistance not granted against holder of paramount title.
600. Summary proceedings under New York Code.

§ 574. **General principles.**—Immediately after the sale is concluded, if the purchaser pays the amount bid and complies with the terms of sale, the officer who made the sale may execute and deliver to him a deed of the premises.[1]

[1] Jackson v. Warren, 32 Ill. 331 (1863).

It is not necessary to make a report of the sale, nor to have the report confirmed, before the deed is executed. It has been said that the referee's deed passes the title to the premises to the purchaser at the moment of its delivery, although the sale may not have been confirmed ;[1] but a legal title can not vest under a deed until its delivery.[2]

It has been said that the property is at the risk of the purchaser from the date of the delivery of the deed by the officer of the court, and that he can not repudiate the contract, although the sale may afterwards be set aside for irregularity.[3] The person holding such a deed has been said to be *prima facie* the legal owner of the land described in it.[4] According to the English doctrine, a purchase at a foreclosure sale is not complete until the report of the officer making such sale has been confirmed ; and the practice there is to withhold the deed until the entry of the final order of confirmation.[5]

Where a deed is delivered before the sale is confirmed, the confirmation relates back to the date of the sale and gives effect to the deed from that time.[6] While the decisions in this country are not uniform, it is thought that the better practice is to report the sale and to have it confirmed before delivering the deed. Yet in those states where time is allowed for redemption after the sale, it is the practice to delay the report until the deed has been executed and delivered.[7] In such cases the mortgagor will waive all merely technical objections to the sale by failing to have it set aside before the time for redemption expires.[8]

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[1] Fort v. Burch, 6 Barb. (N. Y.) 60 (1849). See Mitchell v. Bartlett, 51 N. Y. 447 (1873), aff'g 52 Barb. (N. Y.) 319 ; Fuller v. VanGeesen, 4 Hill (N. Y.) 171 (1843) ; Jones v. Burden, 20 Ala. 382 (1852). See *ante* chap. xxvii for the New York practice, which requires the delivery of the deed before the confirmation of the sale.

[2] Mitchell v. Bartlett, 51 N. Y. 447 (1873).

[3] Jones v. Burden, 20 Ala. 382 (1852).

[4] Jackson v. Warren, 32 Ill. 331 (1863). See Simerson v. Branch Bank at Decatur, 12 Ala. 205 (1847).

[5] *Ex parte* Minor, 11 Ves. 559 (1805).

[6] Lathrop v. Nelson, 4 Dill. C. C. 194 (1877).

[7] Walker v. Schum, 42 Ill. 462 (1867).

[8] Fergus v. Woodworth, 44 Ill.

§ 575. **Provisions for letting purchaser into possession —Rents.**—Where the decree in a foreclosure provides that the purchaser shall be let into possession upon producing the deed of the referee, or other officer making the sale, the purchaser does not acquire the title or the right to the possession of the land, or to the rents and profits thereof, until the delivery of such deed; up to the time of such delivery the owner of the equity of redemption is entitled to the possession and to the rents and profits of the land.[1]

Where mortgaged premises are sold under a decree of foreclosure, the owner of the equity of redemption will be entitled to the rents, issues and profits of the premises until the purchaser becomes entitled to possession; and where the rent is payable between the day of sale and the time when the purchaser will be entitled to the possession, such rent will belong to the owner of the equity of redemption, and not to the purchaser at the sale.[2] But it has been held, where an assignee in bankruptcy of the mortgagor, by order of the bankrupt court, joined in the sale of the mortgaged premises under a power of sale contained in the mortgage, that the purchaser at such sale was entitled, as against the assignee in bankruptcy, to the rents and profits of the property sold for the period intervening between the day of sale and the day of the confirmation thereof by the bankrupt court.[3]

Where a decree of foreclosure directs the sale of the premises, and that the purchaser at the sale be let into possession upon the delivery of the usual referee's deed, the purchaser will be entitled to a writ of assistance or other

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374 (1867); Walker v. Schum, 42 Ill. 462 (1867).

[1] Mitchell v. Bartlett, 51 N. Y. 447 (1873), aff'g 52 Barb. 319; Strong v. Dollner, 2 Sandf. (N. Y.) 444 (1849).

[2] Cheney v. Woodruff, 45 N. Y. 98 (1871); Whalin v. White, 25 N. Y. 462 (1862); Miner v. Beekman, 11 Abb. (N. Y.) Pr. N. S. 147 (1870); s. c. 42 How. (N. Y.) Pr. 33; Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); Clason v. Corley, 5 Sandf. (N. Y.) 447 (1852); Whitney v. Allen, 21 Cal. 233 (1862). But see McDevitt v. Sullivan, 8 Cal. 592 (1857). See also Peck v. Knickerbocker Ice Co., 18 Hun (N. Y.) 183 (1879).

[3] Lathrop v. Nelson, 4 Dill. C. C. 194 (1877).

proper process of the court, requiring the delivery of the premises to him, as against all defendants who were served with the summons; this rule also prevails as against a defendant who is not mentioned in the decree by name, as well as against one whose name is not mentioned in the officer's deed.[1] Where the sale is consummated by the delivery of the deed, it passes the entire estate held by the mortgagor at the date of the mortgage as against all defendants.[2] The right of the purchaser to the possession of the premises under his deed, will not be affected by the fact that, pending the action, the plaintiff executed to one of the defendants a conveyance of the whole of the premises embraced in the decree.[3]

§ 576. **Effect and force of referee's deed.**—It is provided by the Code,[4] that a conveyance upon a sale made pursuant to a final judgment in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate only that would have vested in the mortgagee, if the equity of redemption had been foreclosed.[5] Such a conveyance is as valid as if it had been executed by the mortgagor and the mortgagee, and is an entire bar against each of them and against each party to the action who was duly summoned, and against every person claiming from, through or under a party to the action, by title accruing after the filing of the notice of the pendency of the action.[6] The sale of the mortgaged premises and the confirmation thereof by the court, terminates the right of the owner of the equity of redemption to pay the debt and redeem the estate.[7]

The provision of the Code, declaring a conveyance an "entire bar," refers to rights and interests in the equity of redemption and not to interests paramount to the title of both the mortgagor and the mortgagee.[8] Thus, where

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[1] Frisbie v. Fogarty, 34 Cal. 11 (1867).

[2] Montgomery v. Middlemiss, 21 Cal. 103 (1862); Belloe v. Rogers, 9 Cal. 125 (1858).

[3] Montgomery v. Middlemiss, 21 Cal. 103 (1862).

[4] N. Y. Code Civ. Proc. § 1632.

[5] Lawrence v. Delano, 3 Sandf. (N. Y.) 333 (1849).

[6] N. Y. Code Civ. Proc. § 1632.

[7] Brown v. Frost, 10 Paige Ch. (N. Y.) 243, 247 (1843).

[8] Rector v. Mack, 93 N. Y. 488

persons holding prior mortgages or liens are not made parties to a foreclosure, or if made parties and no purpose is indicated in the complaint to have the amount of their incumbrances ascertained and paid out of the proceeds of the sale, their prior liens will not be affected.[1] And a purchaser at a legal tax sale of land, upon which there was a mortgage at the time of such sale, will not be affected by a subsequent foreclosure of such mortgage and by a sale of the mortgaged premises, unless he is made a party to the foreclosure.[2]

§ 577. **Estate conveyed and interests passed by referee's deed.**—A purchaser at a mortgage foreclosure sale acquires all the title and interest of both the mortgagor and the mortgagee in and to the property.[3] The court undertakes to dispose of the interests of the parties to the suit in the land, and the purchaser acquires those interests whatever they may be.[4] And it has been said that a sheriff's sale of real estate, under a judgment recovered by a *scire facias* upon a mortgage, passes to the purchaser the title

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(1883); s. c. 45 Am. Rep. 260. See Smith v. Roberts, 91 N. Y. 470 (1883); Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127 (1878); Rathbone v. Hooney, 58 N. Y. 463 (1874); Lewis v. Smith, 9 N. Y. 502 (1854); s. c. 61 Am. Dec. 706; Fryer v. Rockefeller, 4 Hun (N. Y.) 800 (1875). See N. Y. Code Civ. Proc. § 1632.

[1] Bache v. Doscher, 67 N. Y. 429 (1876), affirming 41 N. Y. Supr. Ct. (9 J. & S.) 150. See *ante* chap. ix.

[2] Becker v. Howard, 66 N. Y. 5 (1876), affirming 4 Hun (N. Y.) 359

[3] Rector v. Mack, 93 N. Y. 488 (1883); s. c. 45 Am. Rep. 260. See Westbrook v. Gleason, 79 N. Y. 23 (1879); Slattery v. Schwannecke, 44 Hun (N. Y.) 75 (1887); McMillan v. Richards, 9 Cal. 365 (1858); Taylor v. Kearn, 68 Ill. 339 (1873); Hamilton v. State, 1 Ind. 128 (1848); Powesheik County v. Dennison, 36 Iowa, 244 (1873); s. c. 14 Am. Rep. 521; Brown v. Tyler, 74 Mass. (8 Gray), 135 (1857); s. c. 69 Am. Dec. 239; Young v. Brand, 15 Neb. 601 (1884); Carter v. Walker, 2 Ohio St. 339 (1853). The purchaser at a foreclosure sale acquires the rights of the mortgagee, so far as he has any claim or interest in the premises for the security of his debt, and also so much of the equity of redemption as is not bound by the lien of a senior incumbrance. Watson v. Dundee Mortgage and Trust Investment Co., 12 Oreg. 474 (1885). See Sellwood v. Gray, 11 Oreg. 535 (1884).

[4] Leech v. Hillsman, 8 Lea (Tenn.) 747 (1882); Zollman v. Moore, 21 Gratt. (Va.) 313 (1871); Tallman v. Ely, 6 Wis. 244 (1858); Gillett v. Eaton, 6 Wis. 30 (1858).

to the mortgaged premises discharged of all equities,—even of those of which the mortgagee had no notice or knowledge.[1]

The purchaser takes the title of the mortgagor and the mortgagee as it existed at the time of the execution of the mortgage, subject to all its qualifications,[2] because the vendee of mortgaged premises under a sheriff's deed stands upon the equities of the mortgagee.[3] But a deed can not pass a greater interest than that which is authorized by the judgment, although by its terms it may include premises mentioned in the mortgage, but which were subsequently released by the mortgagee from the lien thereof.[4]

If his title was a mere equity or a right to own the property upon the payment of the purchase price, such interest is all that can be transferred by the foreclosure.[5] If the mortgage was upon a lease for a term of years, the purchaser becomes the assignee of the lease.[6] If the property has been previously sold by the mortgagor upon contract, and his vendee is in possession, the purchaser will take the position of the mortgagor as to the vendee; and upon default in the payment of the money due upon the contract, he may turn him out of possession.[7]

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[1] Landell's Appeal, 105 Pa. St. 152 (1884). A foreclosure deed to the mortgagee gives him the same estate as the foreclosure of the equity of redemption, and is as effectual against the owner of the equity as if he executed such deed. Ruggles v. First Nat. Bank of Centreville, 43 Mich. 192 (1880).

[2] Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 526, 531 (1834); McMillan v. Richards, 9 Cal. 365 (1858); s. c. 70 Am. Dec. 655; Taylor v. Kearn, 68 Ill. 339 (1873); Hamilton v. State, 1 Ind. 128 (1848); Powesheik County v. Dennison, 36 Iowa, 244 (1873); s. c. 14 Am. Rep. 521; Marston v. Marston, 45 Me. 412 (1858); Haynes v. Wellington, 25 Me. 458 (1845); Brown v. Tyler, 74 Mass. (8 Gray), 135 1857); s. c. 69 Am. Dec. 239; Ritger v. Parker, 62 Mass. (8 Cush.) 145 (1851); s. c. 54 Am. Dec. 744; Carter v. Walker, 2 Ohio St. 339 (1853); Frische v. Kramer, 16 Ohio, 125 (1847); s. c. 47 Am. Dec. 368; DeHaven v. Landell, 31 Pa. St. 120 (1858); West Branch Bank v. Chester, 11 Pa. St. 282 (1849); s. c. 51 Am. Dec. 547; Hodson v. Treat, 7 Wis. 263 (1859).

[3] Berryhill v. Kirchner, 96 Pa. St. 489 (1880).

[4] Laverty v. Moore, 32 Barb. (N. Y.) 347 (1860); affirmed 33 N. Y. 658.

[5] Stewart v. Hutchinson, 29 How. (N. Y.) Pr. 181 (1864).

[6] Kearney v. Post, 1 Sandf. (N. Y.) 105 (1847).

[7] Chute v. Noris, 31 Barb. (N. Y.) 511 (1860). See Smith v. Roberts, 91

And where persons holding prior liens are not made parties to the action, or, if made parties, no purpose is indicated in the complaint to have their liens ascertained and paid out of the proceeds of the sale, their rights will not be cut off.[1]

§ 578. **Execution and delivery of deed.**—The referee or sheriff making a sale of mortgaged premises under a decree of foreclosure, is required to execute a deed of the premises to the purchaser on such sale.[2] The deed may be executed and delivered before the sale is confirmed;[3] it will take effect immediately upon delivery, and divests all parties to the action of the title from the time of the sale.[4]

The court will not order the officer making a sale to execute and deliver a deed to the purchaser until the whole of the purchase money has been paid into court, even where a junior mortgagee is the purchaser and a portion of the money which is not paid in belongs to such purchaser as surplus money, and will therefore shortly have to be returned to him.[5] When the deed is not ready to be delivered at the time fixed for that purpose, the remedy of the purchaser is by motion for leave to pay the money into court and to compel the referee to complete the sale by delivering the deed.[6]

N. Y. 470 (1883); Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127 (1878); Rathbone v. Hooney, 58 N. Y. 463 (1874); Lewis v. Smith, 9 N. Y. 502 (1854); s. c. 61 Am. Dec. 706; Dwight v. Phillips, 48 Barb. (N. Y.) 116 (1865).

[1] Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127 (1878); Bache v. Doscher, 67 N. Y. 429 (1876), affirming 41 N. Y. Supr. Ct. (9 J. & S.) 150; Becker v. Howard, 66 N. Y. 5 (1876), affirming 4 Hun (N. Y.) 359; Walsh v. Rutger's Fire Insurance Co., 13 Abb. (N. Y.) Pr. 33 (1861). See *ante* chap. ix.

[2] N. Y. Supreme Court Rule 61.

[3] See Mitchell v. Bartlett, 51 N. Y. 447 (1873), aff'g 52 Barb. (N. Y.) 319; Fort v. Burch, 6 Barb. (N. Y.) 60 (1849); Fuller v. Van Geesen, 4 Hill (N. Y.) 171 (1843); Jones v. Burden, 20 Ala. 382 (1852); Walker v. Schum, 42 Ill. 462 (1867); Jackson v. Warren, 32 Ill. 331 (1863).

[4] McLaren v. Hartford Ins. Co., 5 N. Y. 151 (1851); Fort v. Burch, 6 Barb. (N. Y.) 60 (1849); Fuller v. VanGeesen, 4 Hill (N. Y.) 171 (1843).

[5] Battershall v. Davis, 23 How. (N. Y.) Pr. 383 (1861).

[6] Clason v. Corley, 5 Sandf. (N. Y.) 447 (1852).

§ 579. **Requisites of sheriff's or referee's deed.**—The Code provides that where property is sold pursuant to a decree or a judgment, which specifies the particular party or parties, whose right, title or interest is directed to be sold, the deed must distinctly state in the granting clause thereof whose right, title or interest was sold, without naming in that clause any of the other parties to the action; otherwise, the purchaser will not be bound to accept the conveyance, and the officer executing it will be liable for such damages as the purchaser may sustain by the omission, whether he accepts or refuses the conveyance.[1]

This provision of the Code has been held to apply to a deed executed at a mortgage foreclosure sale, as well as to a deed executed upon the sale of property pursuant to an execution.[2] A referee selling under a decree of foreclosure is required to comply with said provision of the Code, by inserting in the deed of conveyance the names of the parties who executed the mortgage foreclosed, and by stating that all the right, title and interest which said mortgagors had at the time of the execution of the mortgage, was sold and thereby conveyed.[3]

§ 580. **Error in description in mortgage—Correcting in deed.**—Where there is a mistake in the description of the property as given in the mortgage, it may be corrected by a proper proceeding before foreclosure, or in the action to foreclose the mortgage; but where such mistake has been carried into the decree of foreclosure, and into all the proceedings thereunder, a purchaser at the sheriff's sale can not maintain an action to correct the decree and the subsequent proceedings, although the sheriff at the sale may have pointed out, as the property which he was selling, the property that ought to have been described in the mortgage, because the authority of the sheriff to sell is limited to the property actually described in the decree and order of sale.[4]

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[1] N. Y. Code Civ. Proc. § 1244.

[2] Randell v. Von Ellert, 12 Hun (N. Y.) 577 (1878).

[3] Randell v. Von Ellert, 4 Abb. (N. Y.) N. C. 88 (1877); s. c. 12 Hun (N. Y.) 577.

[4] Miller v. Kolb, 47 Ind. 220 (1874).

A purchaser at a mortgage foreclosure sale can not acquire the title to lands not described in the mortgage, although such lands may be described in the complaint and judgment.[1] And where, by mistake, real estate belonging to one person is mortgaged by another as his property, and is sold under a decree of foreclosure to a purchaser who has no notice of such mistake, it has been held that such purchaser can not have the sale set aside and recover the purchase money bid and paid by him for such property at the sale.[2]

Where, by inadvertence, the referee's deed embraces the whole mortgaged premises, a portion of which had previously been released from the lien of the mortgage, and was excepted from the operation of the decree of foreclosure, the purchaser will acquire no title to the portion so released.[3] And the same would be true even if the portion of the premises so released were embraced in the decree, but were not offered at the sale.[4]

§ 581. **Variance of description in mortgage, decree and deed.**—In a New York case it appeared that there was a clerical error in the decree of foreclosure, which consisted in giving a distance in the description of the premises as "about 193 feet, 4 inches," instead of "about 123 feet, 4 inches," which was the correct distance. The mortgage described the premises sold correctly, and they were correctly described in the *lis pendens* and in all the proceedings except the judgment. Following the words of description in the judgment was a reference to a deed, executed by the plaintiff to the defendant, in which the description was correct. The referee sold the premises described in the mortgage, and there was no pretence that the purchaser was misled. The report of sale was correct in its description, and, after the sale, an order of the court, amending the judgment by correcting the erroneous description of the premises, was entered *nunc pro tunc*, upon consent

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[1] Hoopes v. Auburn Water Works Co., 37 Hun (N. Y.) 568, 574 (1885).

[2] Neal v. Gillaspy, 56 Ind. 451 (1877); s. c. 26 Am. Rep. 37.

[3] Laverty v. Moore, 32 Barb. (N. Y.) 347 (1860).

[4] Laverty v. Moore, 33 N. Y. 658 (1865), aff'g 32 Barb. (N. Y.) 347.

of all the parties who had appeared in the action. On motion to compel the purchaser to accept the title, it was held that the court had ample power to make such amendment.[1]

Where a parcel of land was sold under a decree of foreclosure and conveyed to the purchaser under an erroneous impression that the mortgage covered the entire tract, the value of the entire tract having been bid and paid, and the purchaser having been placed in possession thereof, and it was afterwards discovered that, from a mistake in the description, the mortgage did not cover the entire premises intended to be mortgaged and that by reason thereof the legal title failed, it was held that the purchaser was entitled to be protected in the peaceable possession of the land purchased.[2] But it is the general rule that the title of a purchaser at a mortgage foreclosure sale is co-extensive with the description contained in the mortgage, the bill to foreclose, and the decree under which the sale is made.[3]

§ 582. Title of purchaser relates back to time of executing mortgage—Reserving easement.—The title of the purchaser at a sale under a decree of foreclosure relates back to the date of the delivery of the mortgage, as against all intervening purchasers and incumbrancers who were made parties to the action, or who became interested in the premises *pendente lite*.[4] All incumbrances and liens, and all

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[1] Wood v. Martin, 66 Barb. (N. Y.) 241 (1873). See Hogan v. Hoyt, 37 N. Y. 300 (1867); Hotaling v. Marsh, 14 Abb. (N. Y.) Pr. 161 (1862); Alvord v. Beach, 5 Abb. (N. Y.) Pr. 451 (1857); Woodruff v. Wicker, 2 Bosw. (N. Y.) 613 (1858); Close v. Gillespey, 3 Johns. (N. Y.) 518 (1808).

[2] Waldron v. Leston, 15 N. J. Eq. (2 McCart.) 126 (1862). See DeRimer v. Cantillon, 4 Johns. Ch. (N. Y.) 85 (1819).

[3] McGee v. Smith, 16 N. J. Eq. (1 C. E. Gr.) 462 (1863).

[4] Jackson v. Ramsay, 3 Cow. (N. Y.) 75 (1824); s. c. 15 Am. Dec. 242; Fuller v. VanGeesen, 4 Hill (N. Y.) 171 (1843); Klock v. Cronkhite, 1 Hill (N. Y.) 107 (1841); Bissell v. Payn, 20 Johns. (N. Y.) 3 (1822); Jackson v. Dickenson, 15 Johns. (N. Y.) 309 (1818); s. c. 8 Am. Dec. 336; Jackson v. Bull, 1 Johns. Cas. (N. Y.) 81 (1799); Lathrop v. Ferguson, 22 Wend. (N. Y.) 216 (1839); Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 122 (1839); s. c. 34 Am. Dec. 285; People's Savings Bank v. Hodgon, 64 Cal. 95 (1883); Ruggles v. First Nat. Bank, 43 Mich. 192 (1880); Gamble v. Horr, 40 Mich. 561 (1879).

conditions, reservations and restrictions which the mortgagor may have imposed upon the property subsequently to the execution of the mortgage, will be extinguished.[1]

Thus, a plaintiff, being the owner of a lot which was subject to a mortgage, conveyed it to M., reserving an easement therein for light and air to the windows of its church adjoining, M. assuming the mortgage. M. conveyed the lot, through a third person, to his wife, subject to the same mortgage, but without an assumption on her part to pay the amount thereof. Upon foreclosure of the mortgage, the wife of M. became the purchaser. In an action to restrain her from obstructing the light and air to the windows of said church, it was held that under her foreclosure deed, Mrs. M. acquired an absolute title, unincumbered by the easement, that she owed no duty to the plaintiff or mortgagee, requiring her to pay off the mortgage, and that there were no equitable rights against her which would prevent her from asserting her title.[2] It seems that in such a case the plaintiff, to save its easement, should have appeared in the foreclosure suit, and bid the full amount of the mortgage debt and costs upon the sale, subject to the easement.[3]

§ 583. Time for redemption—Effect on title of purchaser.—In those states where a period of time is allowed for redemption, after the sale of the premises under a mortgage foreclosure, a purchaser of land at such sale acquires no legal title, nor right to be invested with a legal title, until the period for redemption has expired.[4] He can not maintain an ejectment or other possessory action on his certificate of purchase,[5] for he will not be entitled to possession until the officer making the sale has executed and delivered to him a deed of the premises.[6]

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[1] King v. McCully, 38 Pa. St. 76 (1860). See Rector v. Mack, 93 N. Y. 488 (1883); Davis v. Connecticut Mut. Life Ins. Co., 84 Ill. 508 (1877).

[2] Rector v. Mack, 93 N. Y. 488 (1883).

[3] Rector v. Mack, 93 N. Y. 488 (1883).

[4] Rockwell v. Servant, 63 Ill. 424 (1872); Delahay v. McConnel, 5 Ill. (4 Scam.) 156 (1842).

[5] Rockwell v. Servant, 63 Ill. 424 (1872).

[6] O'Brian v. Fry, 82 Ill. 87, 274 (1876); Bennett v. Matson, 41 Ill. 333 (1866).

He acquires no title to the premises until the period for redemption has passed, and he is entitled to his deed. His deed, when executed, will relate back to the time of the sale in order to cut off intervening incumbrances. His title will become absolute only when his right to a deed accrues; until such time, he will have only an unmatured right to a deed.[1]

§ 584. All fixtures pass to purchaser under referee's deed.—The rules as to fixtures which pass to a purchaser on a mortgage foreclosure sale are the same as those which govern a conveyance from a grantor to a grantee.[2] Whatever is attached to the freehold and would pass under a deed as between a vendor and a vendee, will pass as between a mortgagor and a mortgagee.[3] When a mortgagor, subsequently to the execution of a mortgage, places machinery or other fixtures upon the mortgaged premises, the purchaser of such premises, at a foreclosure sale, will, therefore, acquire title to the fixtures as a part of the realty.[4]

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[1] Stephens v. Illinois Mutual Fire Ins. Co., 43 Ill. 327, 331 (1867). See Johnson v. Baker, 38 Ill. 98 (1865); Sweezy v. Chandler, 11 Ill. 445 (1849).

[2] Snedeker v. Warring, 12 N. Y. 170,174 (1854). See Bishop v. Bishop, 11 N. Y. 123, 126 (1854); s. c. 62 Am. Dec. 68; Bank of Utica v. Finch, 3 Barb. Ch. (N. Y.) 293, 299 (1848); Robinson v. Preswick, 3 Edw. Ch. (N. Y.) 246 (1838); Main v. Schwarzwaelder, 4 E. D. Smith, (N. Y.) 273 (1855); Winslow v. Merchants' Ins. Co., 45 Mass. (4 Metc.) 306 (1842); s. c. 38 Am. Dec. 368; Union Bank v. Emerson, 15 Mass. 159 (1818); Longstaff v. Meagoe, 2 Ad. & E. 167 (1834). See *ante* §§ 426, 427, 428.

[3] Miller v. Plumb, 6 Cow. (N. Y.) 665 (1827); s. c. 16 Am. Dec. 456; Robinson v. Preswick, 3 Edw. Ch. (N. Y.) 246 (1838); Union Bank v. Emerson, 15 Mass. 159 (1818).

[4] Voorhees v. McGinnis, 48 N. Y. 278 (1872); Snedeker v. Warring, 12 N. Y. 170 (1854); Bishop v. Bishop, 11 N. Y. 123 (1854); s. c. 62 Am. Dec. 68; Rice v. Dewey, 54 Barb. (N. Y.) 455 (1862); Gardner v. Finley, 19 Barb. (N. Y.) 317 (1855); Miller v. Plumb, 6 Cow. (N. Y.) 665 (1827); s. c. 16 Am. Dec. 456; Robinson v. Preswick, 3 Edw. Ch. (N. Y.) 246 (1838); Babcock v. Utter, 32 How. (N. Y.) Pr. 439 (1864); s. c. 1 Abb. App. Dec. (N. Y.) 27; Sullivan v. Toole, 26 Hun (N. Y.) 203 (1882); Main v. Schwarzwaelder, 4 E. D. Smith (N. Y.) 273 (1855); Sands v. Pfeiffer, 10 Cal. 258 (1858); Clore v. Lambert, 78 Ky. 224 (1879); Wight v. Gray, 73 Me. 297 (1882); Union Bank v. Emerson, 15 Mass. 159 (1818); Lackas v. Bahl, 43 Wis. 53 (1877).

For a full collection of the authorities as to what are, and what are not, fixtures, see *ante* §§ 426, 427,

Thus, the owner of real estate, with a flouring mill thereon, which was subject to a mortgage, procured new machinery for such mill on credit, upon an agreement that the title to the machinery should not pass to the purchaser until it was fully paid for. The machinery was attached to the realty as was intended. The purchaser upon the foreclosure of such mortgage was held to take title to the machinery as against the vendor of it, notwithstanding the contract and the vendee's failure to pay therefor.[1]

In determining whether chattels affixed to land will pass under a mortgage of the realty, it is immaterial whether such chattels were attached before or after the execution of the mortgage, because, as a general rule, they become bound by the mortgage whenever they become a part of the realty.[2]

§ 585. **Exceptions to above rule.**—To this general rule, however, there are some exceptions, as where chattels are attached to real estate with the intention that they shall not thereby become a part of the freehold; such intention will control, as a general rule, and a mortgage of the real estate will not bind such chattels.[3] And it has been held

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428. See Walker v. Sherman, 20 Wend. (N. Y.) 636 (1839); also Potter v. Cromwell, 40 N. Y. 287 (1869); Butler v. Page, 48 Mass. (7 Metc.) 40 (1843); s. c. 39 Am. Dec. 757; Winslow v. Merchants' Ins. Co., 45 Mass. (4 Metc.) 306 (1842); s. c. 38 Am. Dec. 368; Noble v. Bosworth, 36 Mass. (19 Pick.) 314 (1837); Crane v. Brigham, 11 N. J. Eq. (3 Stockt.) 29 (1855); Teaff v. Hewitt, 1 Ohio St. 511, 529, 530 (1853); s. c. 59 Am. Dec. 734; Christian v. Dripps, 28 Pa. St. 271 (1857); Hill v. Wyntworth, 28 Vt. 428 (1856); Walmsley v. Milne, 7 C. B. N. S. 115 (1859); s. c. 29 L. J. C. P. 97; 6 Jur. N. S. 125; 97 Eng. C. L. 114; Lancaster v. Eve, 5 C. B. N. S. 717 (1859); s. c. 28 L. J. C. P. 235; 5 Jur. N. S. 683; 94 Eng. C. L. 717. As to removed fixtures, see *ante* § 257.

[1] Bass Foundry, &c., Works v. Gallentine, 99 Ind. 525 (1884).

[2] Snedeker v. Warring, 12 N. Y. 170 (1854); Rice v. Dewey, 54 Barb. (N. Y.) 455 (1869); Gardner v. Finley, 19 Barb. (N. Y.) 317 (1855); Sullivan v. Toole, 26 Hun (N. Y.) 203 (1882); Phinney v. Day, 76 Me. 83 (1884); Corliss v. McLagin, 29 Me. 115 (1848); Butler v. Page, 48 Mass. (7 Metc.) 40 (1843); s. c. 39 Am. Dec. 757; Winslow v. Merchants' Ins. Co., 45 Mass. (4 Metc.) 306 (1842); s. c. 38 Am. Dec. 368; Peirce v. Goddard, 39 Mass. (22 Pick.) 559 (1839); Curry v. Schmidt, 54 Mo. 515 (1874); Powers v. Dennison, 30 Vt 752 (1858); Preston v. Briggs, 16 Vt. 124 (1844).

[3] See Sheldon v. Edwards, 35 N. Y. 279 (1866); Ford v. Cobb, 20 N. Y. 344 (1859).

that a mortgage will not bind personal property which has been attached to the freehold subsequently to the execution of the mortgage, where equities in favor of third persons require that it should continue to be considered as personal property.[1] It is well settled that where, by the express agreement of the owner of the equity of redemption and the owner of chattels affixed to the land, such chattels are to remain personal property, they will not become a part of the realty, but will be subject to removal by the owner at any time.[2]

§ 586. All permanent improvements pass under referee's deed.—All additions of a permanent character by way of improvement made on mortgaged premises by the mortgagor or the owner of the equity of redemption, are regarded as part of the mortgaged estate and will inure to the benefit of the holder of the mortgage, and will pass to the purchaser on a foreclosure sale.[3] Thus, where a mortgagor, while the owner of the equity of redemption, erected a house upon the mortgaged premises, without any agreement with the mortgagee, it was held that it became a part of the realty and passed with it to the purchaser at the sale on the foreclosure of the mortgage;[4] and the same rule has been held to apply to a building erected upon mortgaged premises by the husband of the mortgagor.[5]

Where a mortgagor erected a frame building by the side of his mill, to be used as an office in connection with the mill, the building was held to be a fixture, although it was erected after the mortgage was given and was intended to be only temporary, and was neither attached to the mill nor secured to the ground, but rested upon wooden blocks

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[1] See Tifft v. Horton, 53 N. Y. 377 (1873); s. c. 13 Am. Rep. 537; Voorhees v. McGinnis, 48 N. Y. 278 (1872).

[2] Tifft v. Horton, 53 N. Y. 377 (1873); s. c. 13 Am. Rep. 537; Ford v. Cobb, 20 N. Y. 344 (1859); Mott v. Palmer, 1 N. Y. 564 (1848); Farrar v. Chauffetete, 5 Den. (N. Y.) 527 (1848); Smith v. Benson, 1 Hill (N. Y.) 176 (1841).

[3] Baird v. Jackson, 98 Ill. 78 (1881); Wood v. Whelen, 93 Ill. 153 (1879).

[4] Matzon v. Griffin, 78 Ill. 477 (1875); Dooley v. Crist, 25 Ill. 551 (1861).

[5] Wight v. Gray, 73 Me. 297 (1882).

standing upon the surface of the earth.[1] Where the owner of the equity of redemption makes improvements upon land that is mortgaged, he will not be entitled to an allowance for them as against the mortgagor, but in some cases he may be allowed for such improvements out of the surplus moneys.[2]

§ 587. **All emblements pass under referee's deed.**— The crops growing on the land, as well as the land, are held as a security for the mortgage debt,[3] and on the foreclosure of the mortgage, whatever crops are then growing upon the mortgaged premises, if planted subsequently to the making of the mortgage, will pass to the purchaser at the sale, whether they were planted by the mortgagor or his tenant, free from all claim upon them by such mortgagor or tenant;[4]

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[1] State Savings Bank v. Kercheval, 65 Mo. 682 (1877); s. c. 27 Am. Rep. 310 (1877). See also Butler v. Page, 48 Mass. (7 Metc.) 40 (1843); s. c. 39 Am. Dec. 757.

As to what improvements are fixtures see Stockwell v. Campbell, 39 Conn. 362 (1872); s. c. 12 Am. Rep. 393; Arnold v. Crowder, 81 Ill. 56 (1876); s. c. 25 Am. Rep. 260; Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa, 57 (1876); s. c. 24 Am. Rep. 719; McConnell v. Blood, 123 Mass. 47 (1877); s. c. 25 Am. Rep. 12; Richardson v. Borden, 42 Miss. 71 (1868); s. c. 2 Am. Rep. 595; Jarechi v. Philharmonic Society, 79 Pa. St. 403; s. c. 21 Am. Rep. 78; Meigs' Appeal, 62 Pa. St. 28 (1869); s. c. 1 Am. Rep. 372; Hutchins v. Masterson, 46 Tex. 551 (1877); s. c. 26 Am. Rep. 286.

[2] Wharton v. Moore, 84 N. C. 479 (1881); s. c. 37 Am. Rep. 627. See Rice v. Dewey, 54 Barb. (N. Y.) 455 (1862); Union Water Co. v. Murphy, 22 Cal. 621 (1863); Baird v. Jackson, 98 Ill. 78 (1881); Martin v. Beatty, 54 Ill. 100 (1870); McCumber v. Gilman, 15 Ill. 381 (1854); Childs v. Dolan, 87 Mass. (5 Allen), 319 (1862).

[3] See Gillett v. Balcom, 6 Barb. (N. Y.) 370 (1849); Shepard v. Philbrick, 2 Den. (N. Y.) 174 (1846); Lane v. King, 8 Wend. (N. Y.) 584 (1832); s. c. 24 Am. Dec. 105; Toby v. Reed, 9 Conn. 216 (1832); Jones v. Thomas, 8 Blackf. (Ind.) 428 (1847); Hughes v. Graves, 1 Litt. (Ky.) 317 (1822); Winslow v. Merchants' Insurance Co., 45 Mass. (4 Metc.) 310 (1842); s. c. 38 Am. Dec. 368; Cassilly v. Rhodes, 12 Ohio, 88 (1843); Crews v. Pendleton, 1 Leigh (Va.) 297, 305 (1829); s. c. 19 Am. Dec. 750.

[4] Gillett v. Balcom, 6 Barb. (N. Y.) 370 (1849). See Shepard v. Philbrick, 2 Den. (N. Y.) 174 (1846); Lane v. King, 8 Wend. (N. Y.) 584 (1832); s. c. 24 Am. Dec. 105; Jones v. Thomas, 8 Blackf. (Ind.) 428 (1847); Ledyard v. Phillips, 47 Mich. 305 (1882); Ruggles v. First Nat. Bank of Centreville, 43 Mich. 192 (1880); Howell v. Schenck, 24 N. J. L. (4 Zab.) 89 (1853); Crews

and on a proper application, under some circumstances, the court will provide for their preservation until possession is given to the purchaser.[1] But the purchaser at a foreclosure sale can not, before the sale is confirmed and before he has acquired possession of the land, maintain an action in replevin for crops growing thereon at the time of the sale but afterwards severed from the premises by the person in possession.[2]

Where, however, the foreclosure is instituted and a sale is ordered after the severance of the crops, the title thereto will not pass, under such proceedings, to the mortgagee or the purchaser.[3] The purchaser at a mortgage foreclosure sale will be entitled to the crops growing at the time of the sale, in preference to a person claiming under the mortgagor whose claim originated subsequently to the execution of the mortgage.[4] And it has been held that a person purchasing the premises upon the foreclosure of a mortgage is entitled to the growing crops in preference to a person purchasing the same premises at a sale subsequently made under a decree in bankruptcy.[5]

But when the crops are reserved at a sale by special announcement, duly authorized, they will not pass to the purchaser.[6] This rule is placed upon the grounds, that while the mortgagee is not bound to sell in parcels, unless the mortgaged premises are described in parcels,[7] yet that he

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v. Pendleton, 1 Leigh (Va.) 297 (1829); s. c. 19 Am. Dec. 750.

[1] Ruggles v. First Nat. Bank of Centreville, 43 Mich. 192 (1880).

[2] Woehler v. Endter, 46 Wis. 301 (1879).

[3] Buckout v. Swift, 27 Cal. 433 (1865); Codrington v. Johnstone, 1 Beav. 520 (1838).

[4] Shepard v. Philbrick, 2 Den. (N. Y.) 174 (1846); Stewart v. Doughty, 9 Johns. (N. Y.) 112 (1812); Whipple v. Foot, 2 Johns. (N. Y.) 418 (1807); s. c. 3 Am. Dec. 442; Lane v. King, 8 Wend. (N. Y.) 584 (1832); s. c. 24 Am. Dec. 105; Anderson v. Strauss, 98 Ill. 485 (1881); Jones v. Thomas, 8 Blackf. (Ind.) 428 (1847); Howell v. Schenck, 24 N. J. L. (4 Zab.) 89 (1853); Parker v. Storts, 15 Ohio St. 351 (1864); Crews v. Pendleton, 1 Leigh (Va.) 297 (1829); s. c. 19 Am. Dec. 750.

[5] Gillett v. Balcom, 6 Barb. (N. Y.) 370 (1849).

[6] Sherman v. Willett, 42 N. Y. 146 (1870).

[7] See Griswold v. Fowler, 24 Barb. (N. Y.) 135 (1857); s. c. 4 Abb. (N. Y.) Pr. 238; Lamerson v. Marvin, 8 Barb. (N. Y.) 9 (1850).

may do so where the premises are so situated that he can sell in parcels; that he may, if he chooses, even release a portion of the premises and sell the balance; that there is no reason why he may not sell the same portion before releasing any; and that in such case the mortgage is a lien upon the whole premises, including the growing crops, and at the time of the sale the mortgagee may announce that he will not sell the growing crops, but will sell the balance.[1]

But the sheriff, or other officer making the sale, has no authority to reserve the growing crops, and where he makes such a reservation, without authority contained in the mortgage or in the decree of sale, the reservation will be without effect and the sale will pass both the land and the growing crops to the purchaser; and in those cases where he has authority, such reservation will probably be of no avail unless it is expressed in his deed.[2]

§ 588. **Right of purchaser to rents.**—The mortgagor will be entitled to the possession of the land and to the rents and profits thereof, until the mortgagee takes possession or institutes proceedings to subject the rents and profits to his claim.[3] Upon a mortgage foreclosure sale the purchaser does not acquire the title to the premises nor a right to the possession thereof, until the delivery of the deed by the officer making the sale; until that time the owner of the equity of redemption will be entitled to the possession of the land and to its rents and profits.[4]

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[1] Sherman v. Willett, 42 N. Y. 146 (1870).

[2] Howell v. Schenck, 24 N. J. L. (4 Zab.) 89 (1853).

[3] Butler v. Page, 48 Mass. (7 Metc.) 40, 42 (1843); s. c. 39 Am. Dec. 757. See Hele v. Bexley, 20 Beav. 127 (1854); Higgins v. York Buildings Co., 2 Atk. 107 (1740); Drummond v. Duke of St. Albans, 5 Ves. 438 (1800); Colman v. Duke of St. Albans, 3 Ves. 25 (1796). See *ante* § 575.

[4] Mitchell v. Bartlett, 51 N. Y. 447 (1873), aff'g 52 Barb. (N. Y.) 319. See also Mutual Life Ins. Co. v. Balch, 4 Abb. (N. Y.) N. C. 200 (1877); Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); s. c. 43 Am. Dec. 766; Clason v. Corley, 5 Sandf. (N. Y.) 447 (1852); Nichols v. Foster, 9 N. Y. Week. Dig. 468 (1880); Taliaferro v. Gay, 78 Ky. 496 (1879).

The purchaser is generally not entitled to possession, nor to the rents and profits, until he has demanded such possession under his deed.[1] Where a person is in possession under a purchase at a former foreclosure sale which was not confirmed, he will be entitled to the rents only from the date of the confirmation of the report of the last sale.[2]

Where the rent becomes due and payable between the day of sale and the time when the purchaser becomes entitled to the possession, it belongs to the owner of the equity of redemption, and not to the purchaser at the sale.[3] But it may be provided by statute, that where a judgment debtor fails to redeem, he shall be liable to the purchaser for the rent of the premises, or for the use and occupation thereof, from the date of the sale.[4]

§ 589. **Appeal and reversal — Effect on purchaser's title.**—If the court had jurisdiction of the parties and of the subject matter of the action and power to render a judgment, it will not be a valid objection to the title by the purchaser at the sale made under a decree of foreclosure, that such judgment was erroneous;[5] his title will not be affected by any defects in the proceedings which render the judgment irregular, and in consequence of which, it may be set aside or reversed.[6] But where a sale is made under a

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[1] Mitchell v. Bartlett, 51 N. Y. 447 (1873), aff'g 52 Barb (N. Y.) 319; Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); s. c. 43 Am. Dec. 766; Clason v. Corley, 5 Sandf. (N. Y.) 447 (1852).

[2] Taliaferro v. Gay, 78 Ky. 496 (1879). See Mitchell v. Bartlett, 51 N. Y. 447 (1873), aff'g 52 Barb. (N. Y.) 319. See *ante* § 575.

[3] Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); s. c. 43 Am. Dec. 766. See Whalin v. White, 25 N. Y. 462 (1862); Miner v. Beekman, 11 Abb. (N. Y.) Pr. N. S. 147 (1871); s. c. 42 How. (N. Y.) Pr. 33; s. c. 33 N. Y. Supr. Ct. (1 J. & S.) 67; Clason v. Corley, 5 Sandf. (N. Y.) 447 (1852). See *ante* § 575.

[4] Gale v. Parks, 58 Ind. 117 (1877). See Clements v. Robinson, 54 Ind. 599 (1876).

[5] DeForest v. Farley, 62 N. Y. 628 (1875); Storm v. Smith, 43 Miss. 497 (1871); Armstrong v. Humphreys, 5 S. C. 128 (1873).

[6] Brevoort v. Brevoort, 70 N. Y. 136, 140 (1877); DeForest v. Farley, 62 N. Y. 628 (1875). See Clemens v. Clemens, 37 N. Y. 59, 72 (1867); Packer v. Rochester & S. R. R. Co., 17 N. Y. 288 (1858); Blakeley v. Calder, 15 N. Y. 617 (1857); Brainard v. Cooper, 10 N. Y. 359 (1851);

void decree, the purchaser will obtain no title.[1] The rule that a purchaser acquires a valid title, although the decree may be reversed on appeal, does not apply to an interlocutory decree nor to a conditional order, even if the conditions have not been fulfilled.[2]

The rule that a *bona fide* purchaser at a foreclosure sale will receive a good title, although the proceedings were erroneous or irregular, holds good where the purchaser was a party to the suit,[3] even though such purchaser had notice at the time of the sale, that an effort would be made to reverse the decree,[4] and though an appeal had been taken from the judgment at the time of the sale, on which the judgment was subsequently reversed, a stay of proceedings not having been obtained pending such appeal.[5]

It has been held that where a person, not a party to the suit, is a purchaser at a foreclosure sale, the law does not require him to inspect the record and to see that it is free

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Holden v. Sackett, 12 Abb. (N. Y.) Pr. 473 (1861); McMurray v. McMurray, 60 Barb. (N. Y.) 117, 127 (1870); Gaskin v. Anderson, 55 Barb. (N. Y.) 259, 262 (1869); s. c. 7 Abb. (N. Y.) Pr. N. S. 1, 7; Breese v. Bange, 2 E. D. Smith (N. Y.) 474 (1854); Wood v. Jackson, 8 Wend. (N. Y.) 9 (1831); s. c. 22 Am. Dec. 603; Estate of Fenn, 8 N. Y. Civ. Proc. Rep. 206, 211 (1885); s. c. *sub nom.* Price v. Fenn, 3 Dem. (N. Y.) 341. See also Alvord v. Beach, 5 Abb. (N. Y.) Pr. 451 (1857); Silleck v. Heydrick, 2 Abb. (N. Y.) Pr. N. S. 57 (1866); Hening v. Punnett, 4 Daly (N. Y.) 543 (1873); Graham v. Bleakie, 2 Daly (N. Y.) 55 (1866); Jordan v. VanEpps, 19 Hun (N. Y.) 533 (1880); Herbert v. Smith, 6 Lans. (N. Y.) 493 (1872); Minor v. Betts, 7 Paige Ch. (N. Y.) 597 (1839); Coit v. McReynolds, 2 Robt. (N. Y.) 655 (1864); Darvin v. Hatfield, 4 Sandf. (N. Y.) 468 (1851); *In re* Luce, 17 N. Y. Week. Dig. 35 (1883); Buckmaster v. Carlin, 4 Ill. (3 Scam.) 104 (1841); Bustard v. Gates, 4 Dana (Ky.) 429 (1836); Gossom v. Donaldson, 18 B. Mon. (Ky.) 230 (1857); Benningfield v. Reed, 8 B. Mon. (Ky.) 105 (1848); Lampton v. Usher's Heirs, 7 B. Mon. (Ky.) 57 (1846); Gray v. Brignardello, 68 U. S. (1 Wall.) 627 (1863); bk. 17 L. ed. 693; Bank of U. S. v. Voorhees, 1 McL. C. C. 221 (1834).

[1] Gossom v. Donaldson, 18 B. Mon. (Ky.) 230 (1857); Storm v. Smith, 43 Miss. 497 (1871).

[2] Gray v. Brignardello, 68 U. S. (1 Wall.) 627 (1863); bk. 17 L. ed. 693.

[3] Hening v. Punnett, 4 Daly (N. Y.) 543 (1873); Splahn v. Gillespie, 48 Ind. 397 (1874); Gossom v. Donaldson, 18 B. Mon. (Ky.) 230 (1857); s. c. 54 Am. Dec. 547.

[4] Irwin v. Jeffers, 3 Ohio St. 389 (1854).

[5] Hening v. Punnett, 4 Daly (N. Y.) 543 (1873).

from errors; he is only required to ascertain that the court had jurisdiction, and that there is such a judgment or decree unreversed as would authorize the sale. The supreme court of Illinois said in the case of Fergus v. Woodworth,[1] that "if such were not the rule, no one would become a purchaser at a judicial sale, and all competition would cease, and the plaintiffs would become the purchasers at their own price. Stability and confidence must be given to judicial sales to the fullest extent compatible with the interests of the parties, as well the purchaser as the defendant."

§ 590. Delivering possession of premises to purchaser. —A court of equity has authority to decree the possession of land, where a controversy regarding the title thereto has been properly brought within its jurisdiction;[2] and the law will enforce its decree by its officers for the delivery of actual possession, whenever in pursuance of the decree such possession ought to be delivered.[3] The power of a court to give possession to the purchaser at a foreclosure sale was at one time doubted, but it was finally exercised by the court of chancery.[4]

The New York court of appeals held, in the case of Bolles v. Duff,[5] that by statute the court was given power over the whole subject, though the act was in a good degree declaratory. It has been said that a court of equity would fall short of doing complete justice, unless it placed the purchaser at a mortgage foreclosure sale in possession, as well as gave him a deed of the premises. Where the person ejected from the possession of the premises was a party to the suit, or came into possession under a party to the suit *pendente lite*, he can make no objection to such an order.[6]

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[1] 44 Ill. 374, 384 (1867).

[2] Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609 (1820); Irvine v. McRee, 5 Humph. (Tenn.) 556 (1845); s. c. 49 Am. Dec. 468; 4 Kent Com. 184.

[3] Valentine v. Teller, Hopk. Ch. (N. Y.) 422 (1825).

[4] See Bolles v. Duff, 43 N. Y. 469 473 (1871); s. c. 41 How. (N. Y., Pr. 358; Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609 (1820); Thompson v. Campbell, 57 Ala. 188 (1876).

[5] 43 N. Y. 469, 473 (1871).

[6] See Kershaw v. Thompson, 4

It may now be regarded as well settled that courts of equity, in the exercise of their ordinary and general chancery jurisdiction, where the possession of real property is involved, may, upon the consummation of a suit to enforce a lien thereon, do complete justice by putting a successful complainant into possession, if all the persons in interest were made parties to the suit; and that, on a sale in proceedings to foreclose a mortgage, or to enforce a lien, the court may extend the same relief to a purchaser under the decree of sale.[1] But there are exceptions to this general rule.

Thus, if a person, pending the suit, enters into possession under one who did not derive his title to the premises from a party to the action, he can not be turned out of possession under the decree. So in the case of a foreclosure sale, if a person in possession shows a *prima facie* right thereto paramount to the mortgage, the court will not attempt to decide questions affecting his legal title, and the possession must then be sought by proceedings at law.[2] It has been held in Wisconsin,[3] that the statutory provision requiring that the purchaser at a foreclosure sale be let into possession on production of the sheriff's deed, must be construed as defining the rights of such purchaser after the confirmation of the sale.[4] It seems that in some states a purchaser at a foreclosure can not demand possession until the report of the officer making the sale has been confirmed by the court.[5] The rule is different, however, in New York.

§ 591. **Possession obtained by summary process.**—It is usually provided in every judgment of foreclosure and sale, that the purchaser be let into possession on production of the deed of the officer making the sale; whether this provision is inserted in the judgment or not, the purchaser

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Johns. Ch. (N. Y.) 609 (1820); Jones v. Hooper, 50 Miss. 514 (1874). See Creighton v. Paine, 2 Ala. 159 (1841).

[1] Harding v. LeMoyne, 114 Ill. 65 (1885).

[2] Harding v. LeMoyne, 114 Ill. 65 (1885).

[3] Wis. Rev. Stat. 3169.

[4] Welp v. Gunther, 48 Wis. 543 (1879); Wœhler v. Endter, 46 Wis. 301 (1879).

[5] Howard v. Bond, 42 Mich. 131 (1879).

will be entitled to possession on compliance with the terms of the sale, and the court will have power to put him in such possession.[1] The purchaser will not be driven to an action at law to obtain possession.[2] The authority of the court to issue a process and to place the purchaser in possession, is placed upon the ground that it has power to enforce its own decrees and thus to avoid the circuity of vexatious litigation.[3]

But where a party in possession was not a party to the foreclosure, and did not acquire his possession from a person who was bound by the decree, but who is a mere stranger and who entered into possession before the suit was begun, the court will have no power either under the statute or independently of it to deprive him of possession by enforcing the decree.[4] A person obtaining possession by a legal proceeding under a claim of right, will not be summarily dispossessed by an enforcement of the decree of foreclosure adverse to a party to the suit, the proceedings having been commenced prior to the filing of the bill of foreclosure, and he not being a party to the foreclosure.[5]

And a tenant in possession, who became such after the commencement of the suit, where he holds under a person not a party to the suit, who was lawfully in

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[1] Ludlow v. Lansing, Hopk. Ch. (N. Y.) 231 (1824); Dyer v. Kopper, 59 Vt. 477 (1887); s. c. 4 N. Eng. Rep. 368, 371. See Valentine v. Teller, Hopk. Ch. (N. Y.) 422 (1825); Yates v. Hambly, 2 Atk. 360 (1742).

[2] Ludlow v. Lansing, Hopk. Ch. (N. Y.) 231 (1824): Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609 (1820). See VanHook v. Throckmorton, 8 Paige Ch. (N. Y.) 33 (1839); Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204 (1833); Suffern v. Johnson, 1 Paige Ch. (N. Y.) 450 (1829); s. c. 19 Am. Dec. 440; McGown v. Wilkins, 1 Paige Ch. (N. Y.) 120 (1828); Creighton v. Paine, 2 Ala. 158 (1841); Bright v. Pennywhit, 21 Ark. 130 (1860); Horn v. Volcano Water Works, 18 Cal. 141 (1861); Skinner v. Beatty, 16 Cal. 156 (1860); Trabue v. Ingles, 6 B. Mon. (Ky.) 82 (1845); Schenck v. Conover, 13 N. J. Eq. (2 Beas.) 220 (1860).

[3] Ludlow v. Lansing, Hopk. Ch. 231 (1824); Jones v. Hooper, 50 Miss. 514 (1874).

[4] Meiggs v. Willis, 8 N. Y. Civ. Proc. Rep. 125 (1885); Boynton v. Jackway, 10 Paige Ch. (N. Y.) 307 (1843); VanHook v. Throckmorton, 8 Paige Ch. (N. Y.) 33 (1839); Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204 (1833); Kessinger v. Whittaker, 82 Ill. 22 (1876); Benhard v. Darrow, Walk. Ch. (Mich.) 519 (1844).

[5] Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204 (1833).

possession under a claim hostile to that derived under the mortgage, will not be dispossessed, although made a party to the suit for the purpose of barring an interest held by his wife in other premises covered by the mortgage, of which he was in possession and which he had delivered up in pursuance of the decree.[1] But where a person comes into possession *pendente lite* through a party to the suit, he will be bound by the decree in the same manner as the party whom he succeeds.[2]

§ 592. **Provisions of Code for obtaining possession.**—It is provided by the New York Code of Civil Procedure,[3] that where a judgment in an action relating to real property, allots to any person a distinct parcel of land, or contains a direction for the sale of real property, or confirms such an allotment or sale, it may also, except in a case where it is expressly prescribed that the judgment may be enforced by execution, direct the delivery of the possession of the property to the person entitled thereto. If a party or his representative, who is bound by the judgment, withholds possession from a person thus declared to be entitled thereto, the court, besides punishing the disobedience as a contempt, may, in its discretion, by order, require the sheriff to put that person into possession. Such an order must be executed, as if it were an execution for the delivery of the possession of the property.

§ 593. **Writ of assistance—When granted.**—It was held in the recent case of Dyer v. Kopper,[4] that the execution of a decree of foreclosure giving possession, can be made by a summary process. A writ of assistance is an appropriate process to issue from a court of equity, to place a purchaser of mortgaged premises in possession under its decree of sale, after he has received the deed of the officer making the sale, as against parties who are bound by the decree,

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[1] New York Life Ins. & Trust Co. v. Cutler, 9 How. (N. Y.) Pr. 407 (1853).

[2] Kessinger v. Whittaker, 82 Ill. 22 (1876).

[3] § 1675.

[4] 59 Vt. 477, 489 (1887); s. c. 4 N. Eng. Rep. 471. See Ludlow v. Lansing, Hopk. Ch. (N. Y.) 231 (1824).

and who refuse to surrender possession pursuant to the directions of the court.[1]

After a purchaser has complied with the terms of the sale,[2] and has obtained his deed from the officer making the sale,[3] if the possession is wrongfully withheld from him in disobedience of the decree of the court, he will be entitled to a writ of assistance, on proof that he has exhibited his deed to the person in possession and demanded the possession of the premises.[4] Some of the cases hold that a notice of the application for a writ of assistance should first be given to the defendant and also to the tenant of the premises, if there is one.[5] But it would seem, according to the current of authorities, that a notice of the application is unnecessary.[6]

§ 594. Writ of assistance—How obtained.—Where the original decree of foreclosure does not contain an order for the surrender of the premises to the purchaser, a writ of assistance can not be granted until such an order for the possession of the premises has been obtained upon notice to the party occupying the property after a demand for the possession.[7] A proceeding by a purchaser at a foreclosure sale to obtain a writ of assistance by motion, is not the

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[1] Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609 (1820); Terrell v. Allison, 88 U. S. (21 Wall.) 291 (1874); bk. 22 L. ed. 635.

[2] Battershall v. Davis, 23 How. (N. Y.) Pr. 383 (1861); Armstrong v. Humphries, 5 S. C. 128 (1873).

[3] Bennett v. Matson, 41 Ill. 332 (1866). See Howard v. Bond, 42 Mich. 131 (1879).

[4] Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609 (1820); VanHook v. Throckmorton, 8 Paige Ch. (N. Y.) 33 (1839); Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204 (1833); Montgomery v. Tutt, 11 Cal. 190 (1858); O'Brian v. Fry, 82 Ill. 87 (1876); Kessinger v. Whittaker, 82 Ill. 22 (1876); Oglesby v. Pearce, 68 Ill. 220 (1873); Aldrich v. Sharp, 4 Ill. (3 Scam.) 261 (1841); Watkins v. Jerman, 36 Kan. 464 (1887); Wœhler v. Endter, 46 Wis. 301 (1879).

[5] Devaucene v. Devaucene, 1 Edw. Ch. (N. Y.) 272 (1832).

[6] Valentine v. Teller, Hopk Ch. (N. Y.) 422 (1825); Lynde v. O'Donnell, 21 How. (N. Y.) Pr. 39 (1861); s. c. 12 Abb. (N. Y.) Pr. 291; New York Life Ins. & Trust Co. v. Rand, 8 How. (N. Y.) Pr. 35, 352 (1853); Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609 (1820); Dove v. Dove, 1 Bro. Ch. 376 (1784); s. c. 2 Dick. 617; Huguenin v. Baseley, 15 Ves. 180 (1808).

[7] Lynde v. O'Donnell, 12 Abb. (N. Y.) Pr. 286 (1861); s. c. 21 How. (N. Y.) Pr. 34; N. Y. Life

institution of a new suit, but is only a supplementary step in the action for foreclosure.[1] Recourse to an action at law to obtain possession will not, however, be precluded thereby: both remedies may be pursued at the same time without mutual interference, until possession is obtained.[2]

A purchaser under a decree of foreclosure will not be entitled to a writ of assistance to turn the occupant of the premises out of possession, even though such person went into possession *pendente lite*, unless he did so under and by permission of some party to the action,[3] for a writ of assistance will be proper only where a party who is bound by the decree of foreclosure, refuses to give up possession on request; and it should not be granted without proper proof of such refusal, after the right of possession has been established.[4]

Where a tenant is in possession, the deed executed by the officer making the sale should be exhibited to him by the purchaser, when he makes a demand for possession, and in case of his refusal to give possession, no notice of the application to the court for a writ of assistance need be given.[5] If a person in possession is not a party to the suit, but has come into possession of the mortgaged premises since the action was commenced, a writ of assistance will not be granted on refusal to deliver possession to the purchaser on production of the referee's deed, unless notice of the application for such writ has been served upon him.[6] But as against a person who was a party to the suit, a writ

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Ins. & Trust Co. v. Rand, 8 How. (N. Y.) Pr. 35, 352 (1853). See Kessinger v. Whittaker, 82 Ill. 22 (1876); Ballinger v. Waller, 9 B. Mon. (Ky.) 67 (1848); Benhard v. Darrow, Walk. Ch. (Mich.) 519 (1844).

[1] Kessinger v. Whittaker, 82 Ill. 22 (1876).

[2] Kessinger v. Whittaker, 82 Ill. 22 (1876); Haynes v. Meek, 14 Iowa, 320 (1862).

[3] Boynton v. Jackway, 10 Paige Ch. (N. Y.) 307 (1843); VanHook v. Throckmorton, 8 Paige Ch. (N. Y.) 33 (1839). See Ludlow v. Lansing, Hopk. Ch. (N. Y.) 231 (1824); Thompson v. Campbell, 57 Ala. 189 (1876); McChord v. McClintock, 5 Litt. (Ky.) 304 (1824).

[4] Howard v. Bond, 42 Mich. 131 (1879).

[5] N. Y. Life Ins. & Trust Co. v. Rand, 8 How. (N. Y.) Pr. 35, 352 (1853). But see Fackler v. Worth, 13 N. J. Eq. (2 Beas.) 395 (1861).

[6] Benhard v. Darrow, Walk. Ch. (Mich.) 519 (1844).

of assistance may issue *ex parte*.[1] It seems, however, that one who has come into possession *pendente lite* will be entitled to a notice of the motion.[2]

In all cases of resistance by the occupants, the proper method of putting the purchaser into possession is by means of a writ of assistance; it may be issued upon proof of the service of the order to deliver possession and of a refusal to comply with such order.[3]

§ 595. **Against whom possession delivered.**—Under a decree of foreclosure of mortgaged premises the court will award a writ of assistance and give possession to the purchaser, as against all persons who were parties to the suit or who came into possession under any of them while the suit was pending.[4] But the court will not undertake to remove persons who went into possession after the purchaser had received his deed and conveyed the premises to another.[5] A person who enters into possession fifteen months after the sale can not be regarded as having entered pending the suit.[6]

Possession may be given to a purchaser as against a person who was not a party to the suit, if he took possession after the commencement of the action in collusion with the mortgagor, though under a claim of tax title;[7] but the court will not grant a writ of assistance as against a person who

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[1] N. Y. Life Ins. & Trust Co. v. Cutler, 9 How. (N. Y.) Pr. 407 (1853); N. Y. Life Ins. & Trust Co. v. Rand, 8 How. (N. Y.) Pr. 35, 352 (1853).

[2] Benhard v. Darrow, Walk. Ch. (Mich.) 519 (1844); Commonwealth v. Ragsdale, 2 Hen. & Mun. (Va.) 8 (1807). But see Lynde v. O'Donnell, 12 Abb. (N. Y.) Pr. 286 (1861); s. c. 21 How. (N. Y.) Pr. 34.

[3] Valentine v. Teller, Hopk. Ch. 422 (1825); Ballinger v. Waller, 9 B. Mon. (Ky.) 67 (1848); Hart v. Lindsay, Walk. Ch. (Mich.) 144 (1843); Schenck v. Conover, 12 N. J. Eq. (2 Beas.) 220 (1860).

[4] Bell v. Birdsall, 19 How. (N. Y.) Pr. 491 (1860); s. c. *sub nom.* Betts v. Birdsall, 11 Abb. (N. Y.) Pr. 222; Kessinger v. Whittaker, 82 Ill. 22 (1876).

[5] Bell v. Birdsall, 19 How. (N. Y.) Pr. 491 (1860); s. c. *sub nom.* Betts v. Birdsall, 11 Abb. (N. Y.) Pr. 222.

[6] Bell v. Birdsall, 19 How. (N. Y.) Pr. 491 (1860); s. c. *sub nom.* Betts v. Birdsall, 11 Abb. (N. Y.) Pr. 222.

[7] Brown v. Marzyck, 19 Fla. 840 (1883).

entered pending the suit under an adverse claim of title and without the consent or collusion of the mortgagor.[1] And a party who enters pending the suit will not be turned out of possession under the decree of foreclosure, if he did not enter under a party to the suit or under some one who derived title to the premises from, or had gone into possession with the permission of, a party to the action.[2]

The ordinary rule in regard to the execution of a writ of assistance for possession is, that the purchaser must be put in full and complete possession; that the possession to be given by a sheriff is a full and actual possession; and that where the purchaser is put into possession under circumstances plainly indicating that such possession will be but momentary, and he is accordingly ousted the same day, such execution of the writ will be insufficient; the writ of possession will not be regarded as properly executed until the sheriff and his officers have gone and the purchaser is left in quiet and settled possession.[3]

§ 596. **Who entitled to writ of assistance.**—The purchaser at a sale made under a mortgage foreclosure is, of course, entitled to a writ of assistance; and it has been held that the assignee or grantee of the purchaser is entitled to the same remedy, on the further proof that the deed from the purchaser to him has also been exhibited to the party in possession.[4]

§ 597. **Writ of assistance improperly granted.**—Where a writ of assistance which was improperly granted, has been executed, or having been properly granted, persons not properly within the meaning of its terms, have been aggrieved by having it executed against them, the court, upon motion, will be bound to correct the wrong; and the

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[1] VanHook v. Throckmorton, 8 Paige Ch. (N. Y.) 33 (1839).

[2] VanHook v. Throckmorton, 8 Paige Ch. (N. Y.) 33 (1839); Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204 (1833).

[3] Newell v. Whigham, 102 N. Y. 20 (1886); s. c. 1 N. Y. St. Rep. 666, reversing 29 Hun (N. Y.) 204.

[4] N. Y. Life Ins. & Trust Co. v. Rand, 8 How. (N. Y.) Pr. 35 (1853).

persons dispossessed under such writ are entitled to have the possession restored to them.[1]

Where a writ of assistance in favor of a purchaser at a mortgage foreclosure sale is issued upon notice against a tenant in possession of the mortgaged premises, and is executed by placing the purchaser in possession thereof, it will be conclusive upon the tenant and the purchaser as to the right of possession. If the tenant had any defence against the writ, such defence should have been presented upon the hearing of the motion for the writ; the question whether the writ was properly awarded can not be reviewed in another action in another court.[2]

§ 598. **Writ against tenants in possession.**—It has been said that the foreclosure of a mortgage and a sale thereunder of the demised premises pursuant to a decree, extinguishes the title of the mortgagor and also the rights of his lessee.[3] But where tenants in possession of the mortgaged premises have not been made parties to the suit, the purchaser will not be entitled to possession as against them; but if they are made parties, they will be bound to attorn to the purchaser or be removed by a writ of assistance, notwithstanding the fact that they claim under an unexpired lease executed by the mortgagor for a term of years prior to the date of the mortgage foreclosed.[4]

§ 599. **Writ of assistance not granted against holder of paramount title.**—Where, on application for a writ of assistance by a purchaser at a sale under a decree of foreclosure, the party in possession claims to hold the premises under a lease executed before the execution of the mortgage under which the sale is made, the court will not grant a writ of assistance at the instance of such purchaser.[5] In all cases

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[1] Meiggs v. Willis, 8 N. Y. Civ. Proc. Rep. 125 (1885); Chamberlain v. Chloes, 35 N. Y. 477 (1866).

[2] Rawiszer v. Hamilton, 51 How. (N. Y.) Pr. 297 (1875).

[3] Smith v. Cooley, 5 Daly (N. Y.) 401, 409 (1874); Simers v. Saltus, 3 Den. (N. Y.) 216 (1846); Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609 (1820).

[4] Lovett v. German Reform Church, 9 How. (N. Y.) Pr. 220 (1853).

[5] Thomas v. DeBaum, 14 N. J. Eq. (1 McCart.) 37 (1861).

where the person in possession shows a right paramount to the mortgage, the court will not attempt to decide any questions of legal title, and the purchaser will be obliged to seek possession by proceedings at law.[1]

Where a purchaser enters into an arrangement with the mortgagor subsequently to the sale, whereby the mortgagor remains in possession, he will be deemed in possession under such contract, and not as a defendant to the foreclosure suit, and the purchaser will not be entitled to a writ of assistance to put himself in possession of the premises; he will then be left to his remedy by an action at law for ejectment or otherwise.[2] It is held that the granting of a writ of assistance to put a purchaser into possession of the premises rests in every case in the sound discretion of the court; and that in all cases of doubtful right, the possession will be left to legal adjudication.[3]

§ 600. **Summary proceedings under New York Code.** —By a provision of the New York Code of Civil Procedure,[4] the remedy by summary proceedings to obtain possession of premises in mortgage foreclosures, is restricted to those cases where the foreclosure is conducted by advertisement and not by an equitable action

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[1] Schenck v. Conover, 13 N. J. Eq. (2 Beas.) 220 (1860). See McKomb v. Kankey, 1 Bland. Ch. (Md.) 363 (1807), note C.

[2] Toll v. Hiller, 11 Paige Ch. (N. Y.) 228 (1844).

[3] McKomb v. Kankey, 1 Bland. Ch. (Md.) 363 (1807), note C. See Thomas v. DeBaum, 14 N. J. Eq. (1 McCart.) 37 (1861).

[4] § 2232.

CHAPTER XXIX.

JUDGMENT FOR DEFICIENCY.

REPORTING DEFICIENCY—WHO LIABLE FOR—LIABILITY ON BOND—GUARANTY AND ASSUMPTION—INTENTION OF PARTIES GOVERNS—HOW AMOUNT OF DETERMINED—EXECUTION FOR—MISCELLANEOUS MATTERS.

§ 601. Generally.
602. Referee conducting sale reporting deficiency.
603. Contingent decree for deficiency.
604. Power of court of chancery to decree judgment for deficiency.
605. Judgment for deficiency against mortgagor.
606. Judgment for deficiency against third persons.
607. Deficiency against assignor guaranteeing payment.
608. Deficiency against party assuming mortgage.
609. Mortgaged premises primary fund—Subsequent liability.
610. Assumption of mortgage—Defence by grantee.
611. Assumption of mortgage—When grantee not liable for deficiency.
§ 612. Release from liability on assumption.
613. No liability where deed subject to mortgage.
614. Oral contract of assumption may be enforced.
615. Intention of parties determines question of assumption.
616. No judgment for deficiency against non-resident.
617. No judgment for deficiency for installments not yet due.
618. Deficiency—How determined.
619. When judgment for deficiency may be docketed.
620. When judgment for deficiency becomes a lien.
621. Execution for deficiency.
622. Miscellaneous matters connected with judgments for deficiency.

§ 601. Generally.—All proceedings to collect any deficiency arising on the sale of mortgaged premises under a foreclosure are purely statutory.[1] The statute, authorizing a judgment of deficiency in an action for foreclosure in New York, was enacted to avoid the necessity of a separate action at law, and to enable one court to dispose of the whole case.[2]

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[1] McCrickett v. Wilson, 50 Mich. 513 (1883). In this case it was held that a petition to set such proceedings aside for want of notice was permissible without filing a bill of review.

[2] Scofield v. Doscher, 72 N. Y. 491 (1878); Equitable Life Ins. Co.

In most of the states, statutes have been enacted for the regulation of mortgage foreclosures, giving power to the court, not only to direct the sale of the mortgaged premises and to compel the delivery of the possession thereof to the purchaser, but also to adjudge payment by the mortgagor or by any other person liable for the debt of any deficiency that might remain unsatisfied after the sale of the mortgaged premises, and, as in other actions, to issue the necessary execution upon such judgment of deficiency.[1]

Without statutory authority such an execution could not be issued in a foreclosure against the property of the mortgagor or other person liable for the deficiency remaining unsatisfied after the application of the proceeds of the sale to the payment of the mortgage debt.[2] An action at law was formerly the only remedy for the recovery of such deficiency.

§ 602. **Referee conducting sale reporting deficiency.**— The referee conducting the sale in a mortgage foreclosure, is usually required to report any deficiency remaining unpaid after the sale of the property and the application of the proceeds thereof to the payment of the debt. The referee should ascertain the amount of the deficiency, and also the names of the parties who are liable for its payment, and state these facts in his report to the court; a direction to the referee to report such facts should be included in the decree of sale.[3]

A referee's report of sale, which shows that the apparent deficiency is produced entirely by the unauthorized

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v. Stevens, 63 N. Y. 341 (1875); Thorne v. Newby, 59 How. (N. Y.) Pr. 120 (1880).

[1] N. Y. Code Civ. Proc. § 1627; Florida Code (Bush's Dig.) 849 (1872); North Carolina Code, § 190; Wisconsin Rev. Stat., § 3156. See Equitable Life Ins. Co. v. Stevens, 63 N. Y. 341 (1875); Thorne v. Newby, 59 How. (N. Y.) Pr. 120 (1880); Jarman v. Wiswall, 24 N. J. Eq. (9 C. E. Gr.) 267 (1873). See *ante* § 195 *et seq.*

[2] Stark v. Mercer, 4 Miss. (3 How.) 377 (1839); Fleming v. Sitton, 1 Dev. & B. (N. C.) Eq. 621 (1837); Waddell v. Hewitt, 2 Ired. (N. C.) Eq. 252 (1842); Orchard v. Hughes, 68 U. S. (1 Wall.) 73 (1863); bk. 17 L. ed. 560. But see Wightman v. Gray, 10 Rich. (S. C.) Eq. 518 (1859). See *ante* §§ 195–199.

[3] McCarthy v. Graham, 8 Paige Ch. (N. Y.) 480 (1840).

allowance of a claim to the purchaser, is to be treated as not reporting any deficiency.[1]

§ 603. **Contingent decree for deficiency.**—The plaintiff in an action to foreclose a mortgage can not have a personal judgment against any of the defendants prior to the final decree of foreclosure and sale.[2] The correct practice is, to make a contingent judgment in the decree of foreclosure and sale for the payment of any deficiency which may appear upon the coming in and the confirmation of the report of sale, and that the plaintiff have execution therefor.[3] An execution can not be issued until the deficiency has been ascertained from the report of sale.[4] Where the person adjudged in the decree to be liable for the deficiency, has not appeared in the case, it is the practice in New Jersey, after ascertaining the amount of such deficiency, to award execution therefor *ex parte*.[5]

The deficiency for which a mortgagor is liable, is ascertained by deducting the proceeds of the sale from the amount due on the mortgage for principal and interest, together with the costs and all taxes and assessments.[6] In a case where the decree of sale directed that the mortgagor, or other party personally liable for the debt, should pay any deficiency arising on the sale, the property was struck off for enough to satisfy the mortgage, but the purchaser refused to complete the sale; an order requiring him to do so was obtained, but was not enforced; the plaintiff, without proceeding against him for contempt, procured an order for a resale, and upon the second sale there was a deficiency; it was held that the mortgagor, or other party

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[1] Bache v. Doscher, 67 N. Y. 429 (1876), aff'g 41 N. Y. Supr. Ct. (9 J. & S.) 159. See *ante* § 204

[2] Cobb v. Thornton, 8 How. (N. Y.) Pr. 66 (1852).

[3] Cobb v. Thornton, 8 How. (N. Y.) Pr. 66 (1852); McCarthy v. Graham, 8 Paige Ch. (N. Y.) 480 (1840). See *ante* §§ 202–204.

[4] Bank of Rochester v. Emerson, 10 Paige Ch. (N. Y.) 115 (1843); Howe v. Lemon, 37 Mich. 164 (1877).

[5] White v. Zust, 28 N. J. Eq. (1 Stew.) 107 (1877).

[6] Marshall v. Davies, 78 N. Y. 414 (1879), reversing 16 Hun (N. Y.) 606. See also Mitchell v. Bowne, 63 How. (N. Y.) Pr. 1 (1881); s. c. 14 N. Y. Wk. Dig. 234. See *ante* § 204.

liable for the debt, was personally liable for the deficiency arising on the resale.[1]

The deficiency contemplated by the Code[2] has been held to be only the deficiency arising upon an actual sale under a foreclosure of the mortgage, and not the deficiency caused to a second mortgagee by a sale under a prior mortgage; in the latter case the remedy would be by an action on the bond.[3]

§ 604. **Power of court of chancery to decree judgment for deficiency.** — In the absence of statutory provisions giving it authority, a court of equity possesses no power to give a lien upon or to sequestrate any other property of the mortgagor as an additional security, until the property described in the mortgage has been exhausted;[4] for that reason, it can not decree the payment of any deficiency remaining after the application of the proceeds of the sale of the mortgaged premises to the payment of the debt, unless the court of chancery would have had jurisdiction to enforce the debt without the mortgage.[5]

Thus, where no note, bond, mortgage or other legal obligation, was given to secure the payment of the debt, or, if given, had been lost, a court of equity could, in some states, enforce its payment as an equitable claim against the mortgagor, by a personal judgment for the balance remaining unsatisfied after the sale of the premises.[6]

§ 605. **Judgment for deficiency against mortgagor.** — On the foreclosure of a mortgage by the mortgagee, the

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[1] Goodwin v. Simonson, 74 N. Y. 133 (1878).

[2] N. Y. Code Civ. Proc. § 1627.

[3] Loeb v. Willis, 22 Hun (N. Y.) 508 (1880). See Siewert v. Hamel, 33 Hun (N. Y.) 44 (1884), and note to § 605 *post*.

[4] Clapp v. Maxwell, 13 Neb. 542 (1882).

[5] See Dunkley v. VanBuren, 3 Johns. Ch. (N. Y.) 330 (1818); Hunt v. Lewin, 4 Stew. & Port. (Ala.) 138 (1833); Morgan v. Wilkins, 6 J. J. Marsh. (Ky.) 28 (1831); McGee v. Davie, 4 J. J. Marsh. (Ky.) 70 (1830); Downing v. Palmateer, 1 T. B. Mon. (Ky.) 64 (1824); Stark v. Mercer, 4 Miss. (3 How.) 377 (1839); Fleming v. Sitton, 1 Dev. & B. (N. C.) Eq. 621 (1837); Orchard v. Hughes, 68 U. S. (1 Wall.) 73 (1863); bk. 17 L. ed. 560; Noonan v. Lee, 67 U. S. (2 Black), 499 (1862); bk. 11 L. ed. 278. See *ante* §§ 195–199.

[6] Crutchfield v. Coke, 6 J. J. Marsh. (Ky.) 89 (1831); Waddell v. Hewitt, 2 Ired. (N. C.) Eq. 252 (1842).

debtor is entitled to credit only for the net proceeds realized from the sale, after deducting the costs and expenses of the sale and all liens for taxes.[1] No proceedings can be had upon a judgment or decree to compel the payment of the deficiency until the report of the referee or other officer conducting the sale has been filed and duly confirmed, and the exact amount of such deficiency has been ascertained.[2]

It seems that where the judgment in an action for foreclosure provides, "that if the proceeds of the sale be insufficient to pay the amount so reported to be due to the plaintiff, the said referee specify the amount of such deficiency in his report of sale, and that the defendant pay the same to the plaintiff," it is not necessary to apply to the court for an order confirming the report of the referee before issuing execution against the defendant for the amount of the deficiency, nor to enter any further judgment upon the filing of the said report.[3]

§ 606. Judgment for deficiency against third persons. —In the absence of a statutory provision giving the court authority therefor, a judgment for the deficiency arising after the application of the proceeds of the sale of the mortgaged premises to the payment of the debt secured, can not

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[1] Marshall v. Davies, 78 N. Y. 414 (1879).

[2] Bache v. Doscher, 41 N. Y. Supr. Ct. (9 J. & S.) 150 (1876); Bank of Rochester v. Emerson, 10 Paige Ch. (N. Y.) 359 (1843); Tormey v. Gerhart, 41 Wis. 54 (1876); Baird v. McConkey, 20 Wis. 297 (1866). In Siewert v. Hamel, 33 Hun (N. Y.) 44 (1884), during the pendency of an action brought to foreclose a mortgage, a prior mortgage upon the same premises was foreclosed, and the premises were sold and purchased by the plaintiff. The surplus arising from such sale was applied by the plaintiff in reduction of the amount due upon his second mortgage. The usual judgment of foreclosure was then entered, after the said sale under the prior mortgage, directing the referee to specify the amount of the deficiency in his report of the sale, and adjudging the defendant to pay the same to the plaintiff. Thereafter the plaintiff, without having the premises sold under his judgment, applied for leave to enter a judgment of deficiency for the amount remaining due upon his judgment after applying thereon the amount of surplus money received under the foreclosure of the prior mortgage. The application was held to have been properly made and granted. See *ante* §§ 203, 204, 206, 603.

[3] Moore v. Shaw, 15 Hun (N. Y.) 428 (1878).

be taken against any person liable for the debt, other than the mortgagor himself.[1] And it has been held to be erroneous to render a judgment against a person, who guaranteed the collection of a note secured by a mortgage, for any deficiency which might be found due after the sale of the mortgaged premises; the holder of the note and mortgage must exhaust his remedies against the mortgagor and the mortgaged property before he can proceed against the guarantor.[2]

In some states the only remedy against a third person liable for a mortgage debt or for the deficiency arising upon the sale of the mortgaged property, is by a separate action at law after the deficiency has been ascertained. But where a complaint improperly joins these different causes of action, objection thereto must be taken by answer or demurrer or it will be deemed to have been waived;[3] if no objection is taken, a decree for the deficiency may be entered, although not expressly authorized by statute.[4] The statutory jurisdiction for enforcing the collateral obligations of third persons upon a mortgage foreclosure is permissive and not obligatory, and will not be exercised to their prejudice, unless they have made it necessary by their agreements.[5]

It has been held, that mere delay in foreclosing a mortgage, on which the interest has been regularly paid, if there has been no request or notice to foreclose, will not charge upon the mortgagee the consequences of a depreciation in the value of the property, and will not relieve persons liable for the payment of the mortgage debt as sureties from the effects of a judgment of deficiency.[6]

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[1] See Doan v. Holly, 25 Mo. 357 (1857); s. c. 26 Mo. 186; Faesi v. Goetz, 15 Wis. 231 (1862).

[2] Borden v. Gilbert, 13 Wis. 670 (1861). See *ante* § 233.

[3] McCarthy v. Gerraghty, 10 Ohio St. 438 (1859); Baird v. McConkey, 20 Wis. 297 (1866); Cary v. Wheeler, 14 Wis. 281 (1861); Jessop v. City Bank of Racine, 14 Wis. 331 (1861); Stillwell v. Kellogg, 14 Wis. 461 (1861).

[4] McCarthy v. Gerraghty, 10 Ohio St. 438 (1859); Cary v. Wheeler, 14 Wis. 281 (1861).

[5] Gage v. Jenkinson, 58 Mich. 169 (1885).

[6] Merchants' Ins. Co. of the City of New York v. Hinman, 34 Barb. (N. Y.) 410 (1861); s. c. 13 Abb. (N. Y.) Pr. 110. See Newcomb v. Hale, 90 N. Y. 326 (1882).

§ 607. Deficiency against assignor guaranteeing payment.—The assignor of a bond and mortgage, who guarantees their payment, will be liable on such guaranty for any deficiency that may arise upon a foreclosure and sale.[1] While a person who has guaranteed the collection of a mortgage is a proper defendant to a foreclosure, yet the decree of sale in such a case should provide that no execution shall issue against him until an execution against the parties primarily liable has been returned unsatisfied;[2] such a guaranty is merely a conditional undertaking to pay any deficiency that may arise on foreclosure, and not an absolute guaranty to pay the debt.[3]

Where a guarantor dies pending an action to foreclose a mortgage, the court will have no power to order a judgment for deficiency against him *nunc pro tunc*, for the mortgage debt; it will be necessary to revive the action against his personal representatives.[4]

Under the Wisconsin statute,[5] where a joint and several guaranty is secured by the mortgage of only one of the guarantors, all of them may be made defendants to an action for the foreclosure of the mortgage, and a personal judgment may be obtained against them for any deficiency.[6] Where, upon the sale of a bond and mortgage, the assignor guarantees their payment, he will not necessarily be released from his liability on such guaranty by the failure of the

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[1] Vanderbilt v. Schreyer, 91 N. Y. 392 (1883). See Officer v. Burchell, 44 N. Y. Supr. Ct. (12 J. & S.) 575 (1879); Rushmore v. Gracie, 4 Edw. Ch. (N. Y.) 84 (1843); Bristol v. Morgan, 3 Edw. Ch. (N. Y.) 142 (1837); Jarman v. Wiswall, 24 N. J. Eq. (9 C. E. Gr.) 267 (1873). Such a guarantor, although only conditionally liable, was prior to the adoption of the Code of Civil Procedure, by force of the statute (2 N. Y. Rev. Stat. 191, §§ 153, 154), properly made a party defendant in an action to foreclose the mortgage, and judgment therein against him for a deficiency was properly granted. Vanderbilt v. Schreyer, 91 N. Y. 392 (1883). See *ante* §§ 233-236.

[2] See Harlem Sav. Bank v. Mickelsburgh, 57 How. (N. Y.) Pr. 106 (1878); Leonard v. Morris, 9 Paige Ch. (N. Y.) 90 (1841); Curtis v. Tyler, 9 Paige Ch. (N. Y.) 432 (1842).

[3] Vanderbilt v. Schreyer, 91 N. Y. 392 (1883).

[4] Grant v. Griswold, 82 N. Y. 569 (1880), aff'g 21 Hun (N. Y.) 509.

[5] Wis. Rev. Stat. § 3156.

[6] Fon du Lac Harrow Co. v. Haskins, 51 Wis. 135 (1881).

assignee to comply with a notice requiring him to collect the indebtedness by legal proceedings, although the property may have depreciated in value and the obligor become insolvent after the service of the notice.[1]

Where a person assigns a bond and mortgage, guaranteeing their collection, and thereby places himself in the position of a surety for the payment of the debt, and subsequently, for his indemnity, takes the bond of a third person as collateral security for such payment, the principal creditor will, in equity, be entitled to the benefit of such collateral security; and this is true, though he may not originally have relied upon the credit of such collateral security, nor known of its existence. In an action to foreclose the mortgage, the obligor on such collateral bond may properly be made a defendant, to enable the plaintiff to obtain a decree against him for the payment of any deficiency which may remain after he has exhausted his remedy against the mortgagor.[2]

Where a mortgagee, upon assigning his bond and mortgage, guarantees their payment, the extent of his liability in case of a deficiency, if he received less than the face of the mortgage, will be limited to the actual amount paid for the bond and mortgage by the purchaser, with interest, although a larger consideration may be expressed in the assignment.[3]

§ 608. Deficiency against party assuming mortgage. —Most of the states have enacted statutes, giving to their courts authority to render personal judgments in mortgage foreclosures for any deficiency arising after the application of the proceeds of the sale of the property to the payment of the mortgage debt; under such statutes a judgment for deficiency may be rendered against the mortgagor, or against a party who has assumed the payment of the mortgage debt,[4] or against any one who has become

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[1] Newcomb v. Hale, 90 N. Y. 326 (1882). See *ante* §§ 233–236.

[2] Curtis v. Tyler, 9 Paige Ch. (N. Y.) 432 (1842).

[3] Rapelye v. Anderson, 4 Hill (N. Y.) 472 (1842). See Goldsmith v. Brown, 35 Barb. (N. Y.) 484 (1861).

[4] See Marshall v. Davies, 78 N. Y. 414 (1879); Gifford v. McCloskey, 38 Hun (N. Y.) 350 (1885); Douglass v. Wells, 18 Hun (N. Y.) 88 (1879);

a guarantor or surety of it,[1] or who has given a collateral undertaking for its payment.[2] The mortgagee may also maintain an action at law against any such party whenever the attending circumstances justify the conclusion that the promise was made for his benefit.[3]

But a mortgagee's right to proceed in equity against one who has assumed to pay his mortgage, does not extend to a claim for the purchase money on a sale of the mortgaged premises, nor to the vendor's lien to secure it.[4] Where a person purchases mortgaged premises, assuming and agreeing to pay the mortgage debt as a part of the consideration

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Tuttle v. Armstead, 53 Conn. 175 (1885); Bassett v. Bradley, 48 Conn. 224 (1880); Bay v. Williams, 112 Ill. 91 (1884); s. c. 54 Am. Rep. 209; Birke v. Abbott, 103 Ind. 1 (1885); Wright v. Briggs, 99 Ind. 563 (1884); Ellis v. Johnson, 96 Ind. 377 (1883); Logan v. Smith, 70 Ind. 597 (1880); Gage v. Jenkinson, 58 Mich. 169 (1885); Unger v. Smith, 44 Mich. 22 (1880); Fitzgerald v. Barker, 70 Mo. 685 (1879); Heim v. Vogel, 69 Mo. 529 (1879); Bond v. Dolby, 17 Neb. 491 (1885); Cubberly v. Yager, 42 N. J. Eq. (15 Stew.) 289 (1886); Vreeland v. VanBlarcom, 35 N. J. Eq. (8 Stew.) 530 (1882); Allen v. Allen, 34 N. J. Eq. (7 Stew.) 493 (1881); Trustees for support of Public Schools v. Anderson, 30 N. J. Eq. (3 Stew.) 366 (1879); Brewer v. Maurer, 38 Ohio St. 543 (1883); s. c. 43 Am. Rep. 436; Davis v. Hulett, 58 Vt. 90 (1886); Palmeter v. Carey, 63 Wis. 426 (1885). See *ante* §§ 218–232. Where a party purchases real estate and assumes to pay one-half of certain mortgages thereon, he is a proper party to a foreclosure of one of the mortgages, but he is liable to a personal judgment for only one-half of the mortgage debt. Logan v. Smith, 70 Ind. 597 (1880).

The cases on this point, however, are not in harmony. Some of the courts hold that no action lies by the mortgagee, on a promise made to the vendee by the purchaser of an equity of redemption to assume and pay the mortgage on the land, as part of the consideration named in the deed, because it is a promise to a third person. Meech v. Ensign, 49 Conn. 191 (1881); s. c. 44 Am. Rep. 225; Wallace v. Furber, 62 Ind. 103 (1878); Prentice v. Brimhall, 123 Mass. 291 (1877); Booth v. Conn. Mut. Life Ins. Co., 43 Mich. 299 (1880); Stuart v. Worden, 42 Mich. 154 (1879). But see Bassett v. Bradley, 48 Conn. 224 (1880).

[1] Jones v. Steinbergh, 1 Barb. Ch. (N. Y.) 250 (1845); Bristol v. Morgan, 3 Edw. Ch. (N. Y.) 142 (1837); Jarman v. Wiswall, 24 N. J. Eq. (9 C. E. Gr.) 267 (1873). See also Sauer v. Steinbauer, 14 Wis. 70 (1861).

[2] Halsey v. Reed, 9 Paige Ch. (N. Y.) 446 (1842).

[3] Bassett v. Bradley, 48 Conn. 224 (1880).

[4] Emley v. Mount, 32 N. J. Eq. (5 Stew.) 470 (1880).

of the conveyance, he thereby merely agrees to pay his own debt to a third person, who, by an equitable subrogation, stands in the place of the promisee vendor.[1] In those cases where the mortgagor sells the equity of redemption subject to the mortgage, and the purchaser assumes and agrees to pay the mortgage debt as a portion of the purchase money, the grantee becomes personally liable for the payment of the debt in the first instance; if the mortgagor is subsequently compelled to pay such debt, he may recover it from his grantee in an action in equity or at law.[2]

While one who takes a deed of mortgaged land will be personally liable on the foreclosure of the mortgage, if his deed expressly binds him to pay the debt,[3] yet a covenant to pay can not be implied from either the deed or the mortgage.[4] Where a purchaser accepts and holds under a deed containing a clause reciting that he assumes and agrees to pay a note secured by an existing mortgage on the land, he thereby subjects himself to a liability for a personal judgment for any deficiency that may exist after the sale of the premises under a decree of foreclosure; and such liability may be enforced on the foreclosure.[5]

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[1] Bassett v. Bradley, 48 Conn. 224 (1880). See *ante* §§ 218–232.

[2] Comstock v. Drohan, 71 N. Y. 9 (1877); Hartley v. Harrison, 24 N. Y. 170 (1861); Russell v. Pistor, 7 N. Y. 171 (1852); s. c. 57 Am. Dec. 509; Cornell v. Prescott, 2 Barb. (N. Y.) 16 (1847); Ferris v. Crawford, 2 Den. (N. Y.) 595 (1845); Thayer v. Marsh, 11 Hun (N. Y.) 501 (1877); Marsh v. Pike, 10 Paige Ch. (N. Y.) 595 (1844); Halsey v. Reed, 9 Paige Ch. (N. Y.) 447 (1842); Blyer v. Monholland, 2 Sandf. Ch. (N. Y.) 478 (1845). As to the liability of the grantee of a grantee, see Marsh v. Pike, 10 Paige Ch. (N. Y.) 595 (1844).

[3] Ranney v. McMullen, 5 Abb. (N. Y.) N. C. 246 (1878); Wales v. Sherwood, 52 How. (N. Y.) Pr. 413 (1876).

[4] Equitable Life Ins. Co. v. Bostwick, 100 N. Y. 628 (1885); Gage v. Jenkinson, 58 Mich. 169 (1885).

[5] Gifford v. McCloskey, 38 Hun (N. Y.) 350 (1885); Bay v. Williams, 112 Ill. 91 (1884); s. c. 54 Am. Rep. 209; Scarry v. Eldridge, 63 Ind. 44 (1878); Unger v. Smith, 44 Mich. 22 (1880); Winans v. Wilkie, 41 Mich. 265 (1879); Carley v. Fox, 38 Mich. 387 (1878); Miller v. Thompson, 34 Mich. 10 (1876); Crawford v. Edwards, 33 Mich. 360 (1876); Fitzgerald v. Barker, 70 Mo. 685 (1879); Heim v. Vogel, 69 Mo. 529 (1879); Davis v. Hulett, 58 Vt. 90 (1886).

In Lea v. Fabbri, 45 N. Y. Supr. Ct. (13 J. & S.) 361 (1879), it was held that where premises were conveyed, "subject to a certain mortgage on the southerly portion of the

§ 609. **Mortgaged premises primary fund—Subsequent liability.**—Where mortgaged premises are sold to a person who takes them subject to a mortgage and assumes and agrees to pay the mortgage debt as a part of the consideration for the conveyance, the mortgaged premises are the primary fund for the payment of the mortgage debt,[1] and thereafter, the party purchasing will be liable,[2] and his grantor, the original mortgagor, will stand in the position of a surety to such defendant.[3] The obligation of the purchaser inures in equity to the benefit of the holder of the mortgage, who, upon foreclosure, is entitled to a judgment against such purchaser for any deficiency which may exist after the application of the proceeds of the sale to the mortgage debt.[4]

But where a mortgagor sells the mortgaged premises, receiving the full consideration therefor, and his conveyance is not made subject to the payment of the mortgage, he will remain the principal debtor, and the land simply security for the debt, although the deed may contain no covenant

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same" made by the vendor, which mortgage the vendee assumed and agreed to pay, by a clause in the conveyance, which stated that the amount of the debt has "been deducted from the consideration hereinbefore expressed," there is no equitable lien upon the mortgaged premises in favor of the vendor; this, though the vendee, after paying interest for a certain time, makes default, and allows the mortgage to be foreclosed and the vendor to be thereby charged with a judgment for deficiency. The assumption of the mortgage is *pro tanto* the consideration. *A fortiori*, there is no equitable lien upon that portion of the premises not covered by the mortgage. See *ante* §§ 218–232.

[1] Birke v. Abbott, 103 Ind. 1 (1885). And this is true, although the deed may contain a covenant on the part of the grantee to pay the mortgage debt, such covenant being intended to indemnify the grantor against the contingency that the land may not bring enough to pay such debt. Wilbur v. Warren, 104 N. Y. 192 (1887).

[2] Ellis v. Johnson, 96 Ind. 377 (1884).

[3] Drury v. Clark, 16 How. (N. Y.) Pr. 424 (1857). See *ante* § 202 and chap. xi.

[4] See Ricard v. Sanderson, 41 N. Y. 179 (1869); Ranney v. McMullen, 5 Abb. (N. Y.) N. C. 246 (1878); Thayer v. Marsh, 11 Hun (N. Y.) 501 (1877); aff'd 75 N. Y. 340; Comstock v. Drohan, 8 Hun (N. Y.) 373 (1876); aff'd 71 N. Y. 9; Halsey v. Reed, 9 Paige Ch. (N. Y.) 446 (1842); Stiger v. Mahone, 24 N. J. Eq. (9 C. E. Gr.) 426 (1874); Hoy v. Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 563 (1868); Klapworth v. Dressler, 13 N. J. Eq. (2 Beas.) 62 (1860); s. c. 78 Am. Dec. 69.

of title on the part of the grantor.[1] In an action to foreclose a mortgage, where more than one party is personally liable for the payment of the mortgage debt, the judgment should provide for issuing an execution for the deficiency against the several defendants in the order in which they are liable as principal or surety.[2]

§ 610. **Assumption of mortgage—Defence by grantee.** —The purchaser of mortgaged premises, who assumes the payment of the mortgage as a part of the consideration of the conveyance, is liable to the mortgagee and is a proper party to a foreclosure under the Code ;[3] he is estopped from contesting the validity of the mortgage, and will be liable to his grantor if the latter is compelled to pay any part of the mortgage debt.[4] Proof of the recorded deed containing such covenants raises the presumption that the title is vested in the grantee and that he is liable.[5]

The grantor can not, by any act or agreement of his own, release or affect his grantee's liability to the mortgagee, except where an oral agreement is made contemporaneously with the conveyance in which the grantee assumed the mortgage, to the effect that the grantor will, at any time, accept a reconveyance and release the grantee from his covenant ; and where such a verbal agreement has been carried out, the liability of the grantee on the mortgage will be extinguished.[6] A grantee who assumes the payment of a mortgage will be deemed to have entered into an express undertaking to pay the debt, although he may not sign but merely accept the deed by which the conveyance is made.[7]

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[1] Wadsworth v. Lyon, 93 N. Y. 201 (1883) ; s. c. 45 Am. Rep. 190.

[2] Luce v. Hinds, Clarke Ch. (N. Y.) 453 (1841) ; Weed v. Calkins, 24 Hun (N. Y.) 582 (1881) ; Curtis v. Tyler, 9 Paige Ch. (N. Y.) 432, 435 (1842). See *ante* § 202 and chap. xi.

[3] N. Y. Code Civ. Proc. § 1627 ; Ayers v. Dixson, 78 N. Y. 318 (1879).

[4] Parkinson v. Sherman, 74 N. Y. 88 (1878) ; Comstock v. Drohan, 71 N. Y. 9 (1877) ; Fairchild v. Lynch, 46 N. Y. Supr. Ct. (14 J. & S.) 1 (1880) ; Thayer v. Marsh, 11 Hun (N. Y.) 501 (1877). See *ante* §§ 218–232.

[5] Lawrence v. Farley, 24 Hun (N. Y.) 293 (1881).

[6] Devlin v. Murphy, 5 Abb. (N. Y.) N. C. 242 (1878) ; s. c 56 How. (N. Y.) Pr. 326.

[7] Smith v. Truslow, 84 N. Y. 660 (1881); Atlantic Dock Co. v. Leavitt,

§ 611. Assumption of mortgage—When grantee not liable for deficiency.—Where a grantee has assumed the payment of a mortgage, he will not be liable for a judgment of deficiency unless his grantor was liable.[1] Where a deed contains a covenant that the grantee shall pay the mortgage on the property, an extension of the time of payment by the holder of the mortgage will discharge the grantor;[2] and when the mortgagee releases the grantee, he will thereby discharge the mortgagor also from liability.[3]

It has been held, however, that one liable for the deficiency will not be released because the time for completing the sale was extended and a resale subsequently ordered, without proceeding against the original purchaser to compel him to complete his purchase, if it does not appear that the purchaser was personally responsible and that his bid could have been enforced. Neither will he be released where it does not appear that, if the resale had been ordered immediately, the mortgaged premises would have brought more; particularly is this true where no fraud was practiced and no request was made that the purchaser should be proceeded against,—for the plaintiff in a foreclosure may elect to apply for a resale or to compel the purchaser to complete his purchase.[4]

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54 N. Y. 35 (1873); s. c. 13 Am. Rep. 556; Ricard v. Sanderson, 41 N. Y. 179 (1869); Belmont v. Coman, 22 N. Y. 438 (1860); Collins v. Rowe, 1 Abb. (N. Y.) N. C. 97 (1876); Marsh v. Pike, 10 Paige Ch. (N. Y.) 595 (1844); Furnas v. Durgin, 119 Mass. 500 (1876); s. c. 20 Am. Rep. 341; Miller v. Thompson, 34 Mich. 10 (1876); Taylor v. Preston, 79 Pa. St. 436 (1875). See *ante* §§ 230–231.

[1] Cashman v. Henry, 75 N. Y. 103 (1878); Vrooman v. Turner, 69 N. Y. 280 (1877); Smith v. Cross, 16 Hun (N. Y.) 487 (1879); Norwood v. DeHart, 30 N. J. Eq. (3 Stew.) 412 (1879).

[2] Spencer v. Spencer, 95 N. Y. 353 (1884); Marshall v. Davies, 78 N. Y. 414 (1879), reversing 16 Hun (N. Y.) 606; Calvo v. Davies, 73 N. Y. 211 (1878), aff'g 8 Hun (N. Y.) 222; s. c. 29 Am. Rep. 130. See Knoblock v. Zschwetzke, 53 N. Y. Supr. Ct. (21 J. & S.) 391 (1886); s. c. 1 N. Y. State Rep. 238.

[3] Paine v. Jones, 76 N. Y. 274 (1879), aff'g 14 Hun (N. Y.) 577; Riggs v. Boucicault, 33 Hun (N. Y.) 667 (1884); s. c. 20 N. Y. Wk. Dig. 184. See *ante* §§ 218–232.

[4] Goodwin v. Simonson, 74 N. Y. 133 (1878).

It has been held, where a grantee takes a conveyance by a warranty deed containing a covenant to pay the mortgage, and he is subsequently evicted by a paramount title, that he will not be liable on a judgment for deficiency, because the consideration for the covenant has wholly failed.[1] And in an action to foreclose a mortgage, parol evidence is admissible to show that the clause in a deed, whereby the grantee assumes the mortgage, was inserted by mistake and without the knowledge of such grantee.[2] And where the grantee in a conveyance containing such a clause, was unable to produce the evidence that the clause was inserted by mistake and allowed judgment to be taken against him by default, but two years later found the evidence, the judgment was opened on motion and he was allowed to come in and defend.[3]

§ 612. **Release from liability on assumption.**—Whether the personal liability incurred by a grantee to the holder of a mortgage, by assuming its payment, can be released by a subsequent agreement between such grantee and his grantor, is an unsettled question.[4] Thus, it is held in New Jersey, that the covenant by a grantee to pay the mortgage debt is a contract only for the indemnity of the grantor, and may be released or discharged by him;[5] but that a release given without consideration by an insolvent grantor, after notice of foreclosure, and for the sole and

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[1] Dunning v. Leavitt, 85 N. Y. 30 (1881); s. c. 39 Am. Rep. 617, reversing 20 Hun (N. Y.) 178.

[2] DeyErmand v. Chamberlain, 88 N. Y. 658 (1882). See *ante* §§ 218–232.

[3] Trustees, &c., v. Merriam, 59 How. (N. Y.) Pr. 226 (1880). See also Union Dime Saving Institution v. Clark, 59 How. (N. Y.) Pr. 342 (1880).

[4] See Judson v. Dada, 79 N. Y. 373 (1880); Hartley v. Harrison, 24 N. Y. 170 (1861); Douglass v. Wells, 18 Hun (N. Y.) 88 (1879); Stephens v. Casbacker, 8 Hun (N. Y.) 116 (1876); Bay v. Williams, 112 Ill. 91 (1884); s. c. 54 Am. Rep. 209; Berkshire Life Ins. Co. v. Hutchings, 100 Ind. 496 (1884); Young v. Trustees for the support of Public Schools, 31 N. J. Eq. (4 Stew.) 290 (1879); Trustees for the support of Public Schools v. Anderson, 30 N. J. Eq. (3 Stew.) 366 (1879); Brewer v. Maurer, 38 Ohio St. 543 (1882); s. c. 43 Am. Rep. 436.

[5] Young v. Trustees for the support of Public Schools, 31 N. J. Eq. (4 Stew.) 290 (1879). See *ante* § 231.

admitted purpose of defeating the mortgagee's claim for a judgment of deficiency, is void in equity.[1]

On the other hand, it has been held in Illinois[2] and in New York,[3] that such an agreement to pay the mortgage debt, creates an absolute and irrevocable obligation in favor of the mortgagee, which can not be released or affected by any act or agreement of the mortgagor or the grantee to which the mortgagee does not assent; in other cases, it is held that such an agreement becomes irrevocable only after it has been accepted and acted upon by the mortgagee.[4]

Where a grantee, who has assumed the payment of a mortgage, subsequently reconveys the land in good faith to his grantor, who in turn assumes the payment of such debt, the liability of the first grantee to the holder of the mortgage will be thereby terminated.[5]

§ 613. No liability where deed subject to mortgage.— It is well settled that the acceptance of a conveyance containing words importing that the grantee will pay the mortgage, which is a lien upon the premises purchased, binds him to discharge such incumbrance as effectually as though he had signed the deed. No express or formal words are necessary to create this obligation, as the liability depends entirely upon the agreement of the parties;[6] yet the mere fact that the grantee purchased subject to the mortgage, and that a clause to that effect was inserted in the deed, will not alone render the grantee personally liable for the mortgage debt nor create such liability; the words used must clearly show that such obligation was intended by the one party and knowingly assumed by the other.[7]

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[1] Trustees for the support of Public Schools v. Anderson, 30 N. J. Eq (3 Stew.) 366 (1879).

[2] Bay v. Williams, 112 Ill. 91 (1884); s. c. 54 Am. Rep. 209.

[3] Douglass v. Wells, 18 Hun (N. Y.) 88 (1879). See *ante* §§ 230, 231.

[4] See Berkshire Life Ins. Co. v. Hutchings, 100 Ind. 496 (1884); Brewer v. Maurer, 38 Ohio St. 543 (1882); s. c. 43 Am. Rep. 436.

[5] Laing v. Bryne, 34 N. J. Eq. (7 Stew.) 52 (1881). But see *ante* § 232.

[6] Belmont v. Coman, 22 N. Y. 438 (1861); s. c. 78 Am. Dec. 213.

[7] Equitable Life Assurance Soc. v. Bostwick, 100 N. Y. 628 (1885); Smith v. Truslow, 84 N. Y. 660 (1881); Collins v. Rowe, 1 Abb. (N. Y.) N. C. 97 (1876); Johnson v. Monell, 13 Iowa, 300 (1862); Fiske v Tolman, 124 Mass. 254 (1878); s.

As between the mortgagor and his grantee, the latter is secondarily liable for the whole mortgage debt, the land conveyed being primarily liable.[1] A grantee purchasing mortgaged premises subject to the incumbrance, not being personally liable for the debt, will simply lose the premises in case of foreclosure,[2] because in such case the land is the primary fund for the payment of the debt, and must be so applied.[3]

The most that can be claimed for the words "under and subject to" in a conveyance of land, is that as between the parties, they create a covenant of indemnity to the grantor on the part of the grantee.[4] Yet it is said that where a purchaser buys mortgaged premises from the mortgagor subject to the mortgage debt, though the deed may not in terms bind him to pay such debt, he is to be treated, as between himself and the mortgagor, as having assumed the mortgage, and is personally liable for whatever deficiency may remain after the foreclosure sale.[5]

§ 614. **Oral contract of assumption may be enforced.**— Where, at the time of conveying land, it is orally agreed that the grantee shall assume and pay a mortgage, for the payment of which the grantor is liable, the latter may, if subsequently compelled to pay it, recover the amount so paid from the grantee, though the conveyance contains no

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c. 26 Am. Rep. 659; Strong v. Converse, 90 Mass. (8 Allen), 557 (1864); s. c. 85 Am. Dec. 732; Hall v. Morgan, 79 Mo. 47 (1883); Lawrence v. Towle, 59 N. H. 28 (1879); Woodbury v. Swan, 58 N. H. 380 (1883); Walker v. Goldsmith, 7 Oreg. 161 (1879). See *ante* §§ 218-232.

[1] Moore v. Clark, 40 N. J. Eq. (13 Stew.) 152 (1885).

[2] Winans v. Wilkie, 41 Mich. 264 (1879).

[3] Johnson v. Corbett, 11 Paige Ch. (N. Y.) 265 (1844); Halsey v. Reed, 9 Paige Ch. (N. Y.) 446 (1842); Forgy v. Merryman, 14 Neb. 516 (1883).

[4] Taylor v. Mayer, 93 Pa. St. 42 (1880). See Samuel v. Peyton, 88 Pa. St. 465 (1878); also *ante* § 224 and *post* § 615.

[5] Canfield v. Shear, 49 Mich. 313 (1882). It was held by the supreme court of Michigan in Sheldon v. Holmes, 58 Mich. 138 (1885), that on the dismissal of a bill of foreclosure against a subsequent *bona fide* purchaser who has not made full payment, he may be held for such sums as remain due after he has been notified of the complainant's equities.

agreement on the part of the grantee to assume the mortgage, but is only made subject to it.[1] The grantee, however, may so contract with his grantor as to make himself personally liable to the mortgagee. Thus, where the amount of the mortgage debt forms a part of the consideration of the purchase, and by the contract is to be paid by the purchaser, he will be personally liable where he has retained that amount out of the purchase money.[2]

But the deduction of the amount of the mortgage debt from the purchase price on a sale of the land, in the absence of an express agreement to pay, does not impose upon the grantee the absolute duty of paying the mortgage debt. While such deduction may be evidence of the grantor's intention to subject the land to such payment, it is not controlling nor conclusive, and it may be inferred that the deduction was made to protect the grantee against an actionable incumbrance.[3]

§ 615. Intention of parties determines question of assumption.—Whether a personal liability is assumed in any case is always dependent on the intention of the parties; unless the parties have declared this intention in express words no liability will be incurred. If the deed merely recites that the land is taken subject to a certain mortgage, there will be no personal liability;[4] neither will the words "under and subject" to a mortgage which is specified, import a promise to pay, nor create a personal liability.[5]

In those cases where there are words in the deed importing that the grantee is to pay the mortgage, subject to which he takes the land, he will be deemed to have entered into an express undertaking to do so by the mere acceptance

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[1] Taintor v. Hemmingway, 18 Hun (N. Y.) 458 (1879).

[2] Smith v. Truslow, 84 N. Y. 660 (1881); Winans v. Wilkie, 41 Mich. 264 (1879). See *ante* § 224.

[3] Bennett v. Bates, 94 N. Y. 354 (1884).

[4] Belmont v. Coman, 22 N. Y. 438 (1860); s. c. 78 Am. Dec. 213; Hull v. Alexander, 26 Iowa, 569 (1869).

[5] See Girard Life Ins. & Trust Co. v. Stewart, 86 Pa. St. 89 (1878); Lennig's Estate, 52 Pa. St. 135 (1866). See *ante* § 613.

of the deed, and by taking possession of the property under it.[1]

The grantee of mortgaged premises will be liable for the payment of the mortgage debt only where such liability was a part of the bargain for the sale and conveyance of such premises.[2] Therefore, where a clause is inserted in the deed of conveyance without the knowledge of the grantee, by which he is made to assume and agree to pay the mortgage, and he has no knowledge or notice of the insertion of such clause until after the commencement of foreclosure proceedings, he may set up in his answer that the insertion of such clause was a fraud and without his knowledge, and he may have the deed reformed by striking out such clause.[3]

§ 616. No judgment of deficiency against non-resident. —A personal judgment for deficiency can not be rendered against a non-resident who has not appeared in the action, or who has not been personally served with the summons within the state.[4] Where the statute provides for service by publication, a judgment obtained against a non-resident upon such service can be enforced against the mortgaged property only; such a judgment does not impose a personal liability upon him.[5]

But it has been said that due process of law, without which one can not be bound by a judicial decree nor deprived of his property, does not necessarily require the personal service of a notice of the proceedings;[6] and that

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[1] Ricard v. Sanderson, 41 N. Y. 179 (1869); Belmont v. Coman, 22 N. Y. 438 (1860); s. c. 78 Am. Dec. 213; Lawrence v. Fox, 20 N. Y. 268 (1859); Trotter v. Hughes, 12 N. Y. 74 (1854); s. c. 62 Am. Dec. 137; Vail v. Foster, 4 N. Y. 312 (1850); Marsh v. Pike, 10 Paige Ch. (N. Y.) 595 (1844); Halsey v. Reed, 9 Paige Ch. (N. Y.) 446 (1842); Curtis v. Tyler, 9 Paige Ch. (N. Y.) 432 (1842); Blyer v. Monholland, 2 Sandf. Ch. (N. Y.) 478 (1845); Miller v. Thompson, 34 Mich. 10 (1876).

[2] Parker v. Jenks, 36 N. J. Eq. (9 Stew.) 398 (1883). See DeyErmand v. Chamberlain, 22 Hun (N. Y.) 110 (1880); aff'd 88 N. Y. 658.

[3] See DeyErmand v. Chamberlain, 88 N. Y. 658 (1882); Albany City Sav. Inst. v. Burdick, 87 N. Y. 40 (1882). See *ante* § 610.

[4] Schwinger v. Hickok, 53 N. Y. 280 (1873); Lawrence v. Fellows, Walk. Ch. (Mich.) 468 (1844). See *ante* § 203.

[5] Schwinger v. Hickok, 53 N. Y. 280 (1873).

[6] *In re* Empire State Bank, 18 N.

the legislature may declare that judgments obtained against a non-resident, upon service by publication, may be enforced against all property of such defendant found within the state where the judgment is rendered.[1]

§ 617. **No judgment of deficiency for installments not yet due.**—On a mortgage foreclosure, a personal judgment can not be rendered against the mortgagor, or other person liable for the payment of the debt, for any deficiency before such debt becomes due according to the contract.[2] It seems that a judgment of foreclosure for the whole amount due and to become due on several notes, secured by a mortgage or otherwise, is not erroneous, if rendered in conformity to law.[3] But it has been said that where a mortgage securing a debt payable in installments, some of which are due and others yet to become due, is foreclosed, the court can only direct, as to the installments not due, at what time and upon what default subsequent executions shall issue to collect the amounts of such installments.[4]

Where a mortgage provides that, upon default in the payment of an installment of the debt, or in the payment of the interest, the whole debt shall immediately become due and payable, a personal judgment may be entered for the whole amount upon the first default in the payment of the principal or interest.[5]

§ 618. **Deficiency—How determined.**—In a mortgage foreclosure the mortgagor is entitled to be credited on the mortgage debt only with the net proceeds realized from

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Y. 199 215 (1858). See Schwinger v. v. Hickok, 53 N. Y. 284 (1873).

[1] See Bissell v. Briggs, 9 Mass. 462 (1813); s. c. 6 Am. Dec. 88; Boswell v. Otis, 50 U. S. (9 How.) 336 (1850); bk. 13 L. ed. 161; Thompson v. Emmert, 4 McL. C. C. 96 (1846).

[2] Danforth v. Coleman, 23 Wis. 528 (1868). See Skelton v. Ward, 51 Ind. 46 (1875); also *ante* § 204.

[3] Allen v. Parker, 11 Ind. 504 (1858).

[4] Skelton v. Ward, 51 Ind. 46 (1875). See *ante* § 204.

[5] Hatcher v. Chancey, 71 Ga. 689 (1883); Miller v. Remley, 35 Ind. 539 (1871); Hunt v. Harding, 11 Ind. 245 (1858); Lacoss v. Keegan, 2 Ind. 406 (1850); Cecil v. Dynes, 2 Ind. 266 (1850); Greenman v. Pattison, 8 Blackf. (Ind.) 465 (1847); Darrow v. Scullin, 19 Kan. 57 (1877); Adams v. Essex, 1 Bibb (Ky.) 149 (1808); s. c. 4 Am. Dec. 623; Reddick v. Gressman, 49 Mo. 389

the sale of the premises, and will continue liable for all deficiency remaining unpaid. The amount of the deficiency is to be ascertained by deducting from the proceeds of the sale all taxes and other liens, together with the expenses of the sale, and by treating the balance as net proceeds, which must be credited upon the amount due on the bond and mortgage for principal and interest; the balance then remaining unpaid will be the deficiency.[1] A purchase by the plaintiff will not vary the rule.[2]

It has been held that a defendant in an action in another state to recover the balance of the mortgage debt, after a foreclosure and sale of the mortgaged property in New York, can not show that the real value of the property was

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(1872); Bank v. Chester, 11 Pa. St. 282, 290 (1849); Scheibe v. Kennedy, 64 Wis. 564, 567 (1875); Manning v. McClurg, 14 Wis. 350 (1861). See *ante* § 204.

[1] See Sidenberg v. Ely, 90 N. Y. 257, 262–263 (1882); s. c. 43 Am. Rep. 163; Marshall v. Davies, 78 N. Y. 414 (1879); s. c. 58 How. (N. Y.) Pr. 231, reversing 16 Hun (N. Y.) 606; Cornell v. Woodruff, 77 N. Y. 203 (1879); Williams v. Townsend, 31 N. Y. 411, 414 (1865); Robinson v. Ryan, 25 N. Y. 320 (1862); Eagle Fire Ins. Co. v. Pell, 2 Edw. Ch. (N. Y.) 631 (1836); Faure v. Winans, Hopk. Ch. (N. Y.) 283 (1824); s. c. 14 Am. Dec. 545; Brevoort v. Randolph, 7 How. (N. Y.) Pr. 398 (1853); Weed v. Hornby, 35 Hun (N. Y.) 580, 582 (1885); Burr v. Veeder, 3 Wend. (N. Y.) 412 (1829). See *ante* § 204.

[2] In the case of Cornell v. Woodruff, 77 N. Y. 203 (1879), by the judgment in a foreclosure suit and by the terms of sale, all liens upon the premises for taxes and assessments were to be deducted from the proceeds of the sale. The plaintiff became the purchaser. The premises were situated in the city of Brooklyn, and at the time of the sale several years' municipal taxes were in arrears, for which the mortgaged premises had been sold. Certificates of sale had been issued, which were held by the plaintiff. No lease had been executed. After the foreclosure sale, the plaintiff caused the amount necessary to redeem the premises from the tax sales to be deposited in the proper office, and furnished to the sheriff the certificate of deposit and redemption, the amount of which he deducted from the purchase money as liens for taxes, and reported a deficiency against the mortgagor. Held no error; that the certificates of sale were liens to the amount necessary to redeem, *i. e.*, the amount of taxes, expenses of sale and interest at the rate allowed by law upon such sales; and that the right to allow and deduct from the proceeds of sale the amount so necessary to redeem was not affected by the fact that the plaintiff himself held the certificates.

greater than the amount for which it was sold.[1] The judgment in a foreclosure fixes the amount due on the obligation and security, and is a final adjudication on that point; and no objections can be made to the issuing of an execution for the deficiency, unless they arose after the confirmation of the foreclosure sale and, recognizing the decree, tend to the satisfaction of the judgment.[2]

Under the existing statutes of Wisconsin, a personal judgment against the mortgagor for the whole amount of the mortgage debt, or even for the deficiency after a sale of the mortgaged property, can not be entered with the decree of foreclosure, though such decree may include a direction for a subsequent judgment of deficiency, if demanded in the complaint. A judgment for deficiency can be entered only after such deficiency has been duly ascertained, and it can be ascertained only after the sale has been made and confirmed. A judgment in violation of this rule will be reversed.[3]

§ 619. When judgment for deficiency may be docketed. —In a mortgage foreclosure, a personal judgment can not be rendered for the payment of any deficiency until the amount of such deficiency has been ascertained by the officer conducting the sale, and his report thereof has been confirmed by the court.[4] Whatever may be the form of the debt, an absolute personal judgment for any deficiency can not be rendered on foreclosure, but only a contingent judgment against the defendants to the extent of any deficiency which may remain after the sale of the mortgaged premises.[5]

It has been held that the court may make a contingent decree for the payment of any deficiency against the

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[1] Belmont v. Cornen, 48 Conn. 338 (1880).

[2] Haldane v. Sweet, 58 Mich. 429 (1885).

[3] Welp v. Gunther, 48 Wis. 543 (1879).

[4] See Bache v. Doscher, 41 N. Y. Supr. Ct. (9 J. & S.) 150 (1876); DeAgreda v. Mantel, 1 Abb. (N. Y.) Pr. 130 (1854); Cobb v. Thornton, 8 How. (N. Y.) Pr. 66 (1852); Cormerais v. Genella, 22 Cal. 116 (1863); Mickle v. Maxfield, 42 Mich. 304 (1879); Howe v. Lemon, 37 Mich. 164 (1877); Clapp v. Maxwell, 13 Neb. 542, 547 (1882).

[5] Brown v. Willis, 67 Cal. 235 (1885). See Siewert v. Hamel, 33 Hun (N. Y.) 44 (1884); Loeb v. Willis, 22 Hun (N. Y.) 508 (1880).

mortgagor, or other party personally liable for the mortgage debt, previous to the sale or after it, without waiting for the confirmation of the report of sale.[1]

§ 620. **When judgment for deficiency becomes a lien.**—A personal decree for the deficiency, after the application of the proceeds of the sale to pay the mortgage debt, does not have the force and effect of a judgment at law and become a lien upon the real property of the person against whom it is taken, until the excess of the mortgage debt over the proceeds of the sale has been ascertained and a subsequent judgment at law has been docketed.[2] But it has been held in Indiana, that whenever in a proceeding to foreclose a mortgage, the plaintiff is entitled to a personal judgment, and an order made under the statute, that after the sale of the mortgaged premises, the residue of the judgment remaining unpaid, shall be levied on other property of the mortgagor, the judgment is from the date of its rendition a lien on all the lands of the mortgagor in the county.[3] In California, such a judgment becomes a lien upon the property of the debtor only from the time it is docketed.[4]

§ 621. **Execution for deficiency.**—Upon the usual decree for the amount of the deficiency against the mortgagor or other defendant personally liable for the mortgage debt, an execution can not regularly issue prior to the filing and confirmation of the report of the officer making the sale.[5] Upon the coming in of the report of the referee, from which the

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[1] McCarthy v. Graham, 8 Paige Ch. (N. Y.) 480 (1840). But see Cobb v. Thornton, 8 How. (N. Y.) Pr. 66 (1852).

[2] Mutual Life Ins. Co. v. Southard, 25 N. J. Eq. (10 C. E. Gr.) 337 (1874); Bell v. Gilmore, 25 N. J. Eq. (10 C. E. Gr.) 104 (1874). See also DeAgreda v. Mantel, 1 Abb. (N. Y.) Pr. 130 (1854); Cobb v. Thornton, 8 How. (N. Y.) Pr. 66 (1852); Englund v. Lewis, 25 Cal. 337 (1864); Chapin v. Broder, 16 Cal. 403 (1860); N. Y. Code Civ. Proc. §§ 1246, 1250.

[3] Fletcher v. Holmes, 25 Ind. 458 (1865).

[4] Cormerais v. Genella, 22 Cal. 116 (1863). See Rowe v. Table Mountain Water Co., 10 Cal. 441 (1858); Rollins v. Forbes, 10 Cal. 299 (1858).

[5] Bank of Rochester v. Emerson, 10 Paige Ch. (N. Y.) 115 (1843); s. c. 10 Paige Ch. (N. Y.) 359. See Bache v. Doscher, 41 N. Y. Supr. Ct. (9 J. & S.) 150 (1876); Cobb v. Thornton, 8 How. (N. Y.) Pr. 66 (1852); Hanover Fire Ins.

amount of the deficiency is ascertained, it is not necessary to apply to the court for judgment against the mortgagor for such deficiency. The execution may be issued directly on the judgment of foreclosure.[1]

An execution for the deficiency on a foreclosure should not, as a rule, be issued without special application to the court upon notice to the defendant.[2] The decree in foreclosure making a defendant personally liable for any deficiency, taken together with the referee's report of the amount of such deficiency, furnishes a *prima facie* case against such defendant;[3] but a defendant may resist an execution against him by showing objections which are not contradictory to the decree and which would operate to effect its satisfaction.[4]

§ 622. **Miscellaneous matters connected with judgments for deficiency.**—Many matters intimately associated with judgments for deficiency, which would seem to belong to this chapter, have already been fully considered in an earlier part of the work on parties defendant personally liable for the mortgage debt.[5] They are for that reason omitted here. Among such matters may be mentioned the remedies for collecting a deficiency against the estate of a decedent who was personally liable for the payment thereof;[6] the remedies against the heirs and devisees of such a decedent;[7] the liability of the estates of married women for the payment of deficiencies arising on their personal obligations for the payment of mortgage debts;[8] the history of the procedure for enforcing the collection of deficiencies;[9] and technical points connected with the complaint and the decree of sale.[10]

Co. v. Tomlinson, 3 Hun (N. Y.) 630 (1875); Tormey v. Gerhart, 41 Wis. 54 (1876); Baird v. McConkey, 20 Wis. 297 (1866).

[1] Bicknell v. Byrnes, 23 How. (N. Y.) Pr. 486, 490 (1862); Moore v. Shaw, 15 Hun (N. Y.) 428 (1878).

[2] McCrickett v. Wilson, 50 Mich. 513 (1883); Gies v. Green, 42 Mich. 107 (1879); Clapp v. Maxwell, 13 Neb. 542 (1882).

[3] Ransom v. Sutherland, 46 Mich. 489 (1881).

[4] Ransom v. Sutherland, 46 Mich. 489 (1881).

[5] See *ante* chap. xxi.

[6] See *ante* §§ 213–216, 238.

[7] See *ante* §§ 215, 216.

[8] See *ante* §§ 209–212, 237.

[9] See *ante* §§ 194–199.

[10] See *ante* §§ 200–201.

CHAPTER XXX.

RECEIVER—PRACTICE ON APPOINTMENT.

NATURE AND OBJECT OF OFFICE—MODES OF APPOINTMENT—APPLICATION FOR—WHAT MUST BE SHOWN—APPOINTMENT BY REFEREE—ORDER APPOINTING—RIGHTS, POWERS, DUTIES.

§ 623. Introductory—Right of mortgagor to rents and profits.
624. Nature of office of receiver.
625. Object of office of receiver.
626. Appointment of receiver.
627. When receiver will be appointed—*Prima facie* case.
628. Rules for the appointment of a receiver.
629. Modes of appointment.
630. Jurisdiction of the court to appoint a receiver.
631. Doctrine in various states.
632. Appointment of receiver by federal courts.
633. Manner of appointing receiver—Motion or petition.
634. Appointment of receiver by the court.
635. On what papers application for receiver made.
636. Notice of application for receiver.
637. Appointment of receiver on *ex parte* application.
638. What the application must show.
639. Objections to appointment of receiver.
640. Appointment of receiver by referee or master.
§ 641. Report of referee or master.
642. Order of appointment on report of referee recommending proper person.
643. Order of appointment by referee.
644. Order of appointment by court—Appeals.
645. Contents of order appointing receiver—Powers defined—Property described.
646. Proposal of names for receiver.
647. Ineligibility to be appointed a receiver.
648. From what time a receiver considered as appointed.
649. Bond of receiver.
650. Effect of appointment of receiver.
651. Jurisdiction of receiver.
652. Nature of receiver's possession.
653. Rights and powers of receivers.
654. Rights and duties of receivers.
655. Rents bound from date of appointment of receiver.
656. Personal liability of receivers.

§ 623. **Introductory—Right of mortgagor to rents and profits.**—In those states where the right of entry by the mortgagee has been abolished by statute, the mortgagor is entitled, both in law and in equity, to the complete enjoyment of the mortgaged premises, and of the rents and profits thereof, unless such rents and profits have been

pledged, by an express stipulation in the mortgage, for the payment of the debt.[1] And where no proceedings are instituted for the appointment of a receiver to take charge of the rents and profits, the right of the mortgagor to receive them will continue until it is divested by a foreclosure and sale, and even after a sale, until the purchaser becomes entitled to the possession of the premises under the referee's deed;[2] such right will be terminated only upon producing to the occupant of the premises the deed of the referee or other officer conducting the sale.[3]

But, in all cases where the security is insufficient, and the mortgagor, or other party who is personally liable for the payment of the debt, is insolvent, the mortgagee may have a receiver appointed to take charge of the mortgaged premises and of such of the rents and profits as have not yet been collected, unless the mortgagor or other person entitled to the possession gives security to account for the rents and profits, in case there is a deficiency.[4]

§ 624. **Nature of office of receiver.**—A receiver is a disinterested person, as between the parties to a foreclosure, appointed to collect the rents, issues and profits of the

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[1] Syracuse City Bank v. Tallman, 31 Barb. (N. Y.) 201, 208 (1857); Zeiter v. Bowman, 6 Barb. (N. Y.) 133, 139 (1849); Ensign v. Colburn, 11 Paige Ch. (N. Y.) 503 (1845); Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38, 41 (1835). See *ante* § 588.

[2] See Argall v. Pitts, 78 N. Y. 239 (1879); Mitchell v. Bartlett, 51 N. Y. 447 (1873); Cheney v. Woodruff, 45 N. Y. 98, 101 (1871); Whalin v. White, 25 N. Y. 462, 465 (1862); Giles v. Comstock, 4 N. Y. 270, 275 (1850); s. c. 53 Am. Dec. 347; Miner v. Beekman, 11 Abb. (N. Y.) Pr. N. S. 147, 152 (1870); s. c. 42 How. (N. Y.) Pr. 33, 37; 33 N. Y. Supr. Ct. Rep. (1 J. & S.) 67, 77; Peck v. Knickerbocker Ice Co., 18 Hun (N. Y.) 183, 186 (1879); Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); s. c. 43 Am. Dec. 766; Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Clason v. Corley, 5 Sandf. (N. Y.) 447 (1852); Lofsky v. Maujer, 3 Sandf. Ch. (N. Y.) 69 (1845).

[3] N. Y. Supreme Court Rule 61. See Clason v. Corley, 5 Sandf. (N. Y.) 447 (1852).

[4] Syracuse City Bank v. Tallman, 31 Barb. (N. Y.) 201 (1857); Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Smith v. Tiffany, 13 Hun (N. Y.) 671 (1878); Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); s. c. 43 Am. Dec. 766; Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841); Main v. Ginthert, 92 Ind. 180 (1883); Connelly v.

mortgaged premises pending the suit,[1] where it does not seem just and prudent to the court that any of the parties to the action should be permitted to collect them.[2]

It is the duty of a receiver to take charge of the property pending the litigation; to preserve it from waste or destruction; to receive the rents and profits, and to dispose of them under the direction of the court.[3] He is simply to protect and care for the property or the fund entrusted to him,[4] and to make no disposition of it until directed by the court, from which alone he derives his authority.[5]

He is a ministerial officer of the court,[6] and his term of office continues only during the pendency of the suit, unless it is otherwise directed by the order appointing him.[7] He is the mere hand of the court in the management of the property or the fund.[8] His appointment is on behalf of all the parties to the action,[9] and not of the plaintiff or the defendant only;[10]

Dickson, 76 Ind. 440 (1881); Myers v. Estell, 48 Miss. 373 (1873).

[1] Where a court ordered money raised by attachment to be deposited with a designated banker, upon condition that he pay seven per centum interest thereon while in his hands, it was held that such banker was not a receiver. Coleman v. Salisbury, 52 Ga. 470 (1874).

[2] Chautauqua County Bank v. White, 6 Barb. (N. Y.) 589, 597 (1849); Booth v. Clark, 58 U. S. (17 How.) 323, 331 (1854); bk. 15 L. ed. 164; Edw. on Rec. 2; Wyatt's Practice Reg. 355; Dan. Ch. Pr. 1552; 2 Barb. Ch. Pr. (2d ed.) 658.

[3] Green v. Bostwick, 1 Sandf. Ch. (N. Y.) 185 (1843); Beverley v. Brooke, 4 Gratt. (Va.) 187 (1847); Booth v. Clark, 58 U. S. (17 How.) 323, 331 (1854); bk. 15 L. ed. 164.

[4] A receiver is not a trustee of an express trust. Fichtenkamm v. Games, 68 Mo. 289 (1878).

[5] Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183 (1855).

[6] Field v. Jones, 11 Ga. 418 (1852); Maguire v. Allen, 1 Ball & B. 75 (1809); Bryan v. Cormick, 1 Cox Ch. 422, 423 (1788); Angel v. Smith, 9 Ves. 335 (1804).

[7] Weems v. Lathrop, 42 Tex. 207 (1875); Meier v. Kansas Pac. Ry. Co., 5 Dill. C. C. 476 (1878); s. c. 6 Rep. 642.

[8] Richards v. Chesapeake & O. R. R. Co., 1 Hughes C. C. 28 (1877); VanRensselaer v. Emery, 9 How. (N. Y.) Pr. 135 (1854).

[9] But he represents no interest of a stranger to the suit in which he was appointed. Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843).

[10] See Davis v. Marlborough, 2 Swans. 113, 125 (1818); Hutchinson v. Massareene, 2 Ball & B. 55 (1811). Junior mortgagees may, however, by superior diligence in having a receiver appointed, acquire a senior right to the rents and profits collected. See Post v. Dorr, 4 Edw. Ch. (N. Y.) 412 (1844); Howell v. Ripley, 10 Paige Ch. (N.

and for the benefit of all who may establish an interest in the property.[1]

§ 625. **Object of office of receiver.** — The object of obtaining the appointment of a receiver is generally to gain a priority of lien on the rents and profits of the premises, so that the court will have the power of directing their application to the payment of the plaintiff's claim;[2] a receiver can not properly be appointed where the court does not have such power.[3] The immediate and actual cause for the appointment of a receiver in a foreclosure, is to secure the rents and profits of the mortgaged premises in advance of the final judgment, in order that they may be applied towards any deficiency that may exist between the amount of the incumbrances and the amount for which the property may sell under the foreclosure. Courts have no authority to interfere with the mortgagor's right to receive the rents and profits of the mortgaged property, unless such rents and profits, as well as the property, have been pledged as security for the debt,[4] or unless the security is clearly insufficient.[5]

Y.) 43 (1843); Miltenberger v. Logansport R. R. Co., 106 U. S. (16 Otto), 286 (1882); bk. 27 L. ed. 117; s. c. 1 Sup. Ct. Rep. 140; Thomas v. Brigstocke, 4 Russ. Ch. 64 (1827).

[1] Porter v. Williams, 9 N. Y. 142 (1853); s. c. 59 Am. Dec. 519. See Curtis v. Leavitt, 15 N. Y. 9 (1857); Gillet v. Moody, 3 N. Y. 479 (1857); Booth v. Clark, 58 U. S. (17 How.) 323, 331 (1854); bk. 15 L. ed. 164; Davis v. Marlborough, 2 Swans. 113, 125 (1818).

[2] Evans v. Coventry, 3 Drew. 80 (1854); Tullett v. Armstrong, 1 Keen, 428 (1836); Owen v. Homan, 4 H. L. 1032 (1853).

[3] Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Evans v. Coventry, 3 Drew. 80 (1854); Wright v. Vernon, 3 Drew. 121 (1855). Yet a receiver is sometimes appointed to take charge of property in which a stranger has an interest. Vincent v. Parker, 7 Paige Ch. (N. Y.) 65 (1838). In such a case the court will, from time to time, make such orders as will protect the rights of the third party. Vincent v. Parker, 7 Paige Ch. (N. Y.) 65 (1838).

[4] See Syracuse City Bank v. Tallman, 31 Barb. (N. Y.) 201, 208 (1857); Zeiter v. Bowman, 6 Barb. (N. Y.) 133, 139 (1849); Ensign v. Colburn, 11 Paige Ch. (N. Y.) 503 (1845); Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38, 41 (1835).

[5] Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835); Quincy v. Cheeseman, 4 Sandf. Ch. (N. Y.) 405 (1846).

A receiver stands indifferent between the parties,[1] and is in no sense accountable or subject to the control of any party to the suit;[2] he is to be guided only by the order appointing him, and by the rules and practice of the court.[3] As he represents all the parties, it is his duty to act in all things with a view to the equitable rights of all parties interested, and to protect the property and funds in his hands to the best of his ability.[4]

§ 626. **Appointment of receiver.** — The plaintiff in a foreclosure is entitled to the appointment of a receiver of the rents and profits of the mortgaged premises pending the suit,[5] where it is highly probable that the premises will not, upon a sale thereof under a decree of foreclosure, bring a sufficient sum to pay the debt and the costs of the suit, and the mortgagor, or other party who is personally liable for the debt, is insolvent.[6]

A receiver will be appointed only on the application of a person who has an acknowledged interest in the suit;[7] his appointment will continue during the pendency of the suit, unless his term of office is limited by the order appointing him.[8]

§ 627. **When receiver will be appointed—Prima facie case.**—To entitle a mortgagee to the appointment of a receiver, it must appear that the mortgaged premises are an

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[1] Vermont & C. R. R. Co. v. Vermont Cent. R. R. Co. 34 Vt. 1 (1861).

[2] Libby v. Rosekrans, 55 Barb. (N. Y.) 202 (1869); Musgrove v. Nash, 3 Edw. Ch. (N. Y.) 172 (1837); Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183 (1855); Baker v. Backus, 32 Ill. 79 (1863); Booth v. Clark, 58 U. S. (17 How.) 323, 331 (1854); bk. 15 L. ed. 164.

[3] Musgrove v. Nash, 3 Edw. Ch. (N. Y.) 172 (1837). See Broad v. Wickham, M. S. S. Case, (1831), cited in 1 Smith's Ch. Pr. 500; 1 VanSant Eq. Pr. 375.

[4] Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 417 (1846); Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183 (1855).

[5] In California the plaintiff formerly had no right to have a receiver of the rents and profits of the land appointed pending a foreclosure. Guy v. Ide, 6 Cal. 79 (1856); s. c. 65 Am. Dec. 490.

[6] Astor v. Turner, 2 Barb. (N. Y.) 444 (1848); s. c. 3 How. (N. Y.) Pr. 225; Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841); 2 Barb. Ch. Pr. (2d ed.) 293. See *ante* § 623.

[7] Chase's Case, 1 Bland. Ch. (Md.)

insufficient security for the debt, and that the mortgagor, or other party personally liable for the debt, is insolvent.[1] A receiver should be appointed only where there is a real necessity for it.[2] In an action by a mortgagor to redeem, a receiver will not be appointed as against the mortgagee in possession, as long as there is a balance due him on the mortgage debt, unless he is mismanaging the property.[3]

Receivers in mortgage foreclosures are appointed with great caution,[4] and it is only in clear cases that they will be appointed at all,[5] as where the rights of a suitor are apparently well established and can be preserved, pending the suit, only by a receiver.[6]

The right to the relief does not grow out of the legal relations of the parties, nor out of the stipulations in the mortgage, but out of equitable considerations alone. The appointment of a receiver in a mortgage foreclosure is not a

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213 (1826); s. c. 17 Am. Dec. 277; Williams v. Wilson, 1 Bland. Ch. (Md.) 421 (1826).

[8] Weemes v. Lathrop, 42 Tex. 207 (1875). See *ante* § 624.

[1] Burlingame v. Parce, 12 Hun (N. Y.) 148 (1877); Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204 (1833). Under the Michigan statute, Comp. L. §§ 62, 63, a mortgagee is excluded from possession until he acquires an absolute title. Whether or not a clause in the mortgage, giving him possession in case of default, can be carried into effect in view of this provision, by appointing a receiver on foreclosure, it certainly can not be done until after default, and it would even then be a matter of discretion. Beecher v. Marq. & Pac. Rolling Mill Co., 40 Mich. 307 (1879).

[2] Quincy v. Cheeseman, 4 Sandf. Ch. (N. Y.) 405 (1846); McLean v. Presley, 56 Ala. 211 (1876); First Nat. Bank v. Gage, 79 Ill. 207 (1875); Callahan v. Shaw, 19 Iowa, 188 (1865); Oldham v. First Nat. Bank, 84 N. C. 304 (1881); Morrison v. Buckner, Hempst. C. C. 442 (1843).

[3] Patten v. Accessory Transit Co., 4 Abb. (N. Y.) Pr. 237 (1857); Bolles v. Duff, 35 How. (N. Y.) Pr. 481 (1867); Boston, &c., R. R. Co. v. New York, &c., R. R. Co., 12 R. I. 220 (1878); Rowe v. Wood, 2 Jac. & W. 553 (1822); Berney v. Sewell, 1 Jac. & W. 647 (1820); Quarrell v. Beckford, 13 Ves. 377 (1807).

[4] Warner v. Gouverneur, 1 Barb. (N. Y.) 36 (1847); Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841); Jenkins v. Hinman, 5 Paige Ch. (N. Y.) 309 (1835); Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204 (1833).

[5] Hand v. Dexter, 41 Ga. 454 (1871). See Sales v. Lusk, 60 Wis. 490 (1884).

[6] Overton v. Memphis & L. R. R. Co., 3 McCr. C. C. 436 (1882); s. c. 10 Fed. Rep. 866.

matter of strict or absolute right, but is purely an equitable one, and is always addressed to the sound discretion of the court,[1] to be governed by all the circumstances of the case.[2] The plaintiff must always set forth a *prima facie* case,[3] and a probable right to the property which is the subject matter of the litigation or foreclosure.[4]

§ 628. **Rules for the appointment of a receiver.**—No positive and unvarying rule can be laid down as to when a court will or will not interfere by this kind of *interim* protection of the property.[5] Where the evidence on which the court is to act, is very clearly in favor of the plaintiff, there should be no hesitancy about interfering; but where the evidence is weak there will, of course, be more difficulty. The question is one of degree, and it is, therefore, impossible to state any precise and unvarying rules.[6]

A receiver should not be appointed in any instance unless the plaintiff makes out a *prima facie* case, and unless it also appears that the property is in danger of being lost or materially injured before the final judgment is entered in the action.[7] In some cases, the propriety of appointing a

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[1] See Rider v. Bagley, 84 N. Y. 461 (1881); Syracuse Bank v. Tallman, 31 Barb. (N. Y.) 201 (1857); The Orphan Asylum v. McCartee, Hopk. Ch. (N. Y.) 429 (1825); Verplank v. Caines, 1 Johns. Ch. (N. Y.) 57 (1814); Pullan v. Cincinnati & C. A. L. R. R. Co., 4 Biss. C. C. 35 (1865); Crane v. McCoy, 1 Bond C. C. 422 (1860); Vose v. Reed, 1 Wood C. C. 647 (1871). See Copper Hill Mining Co. v. Spencer, 25 Cal. 11, 13 (1864); West v. Chasten, 12 Fla. 315, 332 (1868); Benneson v. Bill, 62 Ill. 408 (1872); Connelly v. Dickson, 76 Ind. 440 (1881); Jacobs v. Gibson, 9 Neb. 380 (1879); Oakley v Patterson Bank, 2 N. J. Eq. (1 H. W. Green), 181 (1839); Sloan v. Moore, 37 Pa. St. 217 (1860); Cone v. Paute, 12 Heisk. (Tenn.) 506 (1873); Sales v. Lusk, 60 Wis. 490 (1884); Milwaukee & M. R. R. Co. v. Soutter, 69 U. S. (2 Wall.) 510 (1864); bk. 17 L. ed. 900; Owen v. Homan, 3 Mac. & G. 378 (1851); Skip v. Harwood, 3 Atk. 564 (1747).

[2] Proof of the insolvency of the party personally liable for the payment of the mortgage debt is not always required. Ponder v. Tate, 96 Ind. 330 (1884).

[3] Copper Hill Mining Co. v. Spencer, 25 Cal. 16 (1864); Owen v. Homan, 3 Mac. & G. 378 (1851).

[4] Saylor v. Mockbie, 9 Iowa, 209 (1859).

[5] Kerr on Rec. 4.

[6] Owen v. Homan, 4 H. L. 1032 (1853); Gray v. Chaplin, 2 Russ. 145 (1826).

[7] Hamilton v. The Accessory Transit Co., 3 Abb. (N. Y.) Pr. 255 (1856); s. c. 13 How. (N. Y.) Pr. 108.

receiver can not be determined until the trial.[1] As a general rule, a receiver will be appointed in every case where the interests of the parties seem to require it.[2]

In no case of a mortgage foreclosure should a receiver be appointed, if it is clear that on a forced sale of the mortgaged property, it will bring an amount sufficient to pay the debt, costs and expenses of the suit;[3] nor in general, if the mortgagor, or other party personally liable for the payment of the debt, is solvent.[4] But an application should be denied on the merits only, and not on merely technical grounds.[5]

The appointment of a receiver must in all cases be dispensed with, if the defendant, who is in possession of the premises, gives security to account for the rents and profits, in case there is a deficiency upon the sale under the decree of foreclosure.[6]

In determining whether a receiver of the rents and profits of mortgaged premises shall be appointed, the court must deal with the cause as it appears from the pleadings and evidence and stands upon the record.[7] If the court is satisfied from the evidence before it, that it is necessary or expedient to preserve the property and to accumulate the rents, issues and profits thereof until the trial, a case will be made out for the appointment of a receiver.[8]

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[1] Verplank v. Caines, 1 Johns. Ch. (N. Y.) 57 (1814).

[2] Crane v. McCoy, 1 Bond C. C. 422 (1860).

[3] Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Burlingame v. Parce, 12 Hun (N. Y.) 144 (1877); Pullan v. Cincinnati & C. A. L. R. R. Co., 4 Biss. C. C. 35 (1865).

[4] Syracuse City Bank v. Tallman, 31 Barb. (N. Y.) 201 (1857); Jenkins v. Hinman, 5 Paige Ch. (N. Y.) 309 (1835).

[5] Patten v. Accessory Transit Co., 4 Abb. (N. Y.) Pr. 235 (1857); Evans v. Coventry, 5 DeG. M. & G. 911 (1854); s. c. 31 Eng. L. & Eq. 436.

[6] Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841); Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835); Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204 (1833).

[7] Silver v. Norwich, 3 Swans. 112 *n* (1816); Skinner's Society v. Irish Society, 1 M. & C. 161 (1836); Evans v. Coventry, 5 DeG. M. & G. 911, 918 (1854); s. c. 31 Eng. L. & Eq. 436.

[8] Hugonin v. Basely, 13 Ves. 107 (1806); Davis v. Marlborough, 2 Swans. 138 (1819); Owen v. Homan, 3 Mac. & G. 412 (1851); s. c. 4 H. L. 1033; Whitworth v. Whyddon, 2

§ 629. **Modes of appointment.**—The appointment of a receiver may be made in either of three ways: (1) He may be appointed by an order made directly by the court on a motion for a receiver, by naming the person to be receiver, prescribing the amount of his bond and the number of his sureties, and stating his duties in general terms; or, if the decision of the court is reserved on the argument of the motion, and is filed subsequently, then, by giving a brief general direction in the decision as to the form of the order, naming the receiver in blank, to be filled in by the judge himself, if the parties do not agree upon a receiver on notice of settlement;[1] (2) the appointment of a receiver may also be made on the confirmation of the report of a referee[2] appointed by the court to hear the application and to report a proper person;[3] (3) it may be made by a referee authorized by the court to appoint a receiver.[4] The latter was formerly the more usual course and practice.[5]

§ 630. **Jurisdiction of the court to appoint a receiver.**—A court has no jurisdiction to appoint a receiver except in an action which is pending,[6] unless, perhaps, in a case where the defendant designedly avoids service of the process.[7] A judge has no power in vacation to appoint a receiver;[8] neither has a clerk of the court power to approve

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Mac. & G. 55 (1850); Clegg v. Fishwick, 1 Mac. & G. 299 (1849).

[1] 1 VanSant. Eq. Pr. 405.

[2] The referee is a substitute in New York for the former master in chancery. Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854).

[3] Attorney-General v. Bank of Columbia, 1 Paige Ch. (N. Y.) 511 (1829); 2 Barb. Ch. Pr. (2d ed.) 311, 312.

[4] The selection and appointment of a receiver, and the taking of security from him, are proper matters of reference under the Code, as they were under the former practice in chancery. Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854).

[5] 2 Wait Pr. 230.

[6] Hardy v. McClellan, 53 Miss. 507 (1876); Anon., 1 Atk. 489 (1738); Wyatt's Prac. Reg. 356.

[7] Sandford v. Sinclair, 3 Edw. Ch. (N. Y.) 393 (1840); Quinn v. Gunn, 1 Hogan, 75 (1817).

[8] Newman v. Hammond, 46 Ind. 119 (1874). It was said by the supreme court of the United States in the case of Hammock v. Loan & Trust Co., 105 U. S. (15 Otto), 77 (1881); bk. 26 L. ed. 1111, that a judge of a circuit court of Illinois can not appoint a receiver in vacation.

a receiver's bond in vacation.[1] A court commissioner has no jurisdiction to appoint a receiver.[2] Neither should a receiver be appointed by a judge in chambers. The appointment must, in all cases, be made by the court.[3]

Where property has been lawfully placed under the custody and control of a receiver by a court having authority to appoint him, no other court will have any right to interfere with such receiver, unless it is some court which has a direct supervisory control over the court under whose process the receiver first took possession, or which has a superior jurisdiction in the premises.[4] Where a state court, with full jurisdiction, has properly appointed a receiver and he is in possession of the property, a federal court will have no such superior jurisdiction or supervisory power as to warrant its interference with such receiver's custody and control of the property;[5] and, consequently, a United States court will not appoint a receiver to take possession of property already ordered to be delivered to a receiver appointed by a state court.[6]

A receiver appointed by a state court over mortgaged premises in an action for foreclosure, can not be dispossessed or interfered with by an assignee in bankruptcy, subsequently appointed in a federal court over the mortgagor's estate,[7]

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[1] Newman v. Hammond, 46 Ind. (1874).

[2] Quiggle v. Trumbo, 56 Cal. 626 (1880).

[3] Ireland v. Nichols, 7 Robt. (N. Y.) 476 (1868); s. c. 37 How. (N. Y.) Pr. 22.

[4] Buck v. Colbath, 70 U. S. (3 Wall.) 334 (1865); bk. 18 L. ed. 257. See Freeman v. Howe, 65 U. S. (24 How.) 450 (1860); bk 16 L. ed. 749; Taylor v. Carryl, 61 U. S. (20 How.) 583, 594–597 (1857); bk. 15 L. ed. 1028; Peale v. Phipps, 55 U. S. (14 How.) 368, 374 (1852); bk. 14 L. ed. 459; Wiswall v. Sampson, 55 U. S. (14 How.) 52, 66 (1852); bk. 14 L. ed. 322; Williams v. Benedict, 48 U. S. (8 How.) 107, 112 (1850); bk. 12 L. ed. 1007; Peck v. Jenness, 48 U. S. (7 How.) 612, 625 (1849); bk. 12 L. ed. 841; *In re* Clark, 4 Ben. D. C. 88, 97–98 (1870).

[5] Davis v. Alabama & F. R. R. Co., 1 Woods C. C. 661 (1873); *In re* Clark, 4 Ben. D. C. 88 (1870); Alden v. Boston H. & E. R. R. Co., 5 Bankr. Reg. 230 (1871). But see *contra*, *In re* Merchants' Ins. Co., 3 Biss. C. C. 162 (1870).

[6] Blake v. Alabama & C. R. R. Co., 6 Bankr. Reg. 331 (1872).

[7] Davis v. Alabama & F. R. R. Co., 1 Woods C. C. 661 (1873).

without first liquidating the debt, the possession of the receiver being regarded as the possession of the mortgagee.[1]

§ 631. **Doctrine in various states.** — In California, a receiver may be appointed by the court in which the action is pending, or by a judge thereof ;[2] but a county judge can not appoint a receiver in a case pending in a district court.[3] It is said that under the Connecticut Act of 1867, the judge should first make an express finding, that it is just and reasonable that a receiver should be appointed.[4] Under the constitution and laws of Florida, a receiver can not be appointed by the judge of one circuit to take possession of property in another circuit.[5] The powers of the courts of Indiana in appointing receivers, are the same under the Code as under the general rules of equity, and the power will be exercised for the same purposes and in the same emergencies.[6]

In Kentucky, in cases specified in the Code of Practice, a receiver may be appointed by the court.[7] In Michigan, a court of equity can not appoint a receiver except in cases where such appointment is allowed by the compiled laws of the state ;[8] there is no statute authorizing such a court to make an *ex parte* order appointing a receiver to take possession of real estate under a foreclosure, even though the parties themselves agree upon a receiver under the terms of the mortgage.[9] Under the Mississippi Code of 1880, a circuit judge has no power to appoint a receiver in a case pending in the chancery court, either in vacation or during a term.[10]

§ 632. **Appointment of receiver by federal court.**—A state court has no jurisdiction to appoint a receiver in an action to foreclose a mortgage, where the premises were, at the

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[1] Marshall v. Knox, 83 U. S. (16 Wall.) 551 (1872) ; bk 21 L. ed. 481.

[2] Cal. Prac. Act, § 651.

[3] Ruthrauff v. Kresz, 13 Cal. 639 (1859).

[4] Bostwick v. Isbell, 41 Conn. 305 (1874).

[5] State v. Jacksonville, P. & M. R. R. Co., 15 Fla. 201 (1875).

[6] Bitting v. TenEyck, 85 Ind. 357 (1882).

[7] Kentucky Civil Code, § 328.

[8] Mich. Comp. L. § 5070.

[9] Hazeltine v. Granger, 44 Mich. 503 (1880).

[10] Alexander v. Manning, 58 Miss. 634 (1881).

time of the commencement of the action, in the hands of a receiver appointed by a federal court having jurisdiction to make such appointment; and the fact that the lien which the receiver was appointed to enforce, is prior or subsequent to the one sought to be enforced in the state court, will not in any way affect the rule.[1]

A court of chancery should not appoint a receiver pending a demurrer to its jurisdiction;[2] nor if the foreclosure is being defended on probable grounds.[3] But in order to guard against the abuse of dilatory pleas, or any irreparable mischief, the court may order an immediate trial of the action.[4]

§ 633. Manner of appointing receiver — Motion or petition.—In an action to foreclose a mortgage a receiver may be appointed on either a motion or a petition. The application may be heard on affidavits or on oral testimony, and the appointment will be very much in the discretion of the court.[5] The court may also appoint a receiver upon its own motion in a case requiring it.[6]

The motion for the appointment of a receiver may be made on petition, if there should be occasion for such appointment before the complaint is actually served;[7] the hearing on such petition may be held in chambers.[8] Under the New York practice, the motion for a receiver must be made at a special term of the court,[9] and by a plaintiff in the action, a motion by a defendant being irregular,[10] except, perhaps, where a cross-complaint is filed and made the basis of the motion.[11]

The duty of the court upon a motion for a receiver in a mortgage foreclosure, is merely to protect the property and

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[1] Milwaukee & St. P. R. R. Co. v. Milwaukee & M. R. R. Co., 20 Wis. 165 (1865).

[2] Ewing v. Blight, 3 Wall. Jr. C. C. 139 (1855).

[3] Shepherd v. Murdock, 2 Molloy, 531 (1830); Darcy v. Blake, 1 Molloy, 247 (1829).

[4] Ewing v. Blight, 3 Wall. Jr. C. C. 139 (1855).

[5] Hursh v. Hursh, 99 Ind. 500 (1884).

[6] O'Mahoney v. Belmont, 62 N. Y. 133 (1875).

[7] VanSant. Eq. Pr 402.

[8] Kilgore v. Hair, 19 S. C. 486 (1883).

[9] 2 Barb. Ch. Pr. (2d ed.) 309, *n* 15.

[10] Robinson v. Hadley, 11 Beav. 614 (1849).

[11] Waters v. Taylor, 15 Ves. 10 (1807); 1 VanSant. Eq. Pr. 402.

to accumulate the rents, issues and profits until the determination of the suit.[1] It has long been the practice on a motion for a receiver in such cases not to look at junior mortgagees farther than to see that their rights are protected.[2] The court will not, on such a motion, encourage any attempt to obtain an intimation of its decision on questions involved in the merits of the action.[3] The court is bound to express an opinion only so far as may be necessary to show the grounds on which the motion for a receiver is decided;[4] it is the duty of the court to confine itself strictly to the appointment of a receiver, and not to go into the merits of the case.[5]

§ 634. **Appointment of receiver by the court.**— The power to appoint a receiver of the rents and profits of mortgaged premises accruing pending a foreclosure, was inherent in the court of chancery before the adoption of the New York Code of Procedure. It was continued by that Code,[6] and has been re-enacted by the provisions of the Code of Civil Procedure,[7] defining cases in which receivers may be appointed.[8]

Courts of equity have power to appoint receivers in mortgage foreclosures and to authorize them to take possession of the mortgaged property,[9] whether it is in the personal possession of the defendant or of his agents or tenants.[10] The appointment of a receiver is an ordinary exercise of appropriate chancery powers;[11] and there are very few cases

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[1] Blakeney v. Dufaur, 15 Beav. 42 (1851).

[2] Norway v. Rowe, 19 Ves. 153 (1812); Price v. Williams, Coop. Ch. 31 (1806); Brooks v. Greathed, 1 Jac. & W. 176 (1820).

[3] Bates v. Brothers, 2 Sm. & G. 509 (1853).

[4] Kerr on Rec. 6, 7.

[5] Skinner's Company v. Irish Society, 1 Myl. & Cr. 164 (1835); Evans v. Coventry, 5 D. M. & G. 918 (1854); Blakeney v. Dufaur, 15 Beav. 42 (1852).

[6] § 244.

[7] § 713

[8] See Hollenbeck v. Donnell, 94 N. Y. 342 (1884); Latimer v. Moore, 4 McL. C. C. 110 (1846).

[9] A court may appoint a receiver on its own motion in cases requiring it. O'Mahoney v. Belmont, 62 N. Y. 133 (1875).

[10] Where the property is in the possession of a tenant under a lease, such tenant must be made a party to the action, or he will not be affected by nor be subject to the order appointing the receiver. See *ante* § 157.

[11] Courts of equity have power to appoint receivers for the purpose of protecting and securing the property

in which a court of equity will not have power to interfere by appointing a receiver.[1]

This jurisdiction has been assumed by the court of chancery for the advancement of justice, and is founded on the inadequacy of the remedies afforded by courts of ordinary jurisdiction;[2] and on the showing of a proper case the court will *ex debito justitiæ* appoint a receiver.[3]

§ 635. On what papers application for receiver made.—A motion for the appointment of a receiver is generally made on the complaint of the plaintiff; but it may be made on affidavits before the complaint is served, when the plaintiff can clearly satisfy the court that he has an equitable claim to the property, and that a receiver is necessary to preserve it from loss.[4] When affidavits are used, they should show such facts and circumstances as may be necessary to sustain the appointment; copies of such affidavits should be served with the notice of motion.[5] If the plaintiff uses affidavits, the defendant may read counter depositions.[6]

§ 636. Notice of application for receiver.—As a rule, a court of equity will have no jurisdiction of a motion for the appointment of a receiver in a mortgage foreclosure, unless notice of such motion has been served upon all the parties adversely interested.[7] Instead of a notice of motion, an

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which is the subject of litigation. Battle v. Davis, 66 N. C. 252 (1874). See Bank of Mississippi v. Duncan, 52 Miss. 740 (1876); The Wharf Case, 3 Bland Ch. (Md.) 361 (1841); Williamson v. Wilson, 1 Bland Ch. (Md.) 418, 421 (1826).

[1] See Bainbrigge v. Baddeley, 3 Mac. & G. 419 (1853).

[2] Skip v. Harwood, 3 Atk. 564 (1747); Stitwell v. Williams, 6 Madd. 49 (1821); Davis v. Marlborough, 2 Swanst. 165 (1819); Mitf. Pl. 145.

[3] Hopkins v. Canal Proprietors, L. R. 6 Eq. 447 (1867). See Williamson v. Wilson, 1 Bland Ch. (Md.) 420 (1826); Cupit v. Jackson, 13 Price 721, 734 (1824).

[4] 2 Barb. Ch. Pr. (2d ed.) 309-310; Metcalfe v. Pulvertoft, 1 Ves. & B. 182 (1812); Duckworth v. Trafford, 18 Ves. 283 (1810).

[5] Goodyear v. Betts, 7 How. (N. Y.) Pr. 187 (1852); Austin v. Chapman, 11 N. Y. Leg. Obs. 103 (1853); Edw. on Rec. 77; 1 VanSant. Eq. Pr. 402.

[6] Edw. on Rec. 66; 2 Barb. Ch. Pr. (2d ed.) 310.

[7] Whitehead v. Wooten, 43 Miss. 523 (1870); Vause v. Wood, 46 Miss. 120 (1871). *Compare* Hardy v. McClellan, 53 Miss. 507 (1876). See Bostwick v. Isbell, 41 Conn. 305 (1874). It is said in Bostwick v. Isbell, that the powers given to a receiver

ex parte order to show cause may be obtained; copies of the papers intended to be used on the motion and of the order to show cause, should then be served on each of the defendants.[1] Where the complaint has not been served, and it is intended to base the motion on that also, a copy thereof should be served with the notice of motion.[2]

The notice of motion for the appointment of a receiver must be served like any other notice of motion,[3] by delivering copies thereof to all the necessary and interested parties.[4] The notice must express concisely, but clearly, the object of the application, for, as a general rule, the court will not extend the order beyond the scope of the notice.[5]

When no serious injury can result to the property involved in the controversy from the delay, notice of motion should always be given to adverse parties before a receiver is appointed;[6] yet a receiver may be appointed without notice where the exigencies of the case require it.[7] But a case of great urgency must be shown to justify an appointment made without notice.[8]

§ 637. **Appointment of receiver on ex parte application.** —It is the settled practice of the supreme court of New York, as it was of the late court of chancery, not to allow the appointment of a receiver *ex parte*, except in those cases where the defendant is without the jurisdiction of the court or can not be found, having fraudulently hidden himself for the purpose of avoiding a personal service of the summons,[9] or where, for some reason, it becomes absolutely

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by the Connecticut Act of 1867, are so great that, if the act is to be construed as intending to authorize the appointment without notice, it should be held to be void and contrary to the principles of natural justice.

[1] 1 VanSant. Eq. Pr. 403.

[2] 1 VanSant. Eq. Pr. 403.

[3] 2 Barb. Ch. Pr. (2d ed.) 310.

[4] See Baring v. Moore, 5 Paige Ch. (N. Y.) 48, 521 (1835); Buxton v. Monkhouse, Coop. Ch. 41 (1810); 2 Barb. Ch. Pr. (2d ed.) 310.

[5] Edw. on Rec. 77.

[6] State v. Jacksonville, P. & M. R. R. Co., 15 Fla. 201 (1875).

[7] Hardy v. McClellan, 53 Miss. 507 (1876).

[8] State v. Jacksonville, P. & M. R. R. Co., 15 Fla. 201 (1875).

[9] Sandford v. Sinclair, 8 Paige Ch. (N. Y.) 373 (1840), aff'g 3 Edw. Ch. (N. Y.) 393; Gibson v. Martin, 8 Paige Ch. (N. Y.) 481 (1840); Verplank v. Mercantile Ins. Co., 2 Paige Ch. (N. Y.) 438 (1831); People v.

necessary for the court to interfere before there is time to give notice to the adverse party, in order to prevent the destruction of, or a serious injury to the property,[1] in which cases a receiver may be appointed *ex parte*.[2] Where it is proper to appoint a receiver *ex parte*, the particular circumstances which render such a summary proceeding necessary, should be distinctly stated in the affidavits or in the petition on which the application is made.[3]

§ 638. **What the application must show.**—To authorize the appointment of a receiver, the complaint or affidavits must show a cause for it by stating the facts which make such appointment necessary.[4] In the complaint, or in the petition for the appointment of a receiver in a mortgage foreclosure, the plaintiff must show that the premises are not of sufficient value to satisfy his debt and the costs of the suit, and that the mortgagor, or other party who is personally liable for the payment of the mortgage debt, is irresponsible and unable to pay an expected deficiency.[5] If danger to the property is not alleged in the complaint, and no facts appear in the affidavits, showing the necessity or expediency of appointing a receiver, the application will be denied.[6] The facts essential to the appointment of a receiver need not be pleaded in the complaint, but may be shown by affidavits.[7]

Norton, 1 Paige Ch. (N. Y.) 17 (1829).

[1] People v. Albany & S. R. R. Co., 38 How. (N. Y.) Pr. 228 (1869); s. c. 57 Barb. (N. Y.) 204; 1 Lans. (N. Y.) 308; 7 Abb. (N. Y.) Pr. N. S. 265.

[2] Gibson v. Martin, 8 Paige Ch. (N. Y.) 481 (1840); Sandford v. Sinclair, 8 Paige Ch. (N. Y.) 373 (1840); 2 Barb. Ch. Pr. (2d ed.) 311. Some courts hold that a judge in chambers, upon an *ex parte* application, may appoint a receiver. See Real Estate Associates v. San Francisco Superior Court, 60 Cal. 223 (1882).

[3] Verplank v. Mercantile Ins. Co., 2 Paige Ch. 438 (1831); People v. Albany & S. R. R. Co., 38 How (N. Y.) Pr. 228 (1869); s. c. 57 Barb. (N. Y.) 204; 1 Lans. (N. Y.) 308; 7 Abb. (N. Y.) Pr. N. S. 265.

[4] Tomlinson v. Ward, 2 Conn. 396 (1818).

[5] Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841).

[6] Baker v. Backus, 32 Ill. 79, 95 (1863); Whitworth v. Whyddon, 2 Mac. & G. 55 (1850); Wright v. Vernon, 3 Drew 121 (1855); Micklethwait v. Micklethwait, 1 D. & J. 530 (1875); Bowker v. Henry, 6 L. T. N. S. 43 (1862).

[7] Commercial Sav. Bank v. Corbett, 5 Sawy. C. C. 172 (1878).

A receiver will not be appointed on a mere allegation that the mortgaged premises are not sufficient security for all "just incumbrances thereon."[1] Neither will one be appointed on a general allegation that loss will ensue if a receiver is not appointed, unless a full statement of the facts is made.[2] A mere allegation of danger to the property will not of itself be sufficient, if the court is satisfied that a loss is not probable.[3]

An application for a receiver pending an action for foreclosure, must show an actual interest in the property and that such interest is in danger of being lost, or other facts which would warrant the interference of the court.[4] An order appointing a receiver will not be granted where the party applying for it does not establish an apparent right to the property in litigation, and where it is neither alleged nor shown by the evidence that there is danger of waste or injury to the property, or loss of the rents and profits by reason of the insolvency of the adverse party in possession.[5] The application must also show who is in possession, as a receiver can not be appointed unless the person in possession of the mortgaged premises is a party to the suit.[6] A demand in the complaint for the appointment of a receiver is not necessary.[7]

The proceedings should be in such a state as to enable the judge to determine who is to receive the fund which the receiver may bring into court.[8] But if the court sees that there is a *prima facie* case upon the record for the appointment of a receiver, the fact that the record is not perfect in

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[1] Warner v. Gouverneur's Ex'rs, 1 Barb. (N. Y.) 36 (1847). See Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842).

[2] Hanna v. Hanna, 89 N. C. 68 (1883).

[3] Whitworth v. Whyddon, 2 M. & G. 55 (1850).

[4] Goodyear v. Betts, 7 How. (N. Y.) Pr. 187 (1852). See McCarthy v. Peake, 9 Abb. (N. Y.) Pr. 164 (1859); s. c. 18 How. (N. Y.) Pr. 138; Patten v. Access. Trans. Co., 4 Abb. (N. Y.) Pr. 235 (1857); s. c. 13 How. (N. Y.) Pr. 502; Hamilton v. Access. Trans. Co., 3 Abb. (N. Y.) Pr. 255 (1856); s. c. 13 How. (N. Y.) Pr. 108.

[5] Twitty v. Logan, 80 N. C. 69 (1879).

[6] Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841).

[7] Commercial Sav. Bank v. Corbett, 5 Sawy. C. C. 172 (1878).

[8] Gray v. Chaplin, 2 Russ. 147 (1826).

detail, and is not in the shape it should be, to enable the court to administer complete justice, will not of itself defeat the appointment, especially if the objection is merely a formal one that may be remedied by amendment.[1] Where the mortgage, by its terms, pledges the income, rents and profits of the mortgaged premises to the payment of the debt, the mortgagee need not conclusively establish a right to recover before he is entitled to ask for the appointment of a receiver. If he shows a probable right to recover, and that the debtor is insolvent, the appointment of a receiver will follow as a matter of course.[2]

§ 639. **Objections to appointment of receiver.**— The objection that other persons are necessary parties to the suit is no bar to the appointment of a receiver. If such parties are necessary, they can be brought in afterwards.[3] Objections because of the misjoinder of parties or of the multifariousness of causes of action, are no answer to an application for a receiver, if sufficient grounds for the appointment of one are shown.[4]

A mortgagor who has sold and conveyed the mortgaged premises subject to his mortgage, is not in a position to oppose the appointment of a receiver.[5] Where the parties stipulate in a mortgage that a receiver may be appointed, an answer not positively sworn to will not constitute a sufficient objection to an appointment.[6] It was held in Thompson v. Selby,[7] that where the original bill had been answered, the pendency of a plea to the amended bill was not a bar to a motion for the appointment of a receiver.

§ 640. **Appointment of receiver by referee or master.** —The selection and appointment, or proposal for appointment, of a receiver and the taking of security from him, are

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[1] Kerr on Rec. 11.

[2] DesMoines Gas Co. v. West, 44 Iowa, 23 (1876).

[3] Barclay v. Quicksilver Mining Co., 9 Abb. (N. Y.) Pr. N. S. 283 (1870).

[4] Evans v. Coventry, 5 D. M. & G. 918 (1854); Steele v. Cobham, L. R. 1 Ch. App. 325 (1866); Major v. Major, 8 Jur. 797 (1844).

[5] The Wall Street Fire Ins. Co. v. Loud, 20 How. (N.Y.) Pr. 95 (1860).

[6] Knickerbocker Life Ins. Co. v. Hill, 2 Hun (N. Y.) 680 (1874).

[7] 12 Sim. 100 (1841).

proper matters for a reference under the New York Code of Civil Procedure, as they were under the former practice in chancery.[1] In general practice the reference is usually made to a person residing in the same county as the defendant, in order to relieve him of unnecessary expenses in traveling;[2] but in mortgage foreclosures, the referee should reside in the county where the land, or a portion of it, is situated, and where the action is pending.

Whether the receiver is appointed directly by the court, or through the medium of a referee, it is the duty of the court to follow the rules and practice of the court of chancery in like cases, so far as they are consistent with the present course of procedure;[3] an appointment by a referee under the old practice will be valid.[4] The order of reference should require the usual notice of hearing to be given to the adverse parties. If no notice is given, and the opposing parties voluntarily appear before the referee, such appearance will be a waiver of all irregularities, and no objection can be taken to the proceedings.[5]

§ 641. Report of referee or master.—The referee or master having made the appointment, or selected a proper person to be recommended to the court for appointment as receiver, according to the terms of the order of reference, should report the facts to the court.[6] The report of the referee or master on the appointment of a receiver can not be excepted to and need not be confirmed.[7] The appointment of a receiver, being within the discretion of the referee or master,[8] to support an objection thereto and to induce the court to interfere with his appointment, substantial reasons

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[1] Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854).

[2] Bank of Monroe v. Keeler, 9 Paige Ch. (N. Y.) 249 (1841).

[3] 2 Barb. Ch. Pr. (2d ed.) 311, *n* 19.

[4] Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854).

[5] Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854).

[6] 2 Barb. Ch. Pr. (2d ed.) 317.

[7] *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840); Thomas v. Dawkin, 1 Ves. Jr. 452 (1792); s. c. 3 Bro. C. C. 507; Wilkins v. Williams, 3 Ves. 588 (1798).

[8] Thomas v. Dawkin, 1 Ves. Jr. 452 (1792); s. c. 3 Bro. C. C. 507. See Benneson v. Bill, 62 Ill. 408 (1867).

for such objection must be presented,[1] for the court will not order the referee to review his decision except on special grounds.[2]

It is a well settled rule in New York, that a court will not disturb or set aside the appointment of a receiver by a referee, unless the person selected is legally disqualified, or his situation is such as to induce the court to believe that he will not properly attend to the interests of the parties.[3] The court will not disturb the referee's or master's decision merely because an interested party may think that a better selection could have been made from the several persons proposed.[4] If, however, the court should order the referee or master to review his decision, the parties may proceed *de novo* by proposing other persons for the receivership.[5]

§ 642. Order of appointment on report of referee recommending proper person.—Where, upon an application to the court for the appointment of a receiver, a referee or master is ordered to report a suitable person to be appointed and to approve of the sureties to be offered by him, the appointment will not be complete until it is confirmed by a special order of the court.[6] The party procuring such an order of reference should give the adverse parties the usual notice to attend before the referee.[7] A voluntary appearance before the referee will, however, waive all irregularities in the notice.[8]

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[1] Thomas v. Dawkin, 1 Ves. Jr. 452 (1792); s. c. 3 Bro. C. C. 507; Tharpe v. Tharpe, 12 Ves. 317 (1806).

[2] *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840); Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854); Wynne v. Newborough, 15 Ves. 283 (1808); Bowersbank v. Collasseau, 3 Ves. 164 (1796); Thomas v. Dawkin, 1 Ves. Jr. 452 (1790); s. c. 3 Bro. C. C. 507; Tharpe v. Tharpe, 12 Ves. 317 (1806).

[3] *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840).

Mere relationship to one of the parties to the action is not of itself a sufficient ground for the removal of a receiver; at most, it is but a circumstance to be taken into consideration at the time of making the appointment. Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92, 93 (1854).

[4] *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840).

[5] Smith on Rec. 11; 2 Barb. Ch. Pr. (2d ed.) 318.

[6] *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840).

[7] Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854).

[8] Wetter v. Schlieper, 7 Abb. (N.

If the party summoned fails to appear, the referee may proceed *ex parte*, and the proceedings will not be open to review, unless proper cause is shown and the costs of the proceedings are paid.[1]

§ 643. **Order of appointment by referee.**—Where the order appointing a referee empowers him to appoint a receiver and to approve the requisite bond for him, the amount of which he has authority to fix, an order for the confirmation of the report will not be necessary.[2] In such cases the referee, after appointing the receiver and approving the sureties to be given by him, should file the required bond,[3] together with his report of the appointment, with the clerk of the court, stating in his report that he has approved and filed such bond.[4] Upon the filing of such report, the appointment of the receiver will be complete, and he may immediately enter upon his duties.[5]

A receiver takes title to the property from the time of his appointment.[6] As between the parties to the suit, he is to be considered appointed from the date of the order of reference.[7] Either party may have the appointment of a receiver by a referee reviewed on presenting a petition to the court, on notice to all the parties interested,[8] setting forth the

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Y.) Pr. 92 (1854). See Brasher v. Van Courtlandt, 2 Johns. Ch. (N.Y.) 242 (1816); Nichols v. Nichols, 10 Wend. 560 (1833); Parker v. Williams, 4 Paige Ch. (N. Y.) 439 (1834); Hart v. Small, 4 Paige Ch. (N. Y.) 288 (1834); Robinson v. Nash, 1 Anst. 76 (1792).

[1] Edw. on Rec. 70; 1 VanSant. Eq. Pr. 408.

[2] *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840); Bowersbank v. Collasseau, 3 Ves. 164 (1796); 1 VanSant. Eq. Pr. 407; 2 Wait. Pr. 235.

[3] 1 VanSant. Eq. Pr. 407.

[4] 2 Wait. Pr. 235.

[5] *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840); Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854); Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183, 191 (1855); 2 Wait. Pr. 235.

[6] Wilson v. Allen, 6 Barb. (N. Y.) 543 (1849); Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183, 191 (1855); Rutter v. Tallis, 5 Sandf. (N. Y.) 610 (1852).

[7] Fairfield v. Weston, 2 Sim. & S. 98 (1824).

[8] Objection to the referee's or master's report can not be made by exceptions. Tyler v. Simmons, 6 Paige Ch. (N.Y.) 127 (1836); Thomas v. Dawkin, 1 Ves. Jr. 452 (1792); s. c. 3 Bro. C. C. 507; Wilkins v. Williams, 3 Ves. 538 (1798).

grounds of objection and praying that the referee be directed to review his report.[1] The application to review the appointment of a referee may also be made by motion supported by affidavits.

The appointment of a receiver being within the discretion of the referee or master,[2] there must be a well-founded objection to support an exception thereto,[3] for the court will not order the referee to review his decision except for special reasons,[4] and the court will not interfere with the appointment of a receiver by a referee unless a case is presented showing that the person appointed is disqualified,[5] or that his position is such as to induce a belief that he will not properly attend to the interests of the parties.[6]

§ 644. Order of appointment by court — Appeals. — When the appointment of a receiver is made by the court, the penalty of the bond should be fixed and the general terms of the order prescribed at the time it is granted.[7] The form and contents of the order appointing a receiver must be determined by the court.[8] The judge may himself draw the order, prescribing all of its details, or he may allow the form of order submitted by the moving party.[9] When the order contains special provisions, it is customary for the attorney of the

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[1] *In re* Eagle Iron Works, 8 Paige Ch (N. Y.) 385 (1840)

[2] Thomas v. Dawkin, 1 Ves. Jr. 452 (1792); s. c. 3 Bro. C. C. 507. See Benneson v. Bill, 62 Ill. 408 (1872).

[3] Thomas v. Dawkin, 1 Ves. Jr. 452 (1792); s. c. 3 Bro. C. C. 507; Tharpe v. Tharpe, 12 Ves. 317 (1806).

[4] Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854); *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840); Wynne v. Newborough, 15 Ves. 283 (1808); Tharpe v. Tharpe, 12 Ves. 317 (1806); Bowersbank v. Colasseau, 3 Ves. 164 (1796); Thomas v. Dawkin, 1 Ves. Jr. 452 (1792).

[5] Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854); *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840); Wynne v. Newborough, 15 Ves. 283, (1808).

[6] Wetter v. Schlieper, 7 Abb. (N. Y.) Pr. 92 (1854); *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840); Wynne v. Newborough, 15 Ves. 283 (1808); 1 Barb. Ch. Pr. 674.

[7] 2 Wait. Pr. 230.

[8] It is said to be the duty of the attorney, and not of the judge, to see that the order is proper. LaFarge v. VanWagenen, 14 How. (N. Y.) Pr. 54, 57 (1857). An order denying the appointment of a receiver in a foreclosure is not final. Beecher v. Marquette & Pac. Rolling Mill Co., 40 Mich. 307 (1879).

[9] 1 VanSant. Eq. Pr. 406.

moving party to submit a copy of the proposed order to the attorney for the adverse party, and if any of its provisions are objectionable, to make an application to the judge in court or at chambers for a settlement of the terms of the order.[1] The attorney opposing the order may propose amendments to be submitted to the judge with the original form for settlement,[2] when the parties can not otherwise agree.[3]

The order,[4] as settled, should then be entered by the moving party,[5] who is entitled to file it with the clerk of the court ;[6] copies of the order should then be served on all the parties interested,[7] because such parties may have a right to appeal, and the duration of such right will be limited only from the time of the service of a copy of the order with a notice of the entry thereof.[8] If the defendant has appeared, the service should be made upon him personally, unless his appearance was by an attorney, when the service may be made upon such attorney.[9] It was held in Farley v.

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[1] If the terms of the order are settled out of court, and the order is allowed by the judge's indorsing his *allocatur* upon it, it must then be filed and entered. 1 VanSant. Eq. Pr. 406.

[2] Not to the clerk as formerly. Whitney v. Belden, 4 Paige Ch. (N. Y.) 140 (1833) ; 1 VanSant. Eq. Pr. 406.

[3] 1 VanSant. Eq. Pr. 406 ; 2 Wait. Pr. 230, § 5.

[4] Orders granted by a justice *ex parte* in chambers, under the New York Code, need not be entered with the clerk. Savage v. Relyea, 3 How. (N. Y.) Pr. 276 (1848) ; s. c. 1 Code (N. Y.) Rep. 42.

[5] The order must be entered by the prevailing party with the clerk of the court where the papers are filed. Savage v. Relyea, 3 How. (N. Y.) Pr. 276 (1848); s. c. 1 N. Y. Code Rep. 42. Should the successful party fail to enter the order within twenty-four hours after it is granted, the unsuccessful party may enter it ; or any party affected by such order, is entitled to do so under the New York Code. Neither party can have any benefit from a decision of the court, until the order on such decision is drawn and entered. Whitney v. Belden, 4 Paige Ch. (N. Y.) 140 (1833); Peet v. Cowenhoven, 14 Abb. (N. Y.) Pr. 56 (1861).

[6] Edw. on Rec. 66.

[7] Whitney v. Belden, 4 Paige Ch. (N. Y.) 140 (1833).

[8] Rankin v. Pine, 4 Abb. (N. Y.) Pr. 309 (1857) ; People *ex rel.* Backus v. Spalding, 9 Paige Ch. 607 (1842) ; Farley v. Farley, 7 Paige Ch. (N. Y.) 40 (1837) ; Tyler v. Simmons, 6 Paige Ch. (N. Y.) 127 (1836) ; Jenkins v. Wilde, 14 Wend. (N. Y.) 539 (1835).

[9] N. Y. Code Civ. Proc. § 717.

Farley,[1] that the moving party is not entitled to notice from the adverse party of the entering of such order, in order to limit his right of appeal therefrom; but it was decided in the more recent case of Rankin v. Pine,[2] that the service of a written notice is necessary, even when the appeal is taken from a judgment entered by the appellant himself.

An appeal must be taken within thirty days after the written notice of the entry of the order has been given to the party appealing.[3] The order will be considered as entered from the time of its delivery to the clerk for that purpose.[4] A notice of the entry of the order will not avail to limit the time of appeal, unless it is in writing,[5] and is such as to apprise the adverse party fully of the whole substance, if not of the very details of the order.[6]

§ 645. Contents of order appointing receiver—Powers defined—Property described.—Where the application for a receiver has been made and allowed, care should be taken in drawing the order for his appointment that it fully defines his powers.[7] It should state distinctly on the face of it, over what property he is appointed,[8] or refer to the pleadings or some paper in the proceedings which describes the property, so that a party may know what the officer of the court is in possession of;[9] otherwise, he can not hold possession of the property.[10]

It sometimes happens that the court, although of the opinion that the moving party is entitled to a receiver, will

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[1] 7 Paige Ch. (N. Y.) 40 (1837).

[2] 4 Abb. (N. Y.) Pr. 309 (1857).

[3] N. Y. Code Civ. Proc., § 1351.

[4] Farley v. Farley, 7 Paige Ch. (N. Y.) 40, 42 (1837).

[5] People *ex rel.* Backus v. Spalding, 9 Paige Ch. (N. Y.) 607 (1842); Fry v. Bennett, 7 Abb. (N. Y.) Pr. 352 (1858); s. c. 16 How. (N. Y.) Pr. 402, 406; 2 Bosw. (N. Y.) 684.

[6] Fry v. Bennett, 7 Abb. (N. Y.) Pr. 352 (1858); s. c. 16 How. (N. Y.) Pr. 402, 406; 2 Bosw. (N. Y.) 684; Champion v. Plymouth Congregational Church, 42 Barb. (N. Y.) 441 (1864).

[7] Edw. on Rec. 66.

[8] Crow v. Wood, 13 Beav. 271 (1850); High on Rec. (2d ed.) 76, § 87.

[9] O'Mahoney v. Belmont, 62 N. Y. 133 (1875); Crow v. Wood, 13 Beav. 271 (1850); 2 Barb. Ch. Pr. (N. Y.) 312; 1 VanSant. Eq. Pr. 405; High on Rec. (2d ed.) 76, § 87.

[10] O'Mahoney v. Belmont, 62 N. Y. 133 (1875).

not make such an appointment directly, but in the alternative, requiring that the demand of the moving party be satisfied, or that a receiver be appointed.[1] The order for a receiver usually directs him to state his accounts from time to time, and to pay the balance found due from him into court to the credit of the action, to be there invested and accumulated, or otherwise disposed of, as the court may think proper.[2]

If a receiver is appointed on behalf of several incumbrancers, the order generally contains a recital that the appointment is to be without prejudice to the rights of the prior incumbrancers of the estate, who may think proper to take possession of the premises by virtue of their respective claims. The order usually directs that the receiver, out of the rents and profits to be collected by him, shall keep down the interest on such incumbrances, according to their priorities, and be allowed the same in passing his accounts.[3] If the mortgagor is in possession of the premises, the order should direct him to deliver the possession thereof to the receiver.[4]

§ 646. **Proposal of names for receiver.**—The referee or master upon a reference to appoint a receiver should designate that person whom he deems, all things considered, best qualified for the office, without regard to the fact that he was proposed by one or the other of the parties;[5] under equal circumstances, the party obtaining the order for a receiver has, *prima facie*, a right to nominate the receiver.[6]

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[1] Curling v. Townsend, 19 Ves. 628 (1816); High on Rec. (2d ed.) 82, § 102.

[2] 2 Dan. Ch. Pr. 1573.

[3] Smith v. Effingham, 2 Beav. 232 (1839); Lewis v. Zouche, 2 Sim. 388 (1828).

[4] Griffith v. Thapwel, 2 Ves. Sr. 401 (1751); Everett v. Belding, 22 L. J. Ch. 75 (1852) As to the form of the order, see Davis v. Duke of Marlborough, 2 Swans. 113, 116 (1818); Baylies v. Baylies, 1 Coll. 548 (1844).

[5] Lespinasse v. Bell, 2 Jac. & W. 436 (1821). The appointment of a receiver is usually a matter of discretion, but there are persons who are not competent to act owing to their peculiar relation to the parties Benneson v. Bill, 62 Ill. 408 (1872). See Thomas v. Dawkin, 1 Ves. Jr. 452 (1792); s. c. 3 Bro. C. C. 508.

[6] Smith on Rec. 8; 2 Barb. Ch. Pr. (2d ed.) 316; 1 VanSant. Eq. Pr. 407.

In proceedings upon a reference for the appointment of a receiver, the party who has obtained the order should present to the referee a written proposal containing the names of the desired receiver and his sureties. If the person thus nominated is objectionable, however, another person may be nominated by any interested party by a counter-proposal.[1]

§ 647. Ineligibility to be appointed a receiver.— Although as a general rule the court will appoint as receiver a disinterested person and not a party to the foreclosure, yet a party to the action is not absolutely disqualified from acting as receiver. Indeed, there are cases in which a party to the suit, if otherwise unobjectionable, should be appointed in preference to any one else.[2] A non-resident should not be appointed a receiver.[3] A master in chancery, whose duty it is to pass upon the accounts and to control the conduct of a receiver, is also disqualified from acting.[4]

The New York Code of Civil Procedure[5] prohibits the appointment in New York and Kings counties of any person who holds the office of clerk, deputy clerk, special deputy clerk or assistant in the clerk's office, of a court of record or of the surrogate's court. And it has been held that usually a party to the suit is not competent to act as receiver, unless by the consent of all parties.[6] In Kansas[7] and Ohio[8] no

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[1] A person not having an interest in the action can not propose a receiver, and it is contrary to the orderly proceedings of a court of justice to allow a stranger to participate in the nominations for such an appointment. O'Mahoney v. Belmont, 62 N. Y. 133 (1875); Attorney-General v. Day, 2 Madd. 246 (1817); Edw. on Rec. 22; 2 Barb. Ch. Pr. (2d ed.) 316. Where the matter is referred to a referee with power to appoint a receiver, the appointment will be entirely within his discretion, and he need not give any reasons for his selection. Benneson v. Bill, 62 Ill. 408 (1872); Thomas v. Dawkin, 1 Ves. Jr. 452 (1792); s. c. 3 Bro. C. C. 508.

[2] Hubbard v. Guild, 1 Duer. (N. Y.) 662 (1853); 1 VanSant. Eq. Pr. 400. But see Benneson v. Bill, 62 Ill. 408 (1872).

[3] See Meier v. Kansas Pac. Ry. Co., 5 Dill. C. C. 476 (1878); s. c. 6 Rep. 642.

[4] Benneson v. Bill, 62 Ill. 408 (1872); Kilgore v. Hair, 19 S. C. (N. S.) 486 (1883); *Ex parte* Fletcher, 6 Ves. 427 (1801).

[5] N. Y. Code Civ. Proc. § 90.

[6] Benneson v. Bill, 62 Ill. 408 (1872). But see Hubbard v. Guild, 1 Duer (N. Y.) 662 (1853).

[7] Kansas Code, § 263.

[8] 2 Ohio Rev. Stat., § 5588.

party, or attorney, or person interested in an action can be appointed a receiver therein; and in Kentucky[1] there is the same prohibition with an exception in favor of executors, administrators, curators, guardians and committees of persons of unsound mind. Generally, a trustee to let and manage an estate should not be appointed a receiver of the same, whether he is sole trustee or acts jointly with others;[2] he should be appointed only when he will act without compensation. Neither is the next of kin of an infant complainant a proper party to be appointed a receiver;[3] nor one who is a stranger to the court, if objected to by either party;[4] nor any person who, by his own act or position, stands in an interested relation to the cause. The law partner of the solicitor for the plaintiff in a foreclosure, can not, even by consent, be appointed receiver.[5]

§ 648. **From what time a receiver considered as appointed.**—An order for a receiver vests the possession in him from the date of his appointment,[6] without reference to the time of his giving bonds.[7] And upon the appointment of a receiver, the title to the property, of which he is made receiver, vests in him in trust, though further proceedings may be necessary to acquire the actual possession of it.[8] But a court can not take property out of the hands of a creditor until his claim is satisfied.[9]

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[1] Ky. Civil Code, § 330.

[2] Sutton v. Jones, 15 Ves. 584 (1809); Sykes v. Hastings, 11 Ves. 363 (1805); 2 Barb. Ch. (N. Y.) Pr. (2d. ed.) 305.

[3] Stone v. Wishart, 2 Madd. 64 (1817).

[4] Smith v. New York Consolidated Stage Co., 28 How. (N. Y.) Pr. 208 (1865); s. c. 18 Abb. (N. Y.) Pr. 419.

[5] Merchants' and Manufacturers' Bank v. Kent, Circuit Judge, 43 Mich. 292 (1880).

[6] Wilson v. Allen, 6 Barb. (N. Y.) 542 (1849); Wilson v. Wilson, 1 Barb. Ch. (N. Y.) 592 (1846). See Porter v. Williams, 9 N. Y. 142 (1853); s. c. 59 Am. Dec. 519; *sub nom.* Porter v. Clark, 12 How. (N. Y.) Pr. 107; West v. Fraser, 5 Sandf. (N. Y.) 653 (1852); Albany City Bank v. Schermerhorn, Clarke Ch. (N. Y.) 297, 300 (1840); VanWyck v. Bradley, 3 N. Y. Code Rep. 157 (1851).

[7] Maynard v. Bond, 67 Mo. 315 (1878).

[8] Olney v. Tanner, 19 Bankr. Reg. 178 (1880).

[9] Benedict v. Maynard, 5 McL. C. C. 262 (1851).

When an order of reference is made for the appointment of a receiver, his title vests in and attaches to the property by relation, from the date of the order of reference, with the same effect as if the order had named the receiver.[1] Such an order is *per se* a sequestration of the property and gives all the necessary means for enforcing the receiver's rights.[2]

Where the court directs a reference to select a proper person to be appointed receiver, the appointment will not be complete until it is confirmed by a special order of the court;[3] but where the referee or master is directed to appoint a receiver and to take the requisite security from him, an order confirming the appointment will not be necessary.[4]

§ 649. **Bond of receiver.**—Except in those cases where the sheriff of the county is appointed to act as receiver in a mortgage foreclosure, the receiver should be required to give proper bonds for the faithful performance of his duties.[5] The bond must be properly executed, approved[6] and filed

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[1] Rutter v. Tallis, 5 Sandf. (N. Y.) 610 (1852). See Deming v. New York Marble Co., 12 Abb. (N. Y.) Pr. 66 (1860); *In re* North American Gutta Percha Co., 17 How. (N. Y.) Pr. 549 (1859); s. c. 9 Abb. (N. Y.) Pr. 79; Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183 (1855).

[2] See Porter v. Williams, 9 N. Y. 142 (1853).

[3] *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840).

[4] 2 Barb. Ch. Pr. (2d ed.) 317.

[5] Grantham v. Lucas, 15 W. Va. 425, 432 (1879). See Willis v. Corlies, 2 Edw. Ch. (N. Y.) 281 (1834); Verplank v. Caines, 1 Johns. Ch. (N. Y.) 57 (1814); Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841); Quincy v. Cheeseman, 4 Sandf. Ch. (N. Y.) 405 (1846); Smith v. Butcher, 28 Gratt. (Va.) 144 (1875). By the provisions of the Kentucky Civil Code, § 331, and the Ohio Rev. St. § 5589, a receiver, before entering upon the discharge of his duties, must be sworn to perform them faithfully, and, with one or more sureties to be approved by the court, execute a bond to such person, and in such sum as the court shall direct, conditioned that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein.

[6] The Maryland Statute, 2 Md. Code Pub. L. 28, 29, requiring the bond of a receiver to be approved by the court, but not making such approval a condition precedent, is directory only; an approval *nunc pro tunc* will be valid. Gephart v. Starrett, 47 Md. 396 (1877). A court commissioner has no jurisdiction to appoint a receiver, and a bond given by a receiver so appointed and approved by such commissioner, is void. Quiggle v. Trumbo, 56 Cal. 626 (1880).

with the clerk of the court which appointed the receiver.[1] After executing and filing his bond he may immediately enter upon the discharge of his duties.[2]

The sureties of the receiver must reside within the jurisdiction of the court,[3] and be real and substantial persons capable of contracting.[4] If the sureties proposed are not satisfactory to the court, the receiver can present the names of other sureties in an amended proposal, stating them to be in place of those formerly proposed.[5] Should the court at any time regard the sureties of a receiver as insufficient, it may require him to show cause why he should not give additional sureties upon his bond; upon his failure to show cause, he may be removed. And it must plainly appear that the court erred in so removing a receiver before an appellate court will reverse its action.[6]

§ 650. **Effect of appointment of receiver.**—The appointment of a receiver determines no rights.[7] A court will not, on a motion to appoint a receiver, prejudge the case,[8] or give any intimation what its decision will be at the trial.[9] While the appointment of a receiver operates, to a certain extent, as an injunction,[10] yet the effect of the appointment of a receiver is very different from that of granting an injunction.[11]

The effect of the appointment of a receiver is to remove the property from the possession of the person occupying or holding it.[12] Where a receiver has been appointed and an

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[1] Where a bond given by a receiver upon his appointment is not filed with the proper officer, the court may direct it to be filed *nunc pro tunc*. Whiteside v. Prendergast, 2 Barb. Ch. (N. Y.) 471 (1847); Carper v. Hawkins, 8 W. Va. 29 (1875).

[2] See *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840).

[3] Cockburn v. Raphall, 2 Sim. & S. 453 (1825).

[4] Smith v. Scandrett, 1 W. Bl. 444 (1778); Breadmore v. Phillips, 4 Maule. & Sel. 173 (1815).

[5] 2 Barb. Ch. Pr. (2d ed.) 316; Edw. on Rec. 74.

[6] Shackelford v. Shackelford, 32 Gratt. (Va.) 481 (1879).

[7] *In re* Colvin, 3 Md. Ch. Dec. 278, 302 (1851); Chase's Case, 1 Bland Ch. (Md.) 206, 213 (1826); Beverley v. Brooke, 4 Gratt. (Va.) 187, 208 (1847).

[8] Hugonin v. Basley, 13 Ves. 107 (1806).

[9] Tripp v. Chard Ry. Co., 11 Hare, 264 (1853).

[10] Evans v. Coventry, 3 Drew. 82

order is made for the delivery of the property to him, a demand therefor must be made by the receiver personally, for the party in possession is not bound to deliver the property to any one except the receiver. The plaintiff's attorney can not act, in this respect, for the receiver or as his attorney.[1]

The appointment of a receiver has no retroactive effect to divest the accrued rights of third persons.[2] The rights of a receiver extend only to the possession of the land, to collecting the rents and profits, to making leases and to exercising other acts of control over the property, the legal title remaining in every respect as it was prior to the appointment of such receiver.[3] A receiver can not be placed in possession of demised premises on the application of a party who not only is not entitled to the possession thereof, but who has no interest whatever in the property in question.[4]

§ 651. Jurisdiction of receiver.—A receiver has no rights or powers except such as are conferred upon him by the order appointing him and by the practice of the courts;[5] and he can not act in his official capacity beyond the jurisdiction of the court by which he was appointed.[6]

(1854). An injunction is embodied more or less in every order appointing a receiver.

[11] See Boyd v. Murray, 3 Johns. Ch. (N. Y.) 48 (1817).

[12] Payne v. Baxter, 2 Tenn. Ch. 517 (1876).

[1] Panton v. Zebley, 19 How. (N. Y.) Pr. 394 (1860).

[2] Favorite v. Deardorff, 84 Ind. 555 (1882).

[3] Foster v. Townshend, 2 Abb. (N. Y.) N. C. 29, 34 (1877); Attorney-General v. Coventry, 1 P. Wm. 307 (1716); Hyde v. Greenhill, 1 Dick. 106 (1745); Sutton v. Stone, 1 Dick. 107 (1745). See Neale v. Bealing, 3 Swan. 304 n. c. (1744); Jeremy Eq. Jurisd. 252, 253.

[4] Huerstel v. Lorillard, 6 Robt. (N. Y.) 260 (1867).

[5] Chatauqua County Bank v. White, 6 Barb. (N. Y.) 589 (1849). See Booth v. Clark, 58 U. S. (17 How.) 322, 331 (1854); bk. 15 L. ed. 164; *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840); Verplank v. The Mercantile Ins. Co., 2 Paige Ch. (N. Y.) 438, 452 (1831); Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183 (1855); Bowersbank v. Colasseau, 3 Ves. 164 (1796); 1 Barb. Ch. Pr. (2d ed.) 669; 2 *Id.* 522.

[6] Moseby v. Burrow, 52 Tex. 396 (1880). But it has been held, that where a mortgage of property situated in one state is executed to a receiver appointed in another state, such receiver, or his successor in office, may maintain an action in his own name to foreclose the mortgage in the state where the premises are

An order appointing a receiver is *per se* a sequestration of the property, and gives all the necessary means of enforcing the receiver's rights;[1] but if the person appointed receiver fails to qualify under the order, he will acquire no interest in or right to the property.[2]

§ 652. **Nature of receiver's possession.**—It has been said, where a receiver is appointed on the application of the mortgagee in a mortgage foreclosure, to take charge of the property and to collect the rents and profits, that such receiver is in law an agent of the mortgagor, the owner of the legal estate;[3] but the better doctrine seems to be that he is an officer of the court, appointed on behalf of all who may establish an interest in the property,[4] and not, in any sense, a representative of the party securing his appointment.[5] The property in his hands is *in custodia legis*;[6] his possession is the possession of the court and is entitled to its protection.[7] The possession of a receiver is valid as against attaching creditors, even when the property is situated in another state.[8]

Where a court, having jurisdiction of the case, has appointed a receiver for the property which is the subject of the suit, and the receiver is in possession, no other court of

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situated. Iglehart v. Bierce, 36 Ill. 133 (1864). See Dixon v. Buell, Adm'r, 21 Ill. 203 (1859); Townsend v. Carpenter, 11 Ohio, 21 (1841).

[1] Porter v. Williams, 9 N. Y. 142 (1853); s. c. 59 Am. Dec. 519.

[2] Cook v. Citizens' Bank, 73 Ind. 256 (1881).

[3] See Chinnery v. Evans, 11 H. L. Cas. 134 (1864).

[4] Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 417 (1846); Booth v. Clark, 58 U. S. (17 How.) 322, 331 (1854); bk. 15 L. ed. 164; Skip v. Harwood, 3 Atk. 564 (1747).

[5] Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183 (1855); Tillinghast v. Champlin, 4 R. I. 173 (1856); s. c. 67 Am. Dec. 510; Booth v. Clark, 58 U. S. (17 How.) 322 (1854); bk. 15 L. ed. 164; Angel v. Smith, 9 Ves. 336 (1804); Jeremy Eq. Jur. 248, 249; 2 Dan. Ch. Pr. 1406.

[6] Ross v. Williams, 11 Heisk. (Tenn.) 410 (1872).

[7] King v. Ohio & M. R'y Co., 7 Biss. C. C. 529 (1877); Field v. Jones, 11 Ga. 413 (1852); Hutchinson v. Hampton, 1 Mon. T. 39 (1868); People v. Brooks, 40 Mich. 333 (1879); s. c. 29 Am. Rep. 534; Battle v. Davis, 66 N. C. 252 (1872).

[8] Chicago, M. & St. P. R. Co. v. Keokuk Northern Line Packet Co., 108 Ill. 317 (1884); s. c. 48 Am. Rep. 557.

co-ordinate jurisdiction can interfere with the property, or entertain complaints against the receiver, or remove him,[1] or in any way interfere with his possession, without leave of the court which made the appointment.[2]

§ 653. Rights and powers of receivers.—Until his appointment is complete, a receiver has no right to the rents and profits of the mortgaged premises, and then only to such as remain unpaid; because it is only by virtue of the receiver's appointment that the mortgagee acquires an equitable lien on the unpaid rents.[3] A receiver appointed in a mortgage foreclosure has no powers except those conferred upon him by the order appointing him and by the practice of the court.[4] And the powers thus conferred, do not extend beyond the jurisdiction of the court making the appointment.[5] Such a receiver has no authority, without an order of the court, to disburse money to any person,[6] or in any manner to lessen the funds in his hands, as by expenditures for repairs.[7]

Where, pending the foreclosure of a mortgage on a farm, a receiver is appointed on the written assent of all the solicitors of all the parties in interest, with power to let the

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[1] Bruce v. Manchester & K. R. R. Co., 19 Fed. Rep. 342 (1884); Young v. Montgomery & E. R. R. Co., 2 Woods C. C. 606 (1875); Kennedy v. Indianapolis, C. & L. R. Co., 2 Flipp. C. C. 704 (1880); s. c. 3 Fed. Rep. 97; 11 Cent. L. J. 89; 26 Int. Rev. Rec. 390; 10 Rep. 359.

[2] See Foster v. Townshend, 2 Abb. (N. Y.) N. C. 29, 36 (1877); Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841); Angel v. Smith, 9 Ves. 336, 338 (1804); Pelham v. Duchess of New Castle, 3 Swan. 289, 293 *n.* (1819); 1 Story Eq. Jur. (11th ed.) 833a.

[3] Rider v. Vrooman, 12 Hun (N. Y.) 299 (1877). See Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835); Favorite v. Deardorff, 84 Ind. 555 (1882).

[4] Verplank v. Mercantile Ins. Co., 2 Paige Ch. (N. Y.) 438, 452 (1831); Booth v. Clark, 58 U. S. (17 How.) 323, 331 (1854); bk. 15 L. ed. 164. See Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183 (1855); *In re* Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840); Bowersbank v. Colasseau, 3 Ves. 164 (1796).

[5] Booth v. Clark, 58 U. S. (17 How.) 322, 331 (1854); bk. 15 L. ed. 164.

[6] Duffy v. Casey, 7 Robt. (N. Y.) 79 (1868). Counsel in a case can not compel a receiver to pay them moneys to which they think themselves entitled, under penalty of removal. See Hospes v. Almstedt, 13 Mo. App. 270 (1885).

[7] Wyckoff v. Scofield, 103 N. Y. 630 (1886). It seems that the court

premises, he may let the farm for a year without a special order of the court, that being the usual term for such a lease; and such a lease will neither be limited nor terminated by the duration of the suit. If the mortgagee is appointed receiver, he must obtain as large a rent as possible, although it may exceed the amount due on his mortgage.[1]

A receiver authorized as such to execute formal satisfactions and discharges of mortgages in his hands upon payment, has also authority to receive payment of the amounts secured by such mortgages, although the same may not be due at the time.[2] A receiver appointed in a mortgage foreclosure has the same powers and is governed by the same rules in respect to the bringing and the defending of suits as receivers in other actions.[3]

§ 654. **Rights and duties of receivers.**—A receiver in a mortgage foreclosure, being an officer of the court, is entitled to receive the guidance and protection of such court,[4] and to be instructed as to his duties,[5] the same as receivers in other cases. In cases of doubt, and particularly

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may direct such expenditures, if they are necessary for the preservation of the property. Wyckoff v. Scofield, 103 N. Y. 630 (1886).

[1] Bolles v. Duff, 37 How. (N. Y.) Pr. 162 (1869). The receiver can not become his own tenant, unless by consent of the parties. Alven v. Bond, 3 Irish Eq. 372 (1841); Stannus v. French, 13 Irish Eq. 161 (1840). Under the English rule, the practice required the receiver to obtain an order of the court before letting the lands. Neale v. Bealing, 3 Swanst. 304 (1744); Morris v. Elme, 1 Ves. Jr. 139 (1790); Swaby v. Dickon, 5 Sim. 631 (1833); Robertson v. Armstrong, 2 Molloy, 352 (1824), or its approbation of the matter; Duffield v. Elwes, 11 Beav. 590 (1849); Wynne v. Newborough, 1 Ves. Jr. 164 (1790).

[2] Heermans v. Clarkson, 64 N. Y. 171 (1876).

[3] See Phelps v. Cole, 3 N. Y. Code Rep. 157 (1850); Smith v. Woodruff, 6 Abb. (N. Y.) Pr. 65 (1858); Merritt v. Lyon, 16 Wend. (N. Y.) 410 (1836); Field v. Jones, 11 Ga. 413, 417 (1852); Gadsden v. Whaley, 14 S. C. 210 (1880); Booth v. Clark, 58 U. S. (17 How.) 322, 331 (1854); bk. 15 L. ed. 164.

[4] Cammack v. Johnson, 2 N. J. Eq. (1 H. W. Green) 163 (1839). See *In re* Receivers of Globe Ins. Co., 6 Paige Ch. (N. Y.) 102 (1836); Hooper v. Winston, 24 Ill. 353 (1860).

[5] See Smith v. New York Cent. Stage Co., 18 Abb. (N. Y.) Pr. 419 (1865); s. c. 28 How. (N. Y.) Pr. 208; *In re* VanAllen, 37 Barb. (N. Y.) 225 (1861); Curtis v. Leavitt, 10 How. (N. Y.) Pr. 481 (1855); s. c. 1 Abb. (N. Y.) Pr. 274.

in cases where there are conflicting interests or claims, the receiver should apply to the court for instruction.[1]

It is the duty of a receiver to obey the orders of the court which appointed him,[2] and to act in all things with a view to the equitable rights of the parties in interest.[3] Where a mortgagee in possession is appointed receiver of the property, his individual interests must not be permitted to interfere with his duties as receiver.[4] A receiver must pay into court all the rents collected by him prior to the conveyance of the mortgaged premises pursuant to the terms of the judgment of foreclosure and sale.[5]

§ 655. **Rents bound from date of appointment of receiver.**—A mortgagee has no claim, as mortgagee, to the rents and profits of the mortgaged premises, and can become entitled to receive them only by commencing proceedings for the foreclosure of his mortgage and procuring the appointment of a receiver;[6] and even then he will be confined to the rents and profits accruing during the pendency of the suit.[7] He will also have authority to collect such rents and

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[1] Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183 (1855). It is said, however, that a receiver should not, of his own motion, make an application to the court; but that, if he finds himself in circumstances of difficulty, he should request the plaintiff to make the necessary application, and that on his default, the receiver may properly apply. Edw. on Rec. 158; 2 Barb. Ch. Pr. (2d ed.) 287.

[2] Corey v. Long, 12 Abb. (N. Y.) Pr. N. S. 427 (1872); s. c. 43 How. (N. Y.) Pr. 492. In case of the refusal of a receiver to obey the instructions of the court, the court can and ought to remove him. Guardians' Savings Institution v. Bowling Green Savings Bank, 65 Barb. (N. Y.) 275 (1873).

[3] It has been said that the receiver should follow the directions of the particular plaintiff who procured his appointment or that of his legal advisers. Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183 (1855).

[4] Bolles v. Duff, 54 Barb. (N. Y.) 215 (1869); s. c. 37 How. (N. Y.) Pr. 162.

[5] Nichols v. Foster, 9 N. Y. Wk. Dig. 468 (1880).

[6] Wyckoff v. Scofield, 98 N. Y. 475 (1885). See Rider v. Bagley, 84 N. Y. 461 (1881); Argall v. Pitts, 78 N. Y. 239 (1879). It was held in the case of Rider v. Bagley, *supra*, that by the appointment of a receiver in a foreclosure suit, the plaintiff obtains an equitable lien only upon the unpaid rents, and that until such appointment, the owner of the equity of redemption has a right to receive the rents and can not be compelled to account for them.

[7] Argall v. Pitts, 78 N. Y. 239 (1881); Neulis v. Bussing, 9 Daly

profits as have theretofore accrued, but have not yet come into the hands of the owner of the equity of redemption, and apply them to the payment of the mortgage debt:[1] but the court has no power to order rents which have already been collected and are in the possession of the owner, to be paid over to the receiver.[2] Neither will a receiver be entitled to rents and profits collected during the pendency of the motion for his appointment.[3]

A mortgagee has no right, as mortgagee, to the rents of the mortgaged premises which have been paid into court by a receiver appointed in a suit by legatees for the administration of the estate of the mortgagor, although the mortgagee may have obtained a decree for the foreclosure of his mortgage in the same court and may have sold the mortgaged premises, and part of the debt remains unsatisfied. He should have applied to the court to discharge the receiver in the suit for administration, and either entered into possession himself or applied for a receiver in his action for foreclosure.[4] The receiver should compel tenants not

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(N. Y.) 305 (1880); Leeds v. Gifford, 41 N. J. Eq. (14 Stew.) 464 (1886); Conover v. Grover, 31 N. J. Eq. (4 Stew.) 539 (1879). See Stillman v. VanBeuren, 100 N. Y. 439 (1885). In Nealis v. Bussing, *supra*, it was held, where a receiver of the rents, issues and profits of mortgaged premises had been appointed in an action for the foreclosure of the mortgage, and notice of his appointment had been given to a lessee of the premises under a lease from the mortgagor, and the lessee had paid rent falling due to the receiver, that the mortgagor had no authority to accept a surrender from the lessee, or to execute a new lease of the premises during the continuance of the receivership, and that such surrender and acceptance and new lease constituted no defence to an action by the receiver against the lessee for rent subsequently accruing and remaining unpaid.

[1] Wyckoff v. Scofield, 98 N. Y. 475 (1885); Codrington v. Johnston, 1 Beav. 524 (1838).

[2] Wyckoff v. Scofield, 98 N. Y. 475 (1885).

[3] Rider v. Bagley, 84 N. Y. 46 (1881). Where another party than the mortgagee has acquired a legal or equitable interest in, or title to, the rents or profits, prior to the appointment of a receiver as provided in section 299 of the Civil Code, the mortgagee's claim to such rents or profits will be postponed to that of the intervening claim. Woolley v. Holt, 14 Bush (Ky.) 788 (1879).

[4] Coddington v. Bispham, 36 N. J. Eq. (9 Stew.) 574 (1883).

parties, to attorn to him, or he will not be permitted to proceed against them by summary proceedings.[1]

§ 656. **Personal liability of receivers.**—The liability of a receiver under a mortgage foreclosure is the same as that of a receiver appointed in any other case. Thus, a receiver will be personally liable for loss through neglect or a breach of duty,[2] or if he exceeds his authority.[3] If a receiver departs from the line of his duty, as marked out by the decree, and a loss ensues, he will be obliged to bear it, although he may have acted under the advice of counsel. But property lost while in the hands of a receiver, being *in custodia legis*, can not be considered as lost by conversion, so as to render the obligors on a bond for its return, liable therefor.[4]

Where a receiver, appointed upon the application of the mortgagee, embezzles or otherwise wastes the rents and profits, the loss will fall on the mortgagor, or on his estate.[5] Yet it is said that a person, at whose instance a receiver is appointed, should see that he performs his duties, and that any loss which he might have prevented by proper diligence, must, as between him and the other litigants, be borne by him.[6]

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[1] Bowery Savings Bank v. Richards, 3 Hun (N. Y.) 366 (1875).

[2] As where loss is sustained by a tenant quitting possession and the receiver neglects to apply promptly to the court for authority to re-let. Wilkins v. Lynch, 2 Molloy, 499 (1823); Edw. on Rec. 573.

[3] Hills v. Parker, 111 Mass. 508 (1873); s. c. 15 Am. Rep. 63; Stanton v. Alabama R. Co., 2 Woods C. C. 506 (1875).

[4] Wall v. Pulliam, 5 Heisk. (Tenn.) 365 (1871).

[5] Rigge v. Bowater, 3 Bro. Ch. 365 (1791); Hutchinson v. Lord Massarcene, 2 Ball & B. (Ir. Ch.) 55 (1811).

[6] Downs v. Allen, 10 Lea (Tenn.) 652 (1882).

CHAPTER XXXI.

RECEIVER—WHEN WILL BE APPOINTED.

CAUSES FOR APPOINTMENT—INADEQUACY OF SECURITY—INSOLVENCY OF MORTGAGOR—PART ONLY OF DEBT DUE—WHEN RECEIVER DENIED—MORTGAGEE IN POSSESSION—ACCOUNTING BY RECEIVER—DISCHARGE.

§ 657. Causes for appointing a receiver—Generally.
658. Inadequacy of security and insolvency of mortgagor.
659. Receivership in New Jersey.
660. Lien of mortgagee on rents and profits.
661. Receiver of deceased mortgagor's estate.
662. Imminent danger of loss or injury.
663. Accumulation of taxes and interest, ground for appointing a receiver.
664. Waste and fraud, causes for appointing a receiver.
665. Injunction restraining sale, cause for appointing a receiver.
666. When a receiver will not be appointed—Mortgagor giving security.
667. Where part only of debt due, or premises can be sold in parcels.
668. Where mortgagee guilty of laches—Validity of mortgage denied.
669. Where property in possession of stranger to the foreclosure.
670. Where a bill is filed to redeem.
671. When rents can not be applied under a receiver.
672. When receiver applied for by defendant.
673. Receiver not appointed during the time allowed for redemption.
674. Receivers as between different mortgagees.
§ 675. Appointment of second receiver.
676. No receiver where mortgagee holds legal title.
677. No receiver where mortgagee in possession.
678. Subsequent mortgagee redeeming from prior mortgagee in possession.
679. Other causes for receiver where mortgagee in possession.
680. When a receiver will be appointed against a mortgagee in possession.
681. Receiver where first mortgagee out of possession.
682. Receiver appointed upon the application of junior mortgagee.
683. Receiver when junior mortgagee in possession.
684. General practice in appointing receiver.
685. Time of appointing receiver.
686. Appointment of receiver before answer.
687. Appointment of receiver after granting decree.
688. Appointment of receiver after sale.
689. Interference with receiver's possession.
690. Remedy of parties claiming title paramount to receiver.
691. Appeal—Continuance of receivership.
692. Accounting of receivers.
693. Compensation of receivers.
694. Removal of receivers.
695. Discharge of receivers.

§ 657. **Causes for appointing a receiver—Generally.**—In an action for the foreclosure of a mortgage, the plaintiff is entitled to the appointment of a receiver to take charge of the property and to collect the rents and profits thereof, when it is made to appear, that the premises will probably be insufficient to pay the mortgage debt,[1] that the party who is liable for any deficiency in the security is insolvent,[2] and that the plaintiff has *prima facie* an equitable right to the property in controversy. A receiver will also be appointed if circumstances of fraud or bad faith on the part of the mortgagor are shown,[3] or if there are other facts involved in the case which would render the denial of a receiver inequitable or unjust.[4] A receiver will always be appointed when it is shown that the rents and profits have been expressly pledged by the terms of the mortgage for the payment of the debt.[5]

The appointment of a receiver is always a matter resting in the sound discretion of the court; and unless it is made clearly to appear that such discretionary power has been

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[1] MacKellar v. Rogers, 52 N. Y. Supr. Ct. (20 J. & S.) 360 (1885); Hollenbeck v. Donell, 94 N. Y. 342 (1883); Main v. Ginthert, 92 Ind. 180 (1883); Jacobs v. Gibson, 9 Neb. 380 (1879). See Barnett v. Nelson, 54 Iowa, 41 (1880); Myton v. Davenport, 51 Iowa, 583 (1879).

[2] See Mitchell v. Bartlett, 51 N. Y. 447 (1873); Astor v. Turner, 2 Barb. (N. Y.) 444 (1848); Hollenbeck v. Donell, 29 Hun (N. Y.) 94 (1883); reversed in 94 N. Y. 342; Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565, 568 (1841); Price v. Dowdy, 34 Ark. 285 (1879); Main v. Ginthert, 92 Ind. 180 (1883); White v. Griggs, 54 Iowa, 650 (1880); Myton v. Davenport, 51 Iowa, 583 (1879); Douglass v. Cline, 12 Bush. (Ky.) 608 (1876); Chase's Case, 1 Bland Ch. (Md.) 206 (1826); Brown v. Chase, Walk. Ch. (Mich.) 43 (1842); Phillips v. Eiland, 52 Miss. 721 (1876); Kerchner v. Fairley, 80 N. C. 24 (1879); Henshaw v. Wells, 9 Humph. (Tenn.) 568 (1848); Schrieber v. Carey, 48 Wis. 208 (1879).

[3] Haas v. Chicago Building Society, 89 Ill. 498 (1878).

[4] Haas v. Chicago Building Society, 89 Ill. 498 (1878). See Bloodgood v. Clark, 4 Paige Ch. (N. Y.) 577 (1834). These facts may be made to appear by affidavits. See Vann v. Barnet, 2 Bro. Ch. 157 (1788); Metcalfe v. Pulvertoft, 1 Ves. & B. 180 (1813).

[5] Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Verplank v. Caines, 1 Johns. Ch. (N. Y.) 57 (1814); Tysen v. Wabash R. Co., 8 Biss. C.C. 247 (1878). See Morrison v. Buckner, Hempst. C. C. 442 (1843); Lloyd v. Passingham, 16 Ves. 59 (1809). See Warner v. Gouverneur's Ex., 1 Barb. (N.Y.) 36 (1847); Edw. on Rec. 356 *et seq.*

abused to the injury of the party complaining, it will not be interfered with.[1] Where the rents and profits are not pledged by the terms of the mortgage, the court must be satisfied that the premises are insufficient to pay the debt and that there are other circumstances which justify the appointment;[2] but where the rents and profits are expressly pledged for the payment of the debt, the mortgagee or his assignee need not conclusively establish a right to recover on the mortgage. If, in such a case, he makes out a probable right to recover and shows the insolvency of the debtor, he will be entitled to the appointment of a receiver.[3]

In Indiana,[4] the appointment of a receiver in a suit to foreclose a mortgage may be made without reference to the solvency of the mortgagor, when it appears that the mortgaged property is not sufficient to satisfy the debt; and the mortgagee is authorized to take possession of the land and the crops growing thereon, although the mortgagor may be in possession at the time.[5]

§ 658. **Inadequacy of security and insolvency of mortgagor.**—In an action for the foreclosure of a mortgage the court has power to appoint a receiver of the rents and profits of the mortgaged premises, where the whole amount of the mortgage is due,[6] and it is made to appear, that the proceeds of the sale will probably be insufficient to satisfy the debt secured,[7] that the property is rapidly depreciating in value,[8] and that the mortgagor, or other party personally liable for the mortgage debt, is insolvent.[9]

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[1] Jacobs v. Gibson, 9 Neb. 380 (1879).

[2] Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Whitehead v. Wooten, 43 Miss. 523 (1870); Frisbie v. Bateman, 24 N. J. Eq. (9 C. E. Gr.) 28 (1873); Cortleyeu v. Hathaway, 11 N. J. Eq. (3 Stockt.) 39 (1855); s. c. 64 Am. Dec. 478.

[3] DesMoines Gas Co. v. West, 44 Iowa, 23 (1876).

[4] Ind. Rev. Stat. (1881), § 1222.

[5] Hursh v. Hursh, 99 Ind. 500 (1884).

[6] Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835).

[7] Jacobs v. Gibson, 9 Neb. 380 (1879). See Haas v. Chicago Building Society, 89 Ill. 498 (1878); Newport & Cinn. Bridge Co. v. Douglass, 12 Bush (Ky.) 673 (1877).

[8] Smith v. Kelley, 31 Hun (N. Y.) 387 (1884).

[9] Hollenbeck v. Donnell, 94 N. Y.

Where a corporation is the defendant owner in a mortgage foreclosure, a receiver will be appointed only when the mortgage debt, or the interest thereon, has remained unpaid for at least thirty days after it became due, and has been demanded of the proper officer of such corporation; and he will be appointed then, only when the rents of such property have been specifically pledged in the mortgage, or the property itself will probably be insufficient to pay the amount of the mortgage debt.[1]

To entitle a mortgagee to a receiver he must show clearly that the mortgaged premises are an inadequate security for the debt and that the mortgagor, or other party personally liable for the debt, is insolvent.[2] Some of the cases hold that the mortgagor must be shown to be hopelessly insolvent;[3] others, however, hold that in order to justify the appointment of a receiver in a foreclosure, it need not appear that the mortgagor is insolvent, if it is shown that the mortgaged property is of insufficient value to pay the debt.[4]

In no case will a receiver be appointed, if it is clear that on a sale under the decree of foreclosure, the mortgaged

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342 (1884), reversing 29 Hun (N. Y.) 94; Warner v. Gouverneur's Ex., 1 Barb. (N. Y.) 36 (1847); Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Verplank v. Caines, 1 Johns. Ch. (N. Y.) 58 (1814); Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); s. c. 43 Am. Dec. 766; Howell v. Ripley, 10 Paige Ch. (N. Y.) 45 (1843); Sea Insurance Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841); Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835); Quincy v. Checseman, 4 Sandf. Ch. (N. Y.) 405 (1846); Hughes v. Hatchett, 55 Ala. 631 (1876); Price v. Dowdy, 34 Ark. 285 (1879); Jacobs v. Gibson, 9 Neb. 380 (1879); Tysen v. Wabash R. Co., 8 Biss. C. C. 247 (1878); Hunter v. Hays, 7 Biss. C. C. 362 (1877); Morrison v. Buckner, Hempst. C. C. 442 (1843); Lloyd v. Passingham, 16 Ves. 59 (1809).

[1] Laws of New York for 1870, chap. 151, § 3.

[2] Syracuse Bank v. Tallman, 31 Barb. (N. Y.) 201 (1857); Tyler v. Poppe, 4 Edw. Ch. (N. Y.) 430 (1844); Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Willis v. Corliss, 2 Edw. Ch. (N. Y.) 281, 287 (1834); Haggarty v. Pittman, 1 Paige Ch. (N. Y.) 298 (1828); s. c. 19 Am. Dec. 434; Wooding v. Malone, 30 Ga. 979 (1860); Edie v. Applegate, 14 Iowa, 273 (1862); Cofer v. Echerson, 6 Iowa, 502 (1858); Blondheim v. Moore, 11 Md. 365, 374 (1857); Clark v. Ridgely, 1 Md. Ch. Dec. 70 (1847).

[3] Cone v. Coombs, 5 McCr. C. C. 651 (1884); s. c. 18 Fed. Rep. 576.

[4] Hursh v. Hursh, 99 Ind. 500 (1884)

property will sell for enough to pay the debt, interest and costs.[1] It is said to be erroneous to appoint a receiver in a foreclosure, where neither waste, nor failure to pay taxes, nor diminution of the value of the security, nor increase of the mortgage debt is shown, and where it does not appear that the party personally liable for the debt is not responsible for any probable deficiency.[2]

§ 659. **Receivership in New Jersey.**—It seems that the rule in New York and in other states, allowing a receiver where the premises are an inadequate security for the debt, and the mortgagor, or other party personally liable therefor, is insolvent, has never been adopted in New Jersey, where a distinction is made between a first and a subsequent mortgagee, their rights being essentially different in that state.

The first mortgagee has a legal right to the rents and profits, and has his remedy at law by ejectment. A subsequent mortgagee is better entitled to the remedy of a receiver, because he has no right at law to the possession of the premises as against a prior mortgagee.[3] But where it appears that the mortgagor is insolvent and has removed from the premises and given the possession thereof to a party who occupies them for his own use without paying rent, and it also appears that the mortgagor is committing waste and that the premises are an insufficient security for the debt, a court of equity will appoint a receiver to take charge of the property while the prior mortgagee is prosecuting his ejectment at law to obtain possession of the mortgaged premises.[4]

§ 660. **Lien of mortgagee on rents and profits.**—On a condition broken, by which a mortgagee is authorized to commence a foreclosure, he will have an equitable lien upon the rents and profits of the mortgaged property, if it is an inadequate security for the debt, which lien may be enforced

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[1] Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Pullan v. Cincinnati & C. R. R. Co., 4 Biss. C. C. 35 (1865).

[2] Morris v. Branchaud, 52 Wis. 187 (1881).

[3] Cortleyeu v. Hathaway, 11 N. J. Eq. (3 Stockt.) 40, 42 (1855).

[4] Brasted v. Sutton, 30 N. J. Eq. (3 Stew.) 462 (1879).

by proper proceedings;[1] but if he makes no demand for the rents, and takes no steps to have them applied to his debt, the mortgagor can continue to collect them,[2] because until the mortgagee takes possession of the premises or files a bill for foreclosure and procures the appointment of a receiver, the mortgagor is "owner to all the world," and is entitled to all the profits made.[3]

Where an assignee in bankruptcy is collecting the rents and profits, if the mortgagee desires them to be applied specifically to his lien, he must not only show the insufficiency of the security, without the pernancy of the rents and profits, but he must also intercept them before they reach the assignee.[4] Where, however, only one-sixth of the mortgage debt is due, and the premises are so divided that a part can be sold, a receiver should not be appointed for the whole of the mortgaged premises, but only for a proportionate part thereof, sufficient protection being afforded thereby.[5]

Notwithstanding the changes in the practice of foreclosing mortgages, the remedy by a receiver remains the same under the New York Code of Civil Procedure as under the old chancery practice,[6] and the mortgagee may obtain a specific lien upon the rents and profits of the premises, though not pledged in the mortgage for the payment of the debt, by diligently obtaining the appointment of a receiver; a subsequent mortgagee may thus gain an advantage over a prior mortgagee as to the rents and profits.[7]

§ 661. **Receiver of deceased mortgagor's estate.**—In the appointment of receivers in mortgage foreclosures, no exception is made in favor of the executors or administrators

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[1] Jacobs v. Gibson, 9 Neb. 380 (1879); Hunter v. Hays, 7 Biss. C. C. 362 (1877).

[2] Hunter v. Hays, 7 Biss. C. C. 362 (1877).

[3] American Bridge Co. v. Heidelbach, 94 U. S. (4 Otto), 798, 800 (1876); s. c. bk. 24 L. ed. 322; 15 Alb. L. J., 294.

[4] Foster v. Rhodes, 10 Bankr. Reg. 523 (1874).

[5] Hollenbeck v. Donnell, 94 N. Y. 342 (1884), reversing 29 Hun (N. Y.) 94.

[6] Hollenbeck v. Donnell, 94 N. Y. 342, 345 (1884). See Post v. Dorr, 4 Edw. Ch. (N. Y.) 412 (1844).

[7] Post v. Dorr, 4 Edw. Ch. (N. Y.) 412 (1844); Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Thomas v. Brigstocke, 4 Russ. 64 (1827).

of deceased mortgagors.[1] No matter who the defendants may be, if the mortgaged property will probably be insufficient to discharge the mortgage debt, the plaintiff is in a position to demand that his security be augmented by enough of the rents and profits to make it good. There is no good reason for making an exception in favor of the representative of a deceased mortgagor; nor can a court, in justice to the mortgagee, do so, for it is very clear that rents collected by the administrator or executor would not be subject to the lien of the mortgage, but would belong to the general assets of the estate and be distributed accordingly among all its creditors.[2]

When a receiver is sought against an executor, administrator or other trustee, to collect rents and to manage the estate, it must be established by suitable proof that there has been some positive loss, or that there is danger of loss of the funds, as by waste, or misapplication, or apprehended insolvency,[3] or personal fraud,[4] or misconduct, or negligence on the part of such trustee. The mere poverty of the trustee is not a sufficient cause;[5] unfitness,[6] or an abuse of the trust, or danger of insolvency, or some other sufficient cause, must be shown.[7]

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[1] Jacobs v. Gibson, 9 Neb 380 (1879). In Kerchner v. Fairley, 80 N. C. 24 (1879), the plaintiff mortgagee was administrator of one of two mortgagors, whose heirs and the other mortgagor were defendants in an action to foreclose the mortgage; the property mortgaged was inadequate to pay the debt, and the mortgagor in possession was insolvent; the plaintiff denied an alleged payment of the debt and the existence of assets in his hands applicable thereto; the court held that, in such a case, it was not error, on application of the plaintiff, to appoint a receiver to secure the rents and profits pending the litigation.

[2] Jacobs v. Gibson, 9 Neb. 380, 383 (1879). The Nebraska Code of Civil Procedure, Gen. Stat. 568, § 266, 2d subd. provides that, "in an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed or materially injured, or is probably insufficient to discharge the mortgage debt," a receiver may be appointed.

[3] Middletown v. Dodswell, 13 Ves. 266 (1806).

[4] See Chautauqua County Bank v. White, 6 N. Y. 236 (1832); McElwain v. Willis, 9 Wend. (N. Y.) 548, 561 (1832); Stileman v. Ashdown, 2 Atk. 477 (1742); Edgell v. Haywood, 3 Atk. 357 (1746).

[5] 2 Story Eq. Jur. (11th ed.) § 386.

[6] Anon., 12 Ves. 4 (1806).

[7] Middleton v. Dodswell, 13 Ves. 266 (1806).

§ 662. **Imminent danger of loss or injury.**—After an action for foreclosure has been commenced and it is made to appear that the property in litigation, or the rents and profits thereof, are in danger of loss or injury, a receiver may be appointed to take charge of such rents and profits in the interest of the litigants;[1] but the rents and profits of the mortgagee's security must be in actual danger to warrant such an appointment.[2] Thus, if the mortgagor of an estate, which is subject to a rent charge, refuses to pay the rent, a receiver may be appointed.[3] And a mortgagee of a leasehold, who has made advances to prevent eviction for non-payment of rent by the mortgagor, may have a receiver appointed, notwithstanding the fact that the interest on the mortgage may have been regularly and promptly paid.[4]

If it appears to the court that the property is in danger of being lost[5] or materially injured,[6] or if there is reason to apprehend that the mortgagee will be in a worse situation if the appointment is delayed,[7] the appointment of a receiver will be granted almost as a matter of course.[8] Thus, it is thought that the court may, in its discretion, appoint a receiver of the rents and profits during the pendency of a foreclosure, where it appears that the premises are chiefly valuable for use during the continuance of an oil business,

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[1] Newport & Cin. Bridge Co. v. Douglass, 12 Bush (Ky.) 673 (1876). See Shotwell v. Smith, 3 Edw. Ch. (N.Y.) 588 (1842); Verplank v. Caines, 1 Johns. Ch. (N. Y.) 57 (1814); Morrison v. Buckner, Hempst. C. C. 442 (1843); Tysen v. Wabash R. Co., 8 Biss. C. C. 247 (1878); Parkhurst v. Kinsman, 2 Blatchf. C. C. 78 (1848); Lloyd v. Passingham, 16 Ves. 59 (1809); N. Y. Code Civ. Proc. § 713.

[2] Chase's Case, 1 Bland Ch. (Md.) 266 (1826); s. c. 17 Am. Dec. 277.

[3] Pritchard v. Fleetwood, 1 Meriv. 54 (1815); Harris v. Shee, 1 J. & LaT. 92 (1846); s. c. 6 Ir. Eq. 543.

[4] Kelly v. Stanton, 1 Hog. 393 (1820).

[5] Bloodgood v. Clark, 4 Paige Ch. (N. Y.) 577 (1834); Evans v. Coventry, 5 DeG., M. & G. 811, 918 (1854); Metcalfe v. Pulvertoft, 1 Ves. & B. 180 (1813).

[6] Williamson v. Wilson, 1 Bland Ch. (Md.) 421 (1826); Chase's Case, 1 Bland Ch. (Md.) 213 (1826); Levenson v. Elson, 88 N. C. 182 (1883).

[7] Thomas v. Davies, 11 Beav. 29 (1847); Metcalfe v. Pulvertoft, 1 Ves. & B. 180 (1813); Aberdeen v. Chitty, 3 Y. & C. 370, 382 (1838).

[8] Oldfield v. Cobbett, 4 L. J. Ch. (N. S.) 272 (1835); Middleton v. Dodswell, 13 Ves. 266 (1806).

and that they are rapidly depreciating in value by reason of the fact that the oil business is rapidly decreasing at that point.[1] Reason for apprehending that the rents and profits will be lost and the security thereby impaired, is the primary ground for appointing a receiver.[2]

§ 663. **Accumulation of taxes and interest, ground for appointing a receiver.**—In proceedings to foreclose a mortgage, a receiver should be appointed on the application of the plaintiff in a case where the mortgaged premises are an inadequate security for the debt, or where he has no personal security and the mortgagor has not paid the interest or the taxes on the premises,[3] even though the unpaid taxes may be a lien subsequent to the mortgage.[4] Where it is shown that the mortgaged premises are about to be sold for taxes, a receiver will be immediately appointed.[5]

§ 664. **Waste and fraud, causes for appointing a receiver.**—Where waste has been committed by a person in possession of the property, or it has depreciated in value through the fault and negligence of the mortgagor in possession, or where he is misapplying the rents and profits, the

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[1] Smith v. Kelley, 31 Hun (N. Y.) 387 (1884).

[2] Rollins v. Henry, 77 N. C. 467 (1877). Where the defendant in an action to foreclose a trust deed on a mill property suffered it to be idle, and the plaintiffs took possession of and managed it, the court held that neither the mill nor the rents were in such "danger of being lost or materially injured" as entitled the plaintiffs to the appointment of a receiver. Sleeper v. Iselin, 59 Iowa, 379 (1882).

[3] Mahon v. Crothers, 28 N. J. Eq. (1 Stew.) 567 (1877); Finch v. Houghton, 19 Wis. 149 (1865). See Sidenberg v. Ely, 90 N. Y. 257 (1882); Wall Street Ins. Co. v. Loud, 20 How. (N. Y.) Pr. 95 (1860); McLane v. Placerville & S. V. R. Co., 66 Cal. 606 (1885); Buchanan v. Berkshire L. Ins. Co., 96 Ind. 510 (1884); Callanan v. Shaw, 19 Iowa, 183 (1865); Clagett v. Salmon, 5 Gill & J. (Md.) 314 (1833); Brown v. Chase, Walk. Ch. (Mich.) 43 (1842); Stockman v. Wallis, 30 N. J. Eq. (3 Stew.) 449 (1879); Johnson v. Tucker, 2 Tenn. Ch. 398 (1875). See also Haas v. Chicago Building Society, 89 Ill. 498 (1878); Brasted v. Sutton, 30 N. J. Eq. (3 Stew.) 462 (1879); Chetwood v. Coffin, 30 N. J. Eq. (3 Stew.) 450 (1879); Oliver v. Decatur, 4 Cr. C. C. 458 (1834).

[4] Chetwood v. Coffin, 30 N. J. Eq. (3 Stew.) 450 (1879).

[5] Darusmont v. Patton, 4 Lea (Tenn.) 597 (1880). See Haas v. Chicago Building Society, 89 Ill. 498 (1878).

mortgagee will be entitled to the appointment of a receiver.[1] Thus, although a mortgagor has a right to cut timber, yet where he has become insolvent and exercises this right in bad faith, a receiver will be appointed to take charge of the premises.[2]

Pending an appeal in a mortgage foreclosure, a receiver may be appointed to preserve the rents and profits, where such rents and profits are being wasted by an heir in possession.[3] In case there is fraudulent conduct on the part of the

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[1] Wall St. Fire Ins. Co. v. Loud, 20 How. (N. Y.) Pr. 95 (1860); Worrill v. Coker, 56 Ga. 666 (1876); Haas v. Chicago Building Soc., 89 Ill. 498 (1878); Brasted v. Sutton, 30 N. J. Eq. (3 Stew.) 462 (1879); Chetwood v. Coffin, 30 N. J. Eq. (3 Stew.) 450 (1879); Stockman v. Wallis, 30 N. J. Eq. (3 Stew.) 450 (1879); Mahon v. Crothers, 28 N. J. Eq. (1 Stew.) 567 (1877); Johnson v. Tucker, 2 Tenn. Ch. 398 (1875); Finch v. Houghton, 19 Wis. 149 (1865); Oliver v. Decatur, 4 Cr. C. C. 458 (1834). See Chappell v. Boyd, 56 Ga. 578 (1876); Tufts v. Little, 56 Ga. 139 (1876).

[2] Or he may be restrained by an injunction. Ensign v. Colburn, 11 Paige Ch. (N. Y.) 503 (1844). It has been said that the mortgage covers the timber standing on the premises, and that when it is severed from the freehold without the consent of the mortgagee, he has a right to hold it as a part of his security. Hutchins v. King, 66 U. S. (1 Wall.) 53 (1863); bk. 17 L. ed. 693. But the general doctrine seems to be that the mortgagee can not maintain trover for trees cut by the mortgagor. Johnson v. White, 11 Barb. (N. Y.) 194 (1851); VanWyck v. Alliger, 6 Barb. (N. Y.) 507 (1849); Watson v. Hunter, 5 Johns. Ch. (N. Y.) 169 (1821); Winship v. Pitts, 3 Paige Ch. (N. Y.) 259 (1832); People v. Alberty, 11 Wend. (N. Y.) 160 (1834). Yet it is held that where the mortgagor is insolvent, the mortgagee may maintain an action for an unauthorized injury to the mortgage security. Morgan v. Gilbert, 2 Flip. C. C. 645 (1880); s. c. 2 Fed. Rep. 835; Willard's Eq. Jur. 371, 379. After the timber upon the mortgaged premises has been severed from the freehold, a court of equity can not restrain its removal; Johnson v. White, 11 Barb. (N. Y.) 194 (1851); VanWyck v. Alliger, 6 Barb. (N. Y.) 507 (1849); Watson v. McClay, 5 Johns. Ch. (N. Y.) 169 (1821); Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122 (1816); Ensign v. Colburn, 11 Paige Ch. (N. Y.) 503 (1845); Winship v. Pitts, 3 Paige Ch. (N. Y.) 259 (1832); People v. Alberty, 11 Wend. (N. Y.) 160 (1834); 2 Story Eq. Jur. (11th ed.) §§ 1016, 1017; Willard's Eq. Jur. 371, 379; but will restrain further waste. Weatherby v. Wood, 29 How. (N. Y.) Pr. 404 (1865), and decree an accounting for the timber cut, Johnson v. White, 11 Barb. (N. Y.) 197 (1851); Spear v. Cutter, 5 Barb. (N. Y.) 486 (1849); s. c. 2 N. Y. Code Rep. 100; 2 Story Eq. Jur. (11th ed.) §§ 957, 1016, 1017.

[3] Brinkman v. Ritzinger, 82 Ind. 358 (1882).

mortgagor, combined with danger of injury to the mortgaged premises, a receiver will be appointed to take charge of the rents and profits and to preserve the mortgaged property;[1] but in such a case, the pleadings should contain allegations of specific charges of fraud or of imminent danger of injury to the property.[2]

§ 665. **Injunction restraining sale, cause for appointing a receiver.**—In a case where the mortgagor has obtained an injunction restraining the sale of the mortgaged premises, until certain counter-claims can be passed upon and the sum really due on the mortgage is ascertained, the mortgagee will be entitled to have a receiver appointed to take charge of the property and to secure the rents and profits thereof, where they are in danger of being lost.[3]

In Warwick v. Hammell,[4] a second mortgagee had obtained an order of sale in a foreclosure, and a stay was procured by a third person, who attacked the plaintiff's title to the mortgage in a court of equity. The mortgagor in possession of the premises was insolvent, and neither the taxes nor the interest on any of the incumbrances having been paid for three years, the second mortgagee was held to be entitled to a receiver of the rents and profits of the mortgaged premises, pending the litigation with the person attacking his title to the mortgage.

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[1] See Orphan Asylum v. McCartee, Hopk. Ch. (N. Y.) 429 (1825); Tomlinson v. Ward, 2 Conn. 396 (1818); Powell v. Quinn, 49 Ga. 523 (1873); Crawford v. Ross, 39 Ga. 44 (1869); Jones v. Dougherty, 10 Ga. 273 (1851); Voshell v. Hynson, 26 Md 83 (1866); Haight v. Burr, 19 Md. 134 (1862); State v. Northern Cent. R. R. Co., 18 Md. 193 (1861); Blondheim v. Moore, 11 Md. 365 (1857); Furlong v. Edwards, 3 Md. 99 (1852); Thompson v. Diffenderfer, 1 Md. Ch. Dec. 489 (1849); Mays v. Rose, 1 Freem. Ch. (Miss.) 703 (1843); Maynard v. Railey, 2 Nev. 313 (1866); Ladd v. Harvey, 21 N. H. (1 Fost.) 514 (1850); Mordaunt v. Hooper, 1 Amb. 311 (1756). Lloyd v. Passingham, 16 Ves. 59 (1809); Middleton v. Dodswell, 13 Ves. 266 (1806); Hugonin v. Basley 13 Ves. 105 (1806); Anon., 1 Ves. 4 (1806).

[2] Powell v. Quinn, 49 Ga. 523 (1873).

[3] Oldham v. Wilmington Bank 84 N. C. 304 (1881).

[4] 32 N. J. Eq. (5 Stew.) 427 (1880).

§ 666. **When a receiver will not be appointed—Mortgagor giving security.**—Where the mortgaged property is of such value, that the debt can be paid from the proceeds of a sale of the premises under foreclosure, a receiver will not be appointed ;[1] and if the party in possession of the premises, as owner of the equity of redemption, is solvent, there is no such reasonable cause for a receiver as will warrant an appointment, although the mortgagor himself may be insolvent.[2]

A court has no authority to interfere with a mortgagor's right to collect the rents and profits of the mortgaged premises, unless such rents and profits, as well as the property, have been pledged as security for the payment of the debt, or unless a clear want of sufficient security, or waste, or failure to pay taxes, or diminution of the value of the security, or mismanagement of the property, or an increase of the mortgage debt is shown.[3] A receiver will not be appointed, in the absence of any of the causes above set forth, merely because the mortgagee wishes to turn the rents and profits to his own use, when such appointment will be to the injury of a prior mortgagee ;[4] nor will a receiver be appointed on the application of one defendant as against another.[5]

Even if there are reasonable grounds for believing that the mortgage security is inadequate to satisfy the debt, a receiver will not be allowed on the application of the plaintiff, if the person in possession of the mortgaged premises, or the party liable for the deficiency, gives security to account for the rents and profits as the court shall direct, in case

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[1] Williams v. Noland, 2 Tenn. Ch. 1. 1 (1874). See Worrill v. Coker, 56 Ga. 666 (1876); Pullan v. Cincinnati & C. O. R. Co., 4 Biss. C. C. 35 (1865).

[2] Silverman v. North-western Mut. L. Ins. Co., 5 Ill. App. 124 (1880).

[3] Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835); Quincy v. Cheeseman, 4 Sandf. Ch. (N. Y.) 405 (1846); Eslava v. Crampton, 61 Ala. 507 (1878); Sales v. Lusk, 60 Wis. 490 (1884); s. c. 18 Rep. 382; Morris v. Branchaud, 52 Wis. 187 (1881); Pullan v. Cincinnati, &c., R. Co., 4 Biss. C. C. 35 (1865).

[4] Sales v. Lusk, 60 Wis. 490 (1884); s. c. 18 Rep. 382.

[5] Robinson v. Hadley, 11 Beav. 614 (1849).

there is a deficiency upon the sale of the premises under a decree of foreclosure.[1] Where the rents and profits of the mortgaged premises have been already applied to the payment of the mortgage debt, and of the necessary expenses incurred in the management and care of the property, an application for the appointment of a receiver will be denied.[2]

§ 667. **Where part only of debt due, or premises can be sold in parcels.**—In those cases where the whole debt is not due, if the mortgagee has neglected to take a specific pledge of the rents and profits of the mortgaged premises as security for his debt before it becomes due, he will have no equitable right to the rents and profits in the meantime,[3] and a receiver will not be appointed on his application, except possibly in case of the death of the mortgagor.[4]

Where only a portion of the mortgage debt is due and no waste or failure to pay taxes, or diminution of value of the security, or increase of the mortgage debt is shown,[5] and the mortgaged premises are capable of being divided and sold in parcels separately without injury to the parties interested, in the absence of any pledge or specific appropriation, by which accruing rents of that portion of the premises not yet liable to be sold, are constituted a security to the mortgagee for the portion of the mortgage not yet due, he will not be entitled to a receivership, for the protection of the unmatured portion of the debt, of that portion of the premises for the sale of which he has no accrued right.[6]

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[1] Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841). See Harper v. Grambling, 66 Ga. 236 (1880); Rich v. Colquitt, 65 Ga. 113 (1880); Grantham v. Lucas, 15 W. Va 425 (1879); Talbot v. Hope Scott, 4 Kay & J. 141 (1858); Pritchard v. Fleetwood, 1 Meriv. 54 (1815); Curling v. Townshend, 19 Ves. 633 (1816). *Compare* Clark v. Johnston, 15 W. Va. 804 (1879).

[2] Myton v. Davenport, 51 Iowa, 583 (1879). See Cortleyeu v. Hathaway, 11 N. J. Eq. (3 Stockt.) 39 (1855); s. c. 64 Am. Dec. 478.

[3] Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835). See Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); s. c. 43 Am. Dec. 766; Howell v. Ripley, 10 Paige Ch. (N. Y.) 45 (1843).

[4] Burrowes v. Malloy, 2 Jo. & La T. 521.

[5] Morris v. Branchaud, 52 Wis. 187 (1881).

[6] Hollenback v. Barnard, 94 N. Y.

§ 668. **Where mortgagee guilty of laches—Validity of mortgage denied.**—Where, from lapse of time or other circumstances, a mortgage is presumed to have been paid, a receiver will not be allowed.[1] Thus, in a case where a mortgagee delayed his suit for foreclosure and permitted the mortgagor to use the property for several years, and after a decree was rendered and a sale ordered, neglected to enforce the same, a motion for the appointment of a receiver was denied, the court saying: "While it is true that the mortgagee may delay his suit for foreclosure after the debt is due and default of the mortgagor to pay it, yet if he delays his remedy and permits the mortgagor to use the property for several years, a very strong case of probable injury to the rights of the mortgagee must be made out, and there must be a pressing necessity for the interposition of the court; and if, as in this case, a decree has been rendered and a sale ordered, and the mortgagee still neglects to have it enforced, the emergency must be grave, and an imperative necessity for the relief be shown to exist, before a court will exercise this extraordinary jurisdiction."[2]

The appointment of a receiver of the rents and profits of mortgaged premises being for the purpose of enforcing the payment of the debt simply, a receiver should not be appointed to take charge of the rents and profits in those cases where the validity of the mortgage is impeached on probable grounds.[3]

§ 669. **Where property in possession of stranger to the foreclosure.**—A court will not appoint a receiver of the rents and profits of property in the possession of a stranger to the suit;[4] and when a tenant, who is not a party to the

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342 (1884). See Wyckoff v. Scofield, 98 N. Y. 475, 477 (1885); Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38, 40 (1835); Quincy v. Cheeseman, 4 Sandf. Ch. (N. Y.) 405 (1846); Morris v. Branchaud, 52 Wis. 187 (1881).

[1] Shepherd v. Murdock, 2 Molloy, 531 (1824); Darcy v. Blake, 1 Molloy, 247 (1829).

[2] Cone v. Combs, 18 Fed. Rep. 576 (1883); s. c. 5 McCrary C. C. 651.

[3] Leahy v. Arthur, 1 Hog. 92, Shepherd v. Murdock, 2 Molloy, 531 (1824); Darcy v. Blake, 1 Molloy, 247 (1829).

[4] Searles v. Jacksonville, P. & M. R. R. Co., 2 Woods C. C. 621 (1873). See Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841). In the case

action, is in possession, his possession will not be disturbed by the appointment of a receiver, but he may be ordered to attorn to the receiver and to pay the rent to him.[1]

Where a tenant goes into possession *pendente lite*, the mortgagee will be entitled to an order requiring him to yield possession of the premises or to pay the rent from that time to the receiver; but he will have no right, in any event, to an order, especially as against the equitable rights of others, which will, in effect, vest in him the possession *nunc pro tunc*, as of a time prior to the application.[2]

§ 670. **Where a bill is filed to redeem.**—Upon a bill to redeem, where the plaintiff is in possession of the premises, and they are ample security for the amount admitted by him to be due, the court will not appoint a receiver of the rents and profits pending the litigation, if the insolvency of the plaintiff is not set up, or if it is alleged and denied.[3] In no case can a receiver be allowed on a bill to redeem, unless the person in possession is a party to the suit or a tenant under a party.[4]

The fact that the mortgagor has a claim against the mortgagee arising out of a different transaction, which claim, if valid, is a set-off against the sum due upon the mortgage, but which is not established or the amount thereof adjusted, will not entitle the mortgagor to a receiver of the property in the hands of the mortgagee.[5]

It is thought that the purchaser at a foreclosure sale of the equity of redemption in mortgaged lands has no right, upon seeking redemption from the mortgagee, to compel the application of personal property embraced in the same mortgage to the payment of the mortgage debt to the

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of Whorton v. Webster, 56 Wis. 356 (1882), this question was raised, but not passed upon.

[1] Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841). See Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835). As to the doctrine at law as regards a tenant, see Rogers v. Humphreys, 5 Nev. & Mann. 511 (1835); s.c. 4 Ad. & El. 299.

[2] Zeiter v. Bowman, 6 Barb. (N. Y.) 133 (1849).

[3] Jenkins v. Hinman, 5 Paige Ch. (N. Y.) 309 (1835).

[4] Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841).

[5] Bayaud v. Fellows, 28 Barb. (N. Y.) 451 (1858).

exoneration of the land; and the appointment of a receiver to take charge of such personal property, upon a bill filed by the purchaser to redeem the mortgaged lands, and an order for its sale and the application of the proceeds to the payment of the mortgage debt, are erroneous.[1]

§ 671. When rents can not be applied under a receiver. —If a mortgage or deed of trust does not, in express terms, create a specific lien upon the rents and profits of the mortgaged property, a receiver thereof should not be appointed for the benefit of those interested in the proceeds simply upon an averment in the bill that the mortgaged estate is an inadequate security for the payment of the debt, and that the mortgagor is insolvent;[2] because, in the absence of a specific clause giving such a lien,[3] the mortgagee is not entitled to and has no lien upon the rents and profits prior to the foreclosure sale,[4] and the mortgagor, though insolvent, may collect or assign them,[5] until such time as the mortgagee becomes authorized to proceed by an action against the mortgagor to subject the property to the payment of his debt.[6]

Where a mortgagee who has neglected to take a specific pledge of the rents and profits of the premises, obtains an order requiring the tenant to attorn to a receiver appointed in a foreclosure, all that he is entitled to is immediate possession of the premises as security for the payment of his debt.[7] A mortgagee becomes entitled to the rents and profits only

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[1] Lovelace v. Webb, 62 Ala. 271 (1878).

[2] Phœnix Mut. Life Ins. Co. v. Grant, 3 McAr. (D. C.) 220 (1877).

[3] Zeiter v. Bowman, 6 Barb. (N. Y.) 133 (1849); Bank of Ogdensburg v. Arnold, 5 Paige Ch. (N. Y.) 38 (1835). See Wyckoff v. Scofield, 98 N. Y. 475 (1885); Argall v. Pitts, 78 N. Y. 239 (1879).

[4] Where a mortgagee has neglected to take a specific pledge of the rents and profits of the premises for the security of his debt, he has no equitable right to them as against the assignee of a chattel mortgage, given by the tenant to the mortgagor to secure the payment of the rent. Zeiter v. Bowman, 6 Barb. (N. Y.) 133 (1849).

[5] See Syracuse Bank v. Tallman, 31 Barb. (N. Y.) 201 (1857); Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Hughes v. Hatchett, 55 Ala. 631 (1876).

[6] See Jacobs v. Gibson, 9 Neb. 380 (1879).

[7] Zeiter v. Bowman, 6 Barb. (N. Y.) 133 (1849).

by commencing a suit to foreclose and by procuring the appointment of a receiver, and he will then be confined to the rents and profits accruing during the pendency of the suit.[1] He does not thereby acquire a lien upon rents which have already accrued, but which have not yet come into the hands of the owner of the equity of redemption;[2] nor can the court order rents already collected and in the possession of the owner to be paid over to the receiver and applied upon the mortgage debt,[3] because the equitable lien obtained by his appointment extends only to the unpaid rents.[4]

Where a mortgagee allows the mortgagor to remain in possession of the property after default, the mortgagor may hold the rents and profits to his own use, and the mortgagee can not compel him to account for them,[5] though the mortgaged property may have become an insufficient security.

§ 672. **When receiver applied for by defendant.**—A defendant is not entitled, as a matter of right, to the appointment of a receiver, even where the plaintiff, in his complaint, has asked for a receiver; and a court will not appoint a receiver on a defendant's application, if it is opposed by the plaintiff;[6] neither will a receiver be appointed on the application of one defendant as against another.[7]

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[1] Argall v. Pitts, 78 N. Y. 239 (1879).

[2] Wyckoff v Scofield, 98 N. Y. 475 (1885); Hollenbeck v. Donnell, 94 N. Y. 342 (1884).

[3] Wyckoff v. Scofield, 98 N. Y. 475 (1885); Rider v. Bagley, 84 N. Y. 461 (1881); Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843).

[4] Wyckoff v. Scofield, 98 N. Y. 475 (1885); Rider v. Bagley, 84 N. Y. 461 (1881); Argall v. Pitts, 78 N. Y. 239 (1879); Mitchell v. Bartlett, 51 N. Y. 447 (1873); Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); 43 Am. Dec. 766; Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Lofsky v. Maujer, 3 Sandf. Ch. (N. Y.) 69 (1845).

[5] Dow v. Memphis & L. R. R. R. Co., 20 Fed. Rep. 768 (1884).

[6] Robinson v. Hadley, 11 Beav. 614 (1849). No costs will be given to the plaintiff under such circumstances.

[7] Robinson v. Hadley, 11 Beav. 614 (1849). In this case the court refused to appoint a receiver for the property in the hands of one defendant on the application of another defendant, and gave as a reason for such refusal, that it knew no instance of a receiver having been appointed upon the application of one defendant as against another defendant, prior to a hearing.

It is thought, where a receiver is denied to a defendant on his application therefor, that he can obtain the desired relief by filing a cross-complaint against his co-defendants and the plaintiff, asking for the appointment of a receiver and moving his appointment in such cross-suit.[1]

§ 673. Receiver not appointed during the time allowed for redemption.—In those states where it is provided by statute that a mortgagor shall have a specified time in which to redeem the mortgaged premises from a sale made under a foreclosure, the mortgagee is not entitled to have a receiver appointed to take charge of the crops, rents and profits of the mortgaged premises during such period allowed for redemption, the mortgagor having a right to the possession of the property during that period, and the mortgagee having no interest whatever in such crops, rents and profits.[2]

It has been held that the Indiana statute,[3] providing for the appointment of a receiver "in actions for the foreclosure and sale of property, where it is in danger of being lost, removed or injured, or is not sufficient to discharge the debt," applies only to the time before the sale, and that while the mortgagor remains in possession of the premises during the year of redemption after the sale, a receiver should not be appointed.[4]

A statutory provision that the mortgaged premises may be used by a mortgagor during the period allowed for redemption in the same manner in which they were previously used, may be waived by express contract.[5] It has been held that, under the Michigan statute,[6] a clause in the mortgage giving the mortgagee possession in case of default, can not be carried into effect by appointing a receiver in a

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[1] McCracken v. Ware, 3 Sandf. (N. Y.) 688 (1850).

[2] White v. Griggs, 54 Iowa, 650 (1880); Lapham v. Ives, 8 Rep. 6 (1879); s. c. 13 West. Jur. 357; 25 Int. Rev. Rec. 186.

[3] Acts 1879, p. 169.

[4] Sheek v. Klotz, 84 Ind. 471 (1882).

[5] Edwards v. Woodbury, 1 McCr. C. C. 429 (1880); s. c. 3 Fed. Rep. 14.

[6] Comp. L. § 6263. This statute excludes the mortgagee from possession until he acquires an absolute title.

foreclosure until after default; and that, even then, it will be a matter of discretion.[1]

Under the Oregon statute, which provides that "a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law," a mortgagee is not entitled to the rents and profits before foreclosure.[2] Where a married woman mortgaged her separate property under this statute to secure the debt of her husband, and the mortgagee, before the sale of the same, to satisfy the debt, entered and took the rents without the consent of the wife, the court held that he was not entitled to credit the same on the husband's debt, but was liable to the wife as for the use and occupation of the premises.[3]

§ 674. **Receivers as between different mortgagees.**— Subsequent mortgagees are entitled to the appointment of a receiver of the rents and profits of the mortgaged premises on a petition showing that the mortgaged property is of less value than the amount of the incumbrances.[4] Where an action is brought to foreclose a mortgage and all the lienholders are made parties, and a receiver is appointed upon the application of one of the mortgagees, but such appointment is not limited to any party or lien, and it afterwards appears that the appointment was, in fact, necessary for all the lienholders, the fund collected by the receiver should be treated as a part of the general security of the mortgagees, and be controlled and distributed according to their priorities.[5] But if the receiver is appointed on the motion and for the benefit of a particular lienholder, such appointment will be for his benefit only;[6] but the receivership may be subsequently extended to one or more of the other liens.[7]

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[1] Beecher v. Marquette & P. R. Mill Co., 40 Mich. 307 (1879).

[2] Teal v. Walker, 111 U. S. 242 (1884); bk. 28 L. ed. 415.

[3] Semple v. Bank of British Columbia, 5 Sawy. C. C. 394 (1879).

[4] Buchanan v. Berkshire Life Ins. Co., 96 Ind. 510 (1884).

[5] Williamson v. Gerlach, 41 Ohio St. 682 (1885).

[6] Ranney v. Peyser, 83 N. Y. 1 (1880).

[7] Williamson v. Gerlach, 41 Ohio St. 682 (1885).

Where the appointment is not limited to any party or lien, it is of no consequence upon whose application the appointment was made, for the fund collected by the receiver under such an appointment will not be appropriated to any particular claim. Thus, in a case where a junior mortgagee had the rents of the property applied to his mortgage to the exclusion of prior mortgagees, it was held that the appointment of a receiver was made for the benefit of this lienholder only, and where no other lienholder asked to have the receivership extended to his lien, that the rents and profits should be applied to the discharge of his debt only.[1]

§ 675. Appointment of second receiver.—One appointment of a receiver does not exhaust the power of the court under the New York practice.[2] An additional receiver will not be appointed, however, unless it appears to be necessary for the protection of the interests of those desiring it.[3] The fact that a receiver has already been appointed in a previous action will not necessarily interfere with the appointment of another receiver in a subsequent suit. But where a second receiver is appointed in a subsequent suit, the duties of such second receiver will be subordinate to those of the first one. When the first receiver becomes *functus officio*, the second will take the funds, or any remaining portion thereof,[4] which may be undisposed of by the court in the litigation.[5]

Where the appointment of a receiver has been completed, whether in the suit first commenced or in a subsequent one, instead of appointing another receiver for the same property, the court will usually extend the receivership of the one action over the other.[6]

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[1] Washington Ins. Co. v. Fleischauer, 10 Hun (N. Y.) 117 (1877); Post v. Dorr, 4 Edw. Ch. (N. Y.) 412 (1844); Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Williamson v. Gerlach, 41 Ohio St. 682 (1885).

[2] See People v. Security Life Ins. Co., 79 N. Y. 267 (1879).

[3] Wabash, St. L. & W. R. R. Co. v. Central Trust Co., 22 Fed. Rep. 513 (1885).

[4] Bailey v. Belmont, 10 Abb. (N. Y.) Pr. N. S. 270, 273 (1871).

[5] O'Mahoney v. Belmont, 62 N. Y. 133, 149 (1875); Bailey v. Belmont, 10 Abb. (N. Y.) Pr. N. S. 270, 273 (1871).

[6] Osborn v. Heyer, 2 Paige Ch. (N. Y.) 342 (1831); Lottimer v.

The appointment of a receiver is an interlocutory proceeding from which no appeal lies,[1] and the consent of the parties to an appeal, can not confer jurisdiction on the appellate court.[2] Where the complaint asks for the appointment of a receiver, and the court finds that a receiver should be appointed but fails to appoint one, such failure can not be assigned as error on an appeal by the party opposed to the appointment, but only by the party asking for such receiver.[3]

§ 676. **No receiver where mortgagee holds legal title.** —Where the legal title to the mortgaged premises is in the mortgagee, he will not be entitled to the appointment of a receiver,[4] because he may recover possession of the estate by an action for ejectment,[5] without the aid of a court of chancery;[6] but if he has only a mortgage of the equity of redemption and the prior mortgagee is not in possession, the subsequent mortgagee may have a receiver appointed without prejudice to the right of the first mortgagee to take possession.[7] If, however, there is a subsisting equity, which, if set up at law, would lead to the trial of questions which might be tried more satisfactorily in equity, the mortgagee, having the legal estate, will be entitled to a receiver.[8]

In White v. Bishop of Peterborough,[9] a third incumbrancer was in possession. The first incumbrance was a devise for

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Lord, 4 E. D. Smith (N. Y.) 183, 191 (1855).

[1] Wilson v. Davis, 1 Mon. T. 98 (1868).

[2] Wilson v. Davis, 1 Mont. T. 98 (1868). When the order appointing a receiver is in excess of the jurisdiction of the court, it is subject to review under the California Code, § 1068. See LaSociéte Francaise v. District Court, 53 Cal. 495 (1879).

[3] Emmons v. Keller, 39 Ind. 178 (1872).

[4] Williams v. Robinson, 16 Conn. 524 (1844); Mahon v. Crothers, 28 N. J. Eq. (1 Stew.) 567 (1877); Beverley v. Brooke, 4 Gratt.(Va) 209 (1847); Williamson v. New Albany R. Co., 1 Biss. C. C., 201 (1857); Sturch v. Young, 5 Beav. 557 (1842); Berney v. Sewell, 1 Jac. & W. 647 (1820). But see Ackland v. Gravener, 31 Beav. 482 (1862).

[5] The action of ejectment against a mortgagor has been abolished in New York ; 5 Wait Pr. 190 ; N. Y. Code Civ. Proc. § 1498.

[6] Ackland v. Gravener, 31 Beav. 484 (1862). See Sturch v. Young, 5 Beav. 557 (1842); Berney v. Sewell, 1 Jac. & W. 648 (1820); Silver v. Bishop of Norwich, 3 Swanst. 113 n. (1816).

[7] 2 Spence Eq. Jur. 689.

[8] Ackland v. Gravener, 31 Beav 482 (1862).

[9] 3 Swanst. 109 (1816).

years, to secure an annuity, and the second incumbrance was also an annuity secured for a term. On a bill filed by the second incumbrancer, Lord Eldon held that he was entitled to a receiver, inasmuch as he could not succeed in ejectment on account of a prior legal estate which might have been set up against him. And it has been held that the grantee of an annuity is entitled to a receiver as against judgment creditors, who have obtained possession under writs of *elegit* or sequestration, if there is a legal estate prior to the term securing his annuity, which bars him from proceeding at law by ejectment.[1]

§ 677. No receiver where mortgagee in possession.— It is a general rule that, as against a prior mortgagee in possession of the property, a receiver will not be allowed in favor of a subsequent mortgagee, as long as any part of the debt remains unpaid to the prior mortgagee,[2] because the prior mortgagee is entitled to retain possession until his claim is fully paid,[3] except where he refuses to accept the unpaid balance, or admits that he has probably received the full amount of his claim.[4] In the early case of Berney v. Sewell,[5] the rule was stated thus: "If a man has a legal mortgage he can not have a receiver appointed; he has nothing to do but to take possession. But if he has only an equitable mortgage, that is if the prior mortgagee is not in the possession, the other is entitled to a receiver without prejudice to his taking possession; but if he is in possession, the subsequent mortgagee can not have a receiver; he must redeem from the prior mortgagee."[6]

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[1] Silver v. Bishop of Norwich, 3 Swanst. 113 n. (1816).

[2] Patten v. The Accessory Transit Co., 4 Abb. (N. Y.) Pr. 235 (1857); s. c. 13 How. (N. Y.) Pr. 502; Quinn v. Brittain, 3 Edw. Ch. (N. Y.) 314 (1839); Bolles v. Duff, 35 How. (N. Y.) Pr. 481 (1867); Rapier v. Gulf City Paper Co., 64 Ala. 330 (1879); Callanan v. Shaw, 19 Iowa, 183 (1865); Trenton Banking Co. v. Woodruff, 3 N. J. Eq. (2 H. W. Gr.) 210 (1835); Rowe v. Wood, 2 Jac. & W. 553 (1821).

[3] Callanan v. Shaw, 19 Iowa, 183 (1865).

[4] Berney v. Sewell, 1 Jac. & W. 649 (1820); Hiles v. Moore, 15 Beav. 180 (1852).

[5] 1 Jac. & W. 648 (1820).

[6] See Mahon v. Crothers, 28 N. J Eq. (1 Stew.) 567 (1877); Cortleyeu v. Hathaway, 11 N. J. Eq. (3 Stockt.) 39 (1855); s. c. 64 Am.

The rule that a receiver will not be appointed against a prior mortgagee in possession as long as anything remains unpaid on his mortgage, applies equally whether the priority is original or has been acquired subsequently to the execution of the mortgage by assignment;[1] but it applies only so long as some part of the debt remains unpaid to the mortgagee who has a right to retain the possession.[2]

This rule, that a receiver will not be appointed against a prior legal mortgagee in possession, has been said to apply in favor of persons in possession, entitled to a mortgage and to prior charges on the estate, though they may have applied part of the rents in payment of the interest on those charges, instead of discharging the principal of the mortgage, it being the proper course, as between a tenant for life and the owners of the inheritance, to keep down such interest out of the rents, and not to treat the surplus rents, after the payment of interest on the unpaid part of the principal, as applicable to the reduction of such principal.[3]

§ 678. **Subsequent mortgagee redeeming from prior mortgagee in possession.**—Where a prior mortgagee is in possession, a subsequent mortgagee, to gain control of the rents, must redeem from the first mortgagee; and, in taking the account, the first mortgagee will not be allowed any sums which he may have paid to the mortgagor after notice of subsequent incumbrances.[4] If the mortgagee in possession claims that anything is due him, the court will not take the possession away from him; and so long as anything remains unpaid, the court can not substitute another security for that for which the mortgagee contracted.[5] The only

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Dec. 478; Trenton Banking Co. v. Woodruff, 3 N. J. Eq. (2 H. W. Gr.) 210 (1835); Schreiber v. Carey, 48 Wis. 213 (1879); Hiles v. Moore, 15 Beav. 175 (1852); Rowe v. Wood, 2 Jac. & W. 553 (1821).

[1] Berney v. Sewell, 1 Jac. & W. 648 (1820); Hiles v. Moore, 15 Beav. 181 (1852); Bates v. Brothers, 17 Jur. 1174 (1853); s. c. 2 Sm. & G. 509,

[2] Codrington v. Parker, 16 Ves. 469 (1809).

[3] Faulkner v. Daniel, 3 Hare, 204 n (1843); s. c. 10 L. J. Ch. N. S. 33.

[4] 2 Spence Eq. Jur. 689.

[5] Quinn v. Brittain, 3 Edw. Ch. (N. Y.) 314 (1839); Berney v. Sewell, 1 Jac. & W. 648, 649 (1820); Dalmer v. Dashwood, 2 Cox Ch. 382, 383 (1793); Bryan v. Cormick, 1 Cox Ch. 422 (1788); Phipps v. Bishop of

course is to pay him off according to his own statement of the debt,[1] particularly where it appears that the mortgaged premises are an inadequate security for the balance due.[2]

It is not necessary that the mortgagee in possession be able to state the exact amount due on his mortgage; it will be sufficient if he can show that anything at all is due.[3] The incomplete state of his accounts will furnish no valid excuse on the part of the mortgagee in possession for not making a definite statement regarding the amount due him; if he keeps his accounts in such shape that he can not tell, and that no one else can ascertain the amount due, the court will assume that nothing is due and will appoint a receiver.[4] Time may be allowed the mortgagee in possession, however, in which to prepare a statement.[5]

If the mortgagee in possession alleges in his answer that some part of the debt is due him, the court may determine the truth of the statement upon affidavits against the answer.[6] The statement must be a positive and distinct one; a vague assertion or a general declaration by the mortgagee that he believes that when the accounts are stated, some particular sums and parts of other sums will be found due, will not be sufficient, unless it is supported by a statement of accounts which will serve to test the truth of such assertion or declaration.[7] If the mortgagee can not state that some definite amount is due him, the court will appoint a receiver.[8]

Bath and Wells, 2 Dick. 608 (1783); Chambers v. Goldwin, cited 13 Ves. 378 (1807); Quarrell v. Beckford, 13 Ves. 378 (1807).

[1] Bayard v. Fellows, 28 Barb. (N. Y.) 451 (1858); Berney v. Sewell, 1 Jac. & W. 648 (1820); Rowe v. Wood, 2 Jac. & W. 557 (1821).

[2] Bayard v. Fellows, 28 Barb. (N. Y.) 451 (1858).

[3] Chambers v. Goldwin, cited in 13 Ves. 378 (1807); Quarrell v. Beckford, 13 Ves. 378 (1807).

[4] Codrington v. Parker, 16 Ves. 469 (1809); Hiles v. Moore, 15 Beav. 180 (1852).

[5] Codrington v. Parker, 16 Ves. 469 (1809).

[6] Rowe v. Wood, 2 Jac. & W. 558 (1821).

[7] Hiles v. Moore, 15 Beav. 181 (1852).

[8] Chambers v. Goldwin, cited in 13 Ves. 378 (1807); Quarrell v. Beckford, 13 Ves. 378 (1807); Rowe v. Wood, 2 Jac. & W. 558 (1821).

In Rowe v. Wood,[1] a motion for a receiver against a mortgagee of mines, who had become a partner by purchasing shares in such mines, made upon the ground of mismanagement, was denied, it not being shown, and the mortgagee not admitting, that the mortgage was paid. It was also held in that case, that the rights and duties of a person in such a situation were not to be governed solely by principles applicable to a party who stands in the position of a mortgagee or partner; and that if a mortgagee can in any case be deprived of his possession on the ground of mismanagement, it must be mismanagement of a clear and specific nature.

§ 679. **Other cases for receiver where mortgagee in possession.**—A mortgagee who has been placed in possession by the mortgagor, by virtue either of a clause in the mortgage or of a subsequent agreement or consent, which may be by parol, is entitled to retain possession and to collect the rents and profits as against a purchaser at a sale under an execution issued on a judgment, the lien of which did not attach until after the mortgagee's possession had commenced.[2]

But possession of the premises obtained by a mortgagee, through arrangements with a tenant of the mortgagor, whose lease has expired, without the consent of such mortgagor, is not a lawful possession and will not be a bar to the appointment of a receiver.[3] And the rule that a receiver will not be appointed against a mortgagee holding the legal title, who is in the actual possession of the mortgaged property, does not apply where the party in possession holds the property under an execution issued upon a judgment.[4]

In order to deprive an equitable mortgagee of the right to a receiver, the possession of the party holding the property must be such as invests him with a right to receive the rents and profits. A mere possession as a tenant is not sufficient, and an incumbrancer who is in possession, not as an

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[1] 2 Jac. & W. 553 (1821).

[2] Edwards v. Wray, 11 Biss. C.C. 251 (1882); s. c. 12 Fed. Rep. 42.

[3] Russell v. Ely, 67 U. S. (2 Black), 575 (1862); bk. 17 L. ed. 258.

[4] Kerr on Rec. 118.

incumbrancer, but as a tenant, can not set up his possession as such tenant against the appointment of a receiver.[1]

In a case where a second mortgagee, who had sold a part of his mortgage to a tenant in possession of the premises, applied for a receiver, and the tenant in possession objected, on the ground that the rent which he was to pay was just equal to the interest he was entitled to receive on his share of the money due on the mortgage, and that it would, therefore, merely increase his expenses by paying into court as rent what he must receive back as interest, the court held that the defendant could not unite his two characters of mortgagee and tenant, and that his possession as tenant could not be set up against the other mortgagee.[2]

§ 680. **When a receiver will be appointed against a mortgagee in possession.**—As has been seen, a receiver will not be appointed as a rule against a mortgagee in possession so long as anything remains due to him; yet, where it appears that he is irresponsible, or that the rents and profits will be lost, or are in danger of being lost, or that he is committing waste upon or a material injury to the premises, an exception will be made and a receiver will be appointed.[3] A receiver will also be appointed in all instances where a *prima facie* case of fraud is shown to the satisfaction of the court,[4] or where gross mismanagement of the estate is made to appear; but to warrant such an interference, the mismanagement must be of a clear and specific nature.[5]

Where liens upon a bankrupt's estate are before a court for adjustment, a receiver will be appointed on the application of his assignee, although the bankrupt may have relinquished possession to some of the prior incumbrancers.[6]

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[1] Kerr on Rec. 44.

[2] Archdeacon v. Bowes, 3 Anst. 752 (1794).

[3] Bolles v. Duff, 35 How. (N. Y.) Pr. 481 (1867); Williams v. Robinson, 16 Conn. 517 (1844); Beverley v. Brooke, 4 Gratt. (Va.) 209 (1847); Meaden v. Sealey, 6 Hare, 620; Codrington v. Park, 16 Ves. 469 (1809); Lloyd v. Passingham, 16 Ves. 59 (1809); Hugonin v. Basely, 13 Ves. 105 (1806).

[4] Corcoran v. Doll, 35 Cal. 476 (1868); Kipp v. Hanna, 2 Bland Ch. (Md.) 26 (1820); Hugonin v. Basely, 13 Ves. 105 (1806); Lloyd v. Passingham, 16 Ves. 59 (1809).

[5] Rowe v. Wood, 2 Jac. & W. 553 (1821).

[6] McLean v. Lafayette Bank, 3

§ 681. **Receiver where first mortgagee out of possession.**—If it appears from the bill that there is a prior mortgagee who is not in possession of the premises, it has been held that the court may, at the instance of subsequent incumbrancers, appoint a receiver in the absence of the prior mortgagee, even where the mortgagor is out of the jurisdiction of the court; but such an appointment will, of course, be made without prejudice to the right of the first mortgagee to take possession of the premises at any time he may desire.[1]

If there are prior outstanding mortgages, but the mortgagees are not in possession, or refuse to take possession, the court may appoint a receiver of the mortgaged premises at the instance of subsequent mortgagees or judgment creditors, without prejudice to the right of the prior mortgagees to

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McL. C. C. 503 (1844); s. c. 2 West. L. J. 441.

[1] Dalmer v. Dashwood, 2 Cox Ch. 378–383 (1793); Bryan v. Cormick, 1 Cox Ch. 423 (1788); Phipps v. Bishop of Bath, 2 Dick. 608 (1783); Berney v. Sewell, 1 Jac. & W. 647–649 (1820); Tanfield v. Irvine, 2 Russ. 151 (1826). But see Holmes v. Bell, 2 Beav. 298 (1840); Browne v. Blounte, 2 Russ. & M. 83 (1830); Anderson v. Stather, 2 Coll. 209 (1845); Rhodes v. Mostyn, 17 Jur. 1007 (1853); Coope v. Creswell, 12 W. R. 299 (1864).

In Phipps v. Bishop of Bath and Wells, 2 Dick. 608 (1783), Lord Thurlow refused to appoint a receiver at the instance of a second mortgagee, the first one not being in possession; but in Bryan v. Cormick, 1 Cox Ch. 422 (1788), he came to the conclusion that a subsequent mortgagee is entitled to have a receiver when the first mortgagee is not in possession. A similar order was made in Dalmer v. Dashwood, 2 Cox Ch. 378 (1793). In Langton v. Langton, 7 DeG. M. & G. 30 (1855), a receiver was appointed at the suit of a junior incumbrancer, the first legal incumbrancer not being entitled to take possession, because he was, by the terms of his security, obliged before doing so, to give three months' notice after default made in the payment of the mortgage money. In the early case of Phipps v. Bishop of Bath and Wells, 2 Dick. 608 (1783), where the first mortgagee was not in possession, a receiver was refused, Lord Thurlow, saying: "A second mortgagee, the mortgagor living, can not have a receiver without the consent of the first mortgagee, because the court can not prevent the first mortgagee from bringing an ejectment against the receiver as soon as he is appointed." But the later cases, given above, have established the rule as stated in the text. See also, Cortelyeu v. Hathaway, 11 N. J. Eq. (3 Stockt.) 39, 42 (1855); State of Maryland v. North Cent. R. R. Co., 18 Md. 193 (1861).

take possession.[1] But a court will not allow a prior legal incumbrancer to object to the appointment of a receiver except by the assertion of his legal rights and by taking possession of the premises himself.[2]

§ 682. **Receiver appointed upon the application of junior mortgagee.**—The appointment of a receiver may be made at the suit of a junior mortgagee, or other legal incumbrancer, for the purpose of keeping down the interest, even though the applicant may be unable, at the time, to enforce the usual mortgagee's remedies, as where he has covenanted not to call in the mortgage debt during a certain time.[3] And the court may, in a suit by a junior mortgagee, appoint a receiver, although the first mortgagee may, by his mortgage, have the power to appoint one.[4] But the appointment will always be without prejudice to the rights of every prior mortgagee, and the receiver will be directed by the order appointing him to keep down the interest upon all prior incumbrances.[5]

If the interest is in arrears, such arrearage will be a sufficient cause for the appointment of a receiver at the suit of a junior mortgagee incumbrancer.[6] But where, as between two equitable incumbrancers, the one later in date has acquired the legal possession of the premises, the court will not appoint a receiver at the instance of the one who was prior in date.[7]

It is said to be a well established rule that a mortgagee obtains a specific lien upon rents and profits by diligently securing the appointment of a receiver, and a second or other subsequent mortgagee may thus secure an advantage

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[1] Rhodes v. Mostyn, 17 Jur. 1007 (1853); Bryan v. Cormick, 1 Cox Ch. 422 (1788).

[2] Wiswall v. Sampson, 55 U. S. (14 How.) 65 (1852); bk. 14 L. ed. 322; Silver v. Bishop of Norwich, 3 Swanst. 112 n (1816).

[3] Burrows v. Malloy, 2 Jac. & LaT. 521.

[4] Bord v. Tollemache, 1 N. R. 177 (1862).

[5] Cortleyeu v. Hathaway, 11 N. J. Eq. (3 Stockt.) 42 (1855); s. c. 64 Am. Dec. 478.

[6] White v. Bishop of Petersborough, 3 Swanst. 109 (1818); Tanfield v. Irvine, 2 Russ. 151 (1826); Wilson v. Wilson, 2 Keen, 249 (1836); Hopkins v. Worcester and Birmingham Canal Co., L. R. 6 Eq. 437 (1868).

[7] Bates v. Brothers, 17 Jur. 1174 (1853).

over the first mortgagee as to the rents collected,[1] even though the first mortgagee may not receive from the foreclosure sale a sufficient amount to discharge his mortgage debt. But this rule is said to apply only to those cases where the first mortgagee is not a party to the suit.[2]

§ 683. **Receiver when junior mortgagee in possession.** —If a subsequent incumbrancer is in possession of the property and a prior legal incumbrancer can not recover possession by an ejectment, a receiver may be appointed.[3] Where a second mortgagee forecloses and buys in the premises for less than the amount of his mortgage debt, and takes possession as purchaser, and the premises are doubtful security for the first mortgage, the first mortgagee may, in an action to foreclose his mortgage, have a receiver appointed, who will be required to account to such purchaser for any balance that may remain after satisfying the first mortgage.[4]

Where, in an action for foreclosure, a junior mortgagee was appointed receiver with power to keep the buildings insured and in repair and "to pay ground rent and taxes," and subsequently a prior mortgagee foreclosed and bought in the premises for less than his claim, the receiver, having paid the ground rent to the date of sale, was held to be entitled to appropriate the balance in his hands to the discharge of his mortgage, and could not be required to pay the taxes from the fund.[5] A third mortgagee, who advances money to buy up a first incumbrance, can not retain the property as against a second mortgagee, after the first

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[1] Post v. Dorr, 4 Edw. Ch. (N. Y.) 412 (1844). See Warner v. Gouverneur, 1 Barb. (N. Y.) 36 (1847); Washington Life Ins. Co. v. Fleischauer, 10 Hun (N. Y.) 117 (1877); Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); s. c. 43 Am. Dec. 766; Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Thomas v. Brigstocke, 4 Russ. 64 (1827).

[2] Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Miltenberger v. Logansport R. Co., 106 U. S. (16 Otto), 286 (1882); bk. 27 L. ed. 117; s. c. 1 Sup. Ct. Rep. 140; High on Rec. § 688.

[3] Silver v. Bishop of Norwich, 3 Swanst. 116, n (1816).

[4] New York Life Ins. Co. v. Glass, 50 How. (N. Y.) Pr. 88 (1875).

[5] Ranney v. Peyser, 83 N. Y. 1 (1880), reversing 20 Hun (N. Y.) 11.

mortgage has been paid off, if he had notice of the existence of such second mortgage.[1]

§ 684. **General practice in appointing receiver.**—Where the plaintiff avers that the security for the mortgage debt is insufficient, and the mortgagor or the party personally liable for the payment of the debt is insolvent, the mortgagee will be entitled to apply for a receiver of the rents and profits of the mortgaged premises at any time during the progress of the cause,[2] and will, even before the hearing,[3] be entitled to a receiver as a matter of right, unless the party in possession, or the person liable for the payment of the deficiency, gives a sufficient undertaking to account for the rents and profits in case of a deficiency.[4] A receiver may be appointed even after a voluntary assignment by a mortgagor for the benefit of his creditors.[5]

While a receiver may be appointed, either upon the application of the plaintiff, or upon the motion of the court in a case justifying it, yet one will not be appointed on the application of a mere stranger having no connection with or interest in the subject matter of the litigation.[6]

§ 685. **Time of appointing receiver.**—A court of chancery has no power to appoint a receiver prior to the filing of a bill and the beginning of an action,[7] nor without notice to the parties interested in the property to be delivered

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[1] Hiles v. Moore, 15 Beav. 175, 181 (1852).

[2] Lofsky v. Maujer, 3 Sandf. Ch. (N. Y.) 69 (1845); Hardy v. McClellan, 53 Miss. 507 (1876); Whitehead v. Wooten, 43 Miss. 523 (1870); Brown v. Chase, Walk. Ch. (Mich.) 43 (1842).

[3] Brinkman v. Ritzinger, 82 Ind. 364 (1882). See Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204 (1833); Caslin v. State, 44 Ind. 151 (1873).

[4] Syracuse Bank v. Tallman, 31 Barb. (N. Y.) 201 (1857). See Warner v. Gouverneur, 1 Barb. (N. Y.) 36 (1847); Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588 (1842); Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843); Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841); Main v. Ginthert, 92 Ind. 180 (1883); Myers v. Estell, 48 Miss. 372 (1873).

[5] Upham v. Lewis, 1 Law Bull. 86 (1879).

[6] O'Mahoney v. Belmont, 62 N.Y. 133 (1875). See Attorney-General v. Day, 2 Madd. 246 (1817).

[7] Crowder v. Moone, 52 Ala. 220 (1875).

into the receiver's hands;[1] an order to show cause why a receiver should not be appointed, served before the action is commenced, is irregular.[2] It has long been held that a receiver should not be applied for prior to the service of the summons,[3] unless, perhaps, where the defendant designedly keeps without the jurisdiction of the court, or is in hiding, to avoid service of the process,[4] because a court has no jurisdiction to deprive a party, who is not present to defend himself, of the possession of his estate.[5] A receiver should not be appointed before final judgment, merely because of a concurrent demand by two or more parties to the action.[6]

§ 686. **Appointment of receiver before answer.**—The general rule is, that a receiver will not be appointed before the defendant answers, especially if one is not asked for in the complaint, unless it clearly appears that the property is in danger of loss or injury by reason of the insolvency of the party having possession of it, or from other causes.[7] And where a receiver is appointed before the answer is served, he may afterwards be discharged on the defendant's motion, if the complaint and answer taken together show that a receiver should not have been appointed.[8]

It was formerly held not to be proper to move for a receiver upon the pleadings and affidavits in the action before the hearing on the trial.[9] The present doctrine, however, is that after an action for foreclosure has been commenced, the plaintiff may, if the security is in jeopardy, sequestrate the rents or emblements or both through the aid

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Jones v. Schall, 45 Mich. 379 (1881).

[1] Kattenstroth v. Astor Bank, 2 Duer (N. Y.) 632 (1853).

[3] Stratton v. Davidson, 1 Russ. & Myl. 484 (1830).

[4] Quinn v. Gunn, 1 Hog. 75 (1816); Malcolm v. Montgomery, 2 Molloy, 500 (1824); Maguire v. Allen, 1 Ball & B. 75 (1809); Coward v. Chadwick, 2 Russ. 150, n. (1825). See 1 VanSant. Eq. Pr. 402.

[5] Tanfield v. Irvine, 2 Russ. 151 (1826).

[6] Dusenbury v. Dusenbury, 11 Daly (N. Y.) 112 (1882).

[7] People v. Mayor of N. Y., 8 Abb. (N. Y.) Pr. 7 (1858); West v. Swan, 3 Edw. Ch. (N. Y.) 420 (1840).

[8] Phœnix Mut. Life Ins. Co. v. Grant, 3 McAr. D. C. 220 (1879).

[9] Lloyd v. Passingham, 3 Meriv. 697 (1811).

of a receiver, at any time during the progress of the action; but that the receiver is not entitled to recover rents collected nor the value of emblements enjoyed prior to the date of his appointment.[1]

To authorize the appointment of a receiver before the hearing, the complaint must contain a prayer for such appointment.[2] A receiver will be appointed after a hearing or after a rehearing, even though such appointment may have been once refused, upon showing a new state of facts such as to justify the appointment.[3]

§ 687. Appointment of receiver after granting decree. —After a decree of foreclosure has been granted, the court may appoint a receiver, although not asked for in the complaint,[4] where such appointment is necessary to protect the interests of the mortgagee;[5] the fact that the complaint does not state facts authorizing the appointment of a receiver, constitutes no objection to an application well supported on the merits.[6]

If a trustee, appointed by a final decree, refuses the trust, a receiver may be appointed to protect the interests of all the parties interested in the estate.[7] And where a receiver has been properly appointed in a suit for the foreclosure of a mortgage, it will be no error to continue the receivership after the final decree of sale.[8]

Although a mortgagor may be entitled to hold the legal title to the premises until the foreclosure sale, yet in a proper

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[1] Hamilton v. Austin, 36 Hun (N. Y.) 138 (1885).

[2] Cook v. Gwyn, 3 Atk. 689 (1748); Meredith v. Wyse, 1 Molloy, 2 (1826).

[3] Attorney-General v. Mayor of Galway, 1 Molloy, 95 (1828).

[4] Cook v. Gwyn, 3 Atk. 689 (1748); Meredith v. Wyse, 1 Molloy, 2 (1826).

[5] Haas v. Chicago Building Soc., 89 Ill. 498 (1878); Schreiber v. Carey, 48 Wis. 208 (1880). In Schreiber v. Carey, *supra*, the court say: "Although, by the laws of this state, the mortgagor of lands holds the legal title until the foreclosure sale, yet in a proper case, when necessary to protect the mortgagee's interests, equity will appoint a receiver; this may be done by an order in the foreclosure suit after judgment; and the fact that the complaint does not state facts authorizing the appointment, is no objection in such a case."

[6] Schreiber v. Carey, 48 Wis. 208 (1880).

[7] Wilson v. Russ, 17 Fla. 691 (1880).

[8] Buchanan v. Berkshire L. Ins Co., 96 Ind. 510 (1884).

case, and when necessary to protect the mortgagee's interests, equity will appoint a receiver; and his appointment may be made by an order in the foreclosure even after judgment.[1] But an order appointing a receiver of rents and profits after a final decree of foreclosure and sale, should not be granted without notice; yet if a party voluntarily appears and resists the application for a receiver, notice thereof will be deemed to have been waived.[2]

§ 688. **Appointment of receiver after sale.**—Inasmuch as the necessity for the appropriation of the rents and profits to the payment of the mortgage debt frequently does not appear until after the sale, a receiver to collect them may be appointed by the court after the sale upon a proper showing of the facts and circumstances,[3] or where it clearly appears that the rights of the purchaser have been impaired or are likely to be impaired by the possession of the mortgagor. The reason for this would seem to be that the security is not exhausted by the sale, for there is also a fund included in it which is secondarily liable,—the rents and profits. The power of appointing a receiver after a sale, however, should be exercised only in extreme cases and to prevent gross wrong and injustice.[4]

It has been said that where a mortgagee completes his foreclosure without sequestrating the rents and profits, he can not afterwards, on finding the property insufficient security, have the rents and profits applied to the payment

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[1] Schreiber v. Carey, 48 Wis. 208 (1880).

[2] Haas v. Chicago Building Soc., 89 Ill. 498 (1878).

[3] Smith v. Tiffany, 13 Hun (N. Y.) 671 (1878); Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); s. c. 43 Am. Dec. 766; Haas v. Chicago Building Soc., 89 Ill. 498 (1878); Connelly v. Dickson, 76 Ind. 440 (1881); Adair v. Wright, 16 Iowa, 385 (1864); Schreiber v. Carey, 48 Wis. 208 (1880); Thomas v. Davies, 11 Beav. 29 (1847). In Indiana the old equity rule governing this subject was embodied in and re-enacted by 2 Ind. Rev. Stat. (1876), 144, § 199, chap. 6.

[4] Haas v. Chicago Building Soc., 89 Ill. 498 (1878). See Astor v. Turner, 11 Paige Ch. (N. Y.) 436 (1845); s. c. 43 Am. Dec. 766; Smith v. Tiffany, 13 Hun (N. Y.) 671 (1878); Adair v. Wright, 16 Iowa, 385 (1864); Schreiber v. Carey, 48 Wis. 208 (1880); Thomas v. Davies, 11 Beav. 29 (1847).

of his debt, because his right to intercept such rents and profits ceases with the completion of the foreclosure ;[1] but the better doctrine is thought to be that a receiver may be appointed after the granting of a decree or even after a sale, where such appointment is necessary to protect the interests and to preserve the rights of the parties to the action.

§ 689. **Interference with receiver's possession.**—The possession of a receiver appointed in a mortgage foreclosure is not to be disturbed without leave of the court making the appointment,[2] and all claims adverse to such receiver are to be determined by the court appointing him.[3] But, although the courts will prevent any disturbance of a receiver in possession under an order of sequestration, yet they generally refuse to interfere as against the legal title.[4]

The court, when appealed to, will examine the title and discharge the receiver, or leave the party claiming the possession under a superior legal title, to enforce his rights by an action at law.[5]

§ 690. **Remedy of parties claiming title paramount to receiver.**—Where a receiver has been appointed in a mortgage foreclosure and a party claims a paramount title to the estate, the remedy of the receiver is to apply to the court to direct the claimant to exhibit interrogatories in order that he may be examined *pro interesse suo*,[6] as to his title to the estate.[7]

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[1] Foster v. Rhodes, 10 Bankr. Reg. 523 (1871).

[2] Foster v. Townshend, 2 Abb. (N. Y.) N. C. 29, 36 (1877). See Sea Ins. Co. v. Stebbins, 8 Paige Ch. (N. Y.) 565 (1841); Angel v. Smith, 9 Ves. 336, 338 (1804); Brooks v. Greathed, 1 Jac. & W. 176, 178 (1820); Pelham v. Dutchess of Newcastle, 3 Swanst. 289, 293, n (1819); 1 Story Eq. Jur. (11th ed.) § 33a; Daniels Ch. Pr. 1579.

[3] O'Mahoney v. Belmont, 62 N. Y. 133, 149 (1875). See Milwaukee & St. P. R. R. Co. v. Milwaukee & M. R. R. Co., 20 Wis. 165 (1865); Peale v. Phipps, 55 U. S. (14 How.) 368, 374 (1852); bk. 14 L. ed. 459.

[4] Foster v. Townshend, 2 Abb. (N. Y.) N. C. 29, 37 (1877). See Tyson v. Fairclough, 2 Sim. & S. 142 (1824); Jeremy Eq. Jur. 252.

[5] Foster v. Townshend, 2 Abb. (N. Y.) N. C. 29, 37 (1877). See Angel v. v. Smith, 9 Ves. 336, 338 (1804); Dixon v. Smith, 1 Swanst. 457 (1818); Attorney-General v. Coventry, 1 P. Wm. 306 (1715); Empringham v. Short, 3 Hare, 461 (1844); Gilb. For. Roman. 81 (1874).

[6] Though it was formerly questioned [see Kaye v. Cunningham, 5

Any one interfering with a receiver in possession without first obtaining leave of the court which appointed him, must either come into court and be examined *pro interesse suo*,[1] or apply to the court for leave to enforce his legal rights by bringing an action in ejectment;[2] in either case the application may be made by motion,[3] or on petition; a petition is probably the most convenient practice.[4]

§ 691. Appeal — Continuance of receivership. — In McMahon v. Allen,[5] an order directing the continuance of a receivership during the pendency of an appeal, which was to be taken from the final decree, was held to continue the receiver's authority not only during the appeal to the general term, but also during an appeal to the court of appeals.

In Rider v. Bagley,[6] it was held that where fraud or contempt upon the supreme court is charged upon the owner, for

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Madd. 406 (1820)], it now appears to be settled, that the party for whose benefit the receivership was had, may require the party claiming an adverse right or title, to come in and show cause why he should not be examined *pro interesse suo*. Foster v. Townshend, 2 Abb. (N. Y.) N. C. 29, 37 (1877). See Johnes v. Claughton, Jac. 573 (1822); Brooks v. Greathed, 1 Jac. & W. 573 (1820); Hamlyn v. Lee, 1 Dick. 94 (1743).

[7] Wiswall v. Sampson, 55 U. S. (14 How.) 52, 65 (1852); bk. 14 L. ed. 322; 3 Dan. Ch. Pr. 1984.

[1] Wiswall v. Sampson, 55 U. S. (14 How.) 52, 65 (1852); bk. 14 L. ed. 322. Regarding the practice in such cases, see Hamlyn v. Lee, 1 Dick. 94 (1743); Gomme v. West, 2 Dick. 472 (1772); Hunt v. Priest, 2 Dick. 540 (1778); Anon., 6 Ves. 287 (1801).

[2] Green v. Winter, 1 Johns. Ch. (N. Y.) 60 (1814); s. c. 7 Am. Dec. 475; Bryan v. Cormick, 1 Cox Ch. 422 (1788); Angel v. Smith, 9 Ves. 335 (1834); 2 Spence Eq. Jur. 647.

[3] Brooks v. Greathed, 1 Jac. & W. 179, note, (1820); Dickinson v. Smith, 4 Madd. 177 (1813); Walker v. Bell, 2 Madd. 21 (1816); Dixon v. Smith, 1 Swanst. 457 (1818).

[4] Brooks v. Greathed, 1 Jac. & W. 178 (1820); 2 Spence Eq. Jur. 699. Where it is made to appear to the satisfaction of the court that the claimant has a superior right or title to the sequestration, the receiver will be discharged as to him. Foster v. Townshend, 2 Abb. (N. Y.) N. C. 29, 36 (1877); Attorney-General v. Coventry, 1 P. Wm. 306, 309, note, (1715); Wharam v. Broughton, 1 Ves. Sr. 181 (1748); 3 Dan. Ch. Pr. 1269, 1270, 1271, and such orders will be made as the rights of all the parties in interest may require. Field v. Jones, 11 Ga. 413 (1852); Angel v. Smith, 9 Ves. 335, 338 (1804); 2 Story Eq. Jur. (11th ed.) §§ 833, 891.

[5] 14 Abb. (N. Y.) Pr. 220 (1862).

[6] 84 N. Y. 461 (1881).

collecting rents with a knowledge of the pendency of an application for a receiver, it is for the court to deal with the charge, and its action in the matter will not be subject to review on appeal. Assuming that the court has power to compel such owner to pay the rents to the receiver after his appointment, it seems that the exercise of such power is in the discretion of the court, and consequently not reviewable.[1]

§ 692. Accounting of receivers.—While a receiver is at all times liable for an accounting, he can be called upon for an accounting only by the court which appointed him;[2] and an order directing him to deliver the property to another court will not relieve him from the control of the appointing court and its power to compel him to settle.[3] The accounting of a receiver is to be made to the court only; he can not be compelled to show his books to a party to the suit.[4] A report upon a receiver's account can not be excepted to and need not be confirmed;[5] and where there is no claim of fraud or bad faith with reference to the accounts of a receiver, he can not be compelled to pay the costs of a reference to settle the same.[6]

A mortgagee who has purchased the mortgaged premises at a foreclosure sale, not being entitled to any of the rents and profits which accrued prior to the time of his purchase, can not require a receiver to account therefor until they have been collected.[7] If there are two or more mortgagees, and a receiver is appointed for the benefit of all the parties to the action, the fund collected by the receiver will be subject to whatever disposition may appear to the court to be most equitable under the circumstances of the case.[8]

But it has been held that where, in an action brought to foreclose a mortgage, a subsequent incumbrancer who is made

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[1] Rider v. Bagley, 84 N. Y. 461 (1881).

[2] Conkling v. Butler, 4 Biss. C. C. 22 (1865).

[3] Mabry v. Harrison, 44 Tex. 286 (1875).

[4] Musgroove v. Nash, 3 Edw. Ch. (N. Y.) 172 (1837).

[5] Brower v. Brower, 2 Edw. Ch. (N. Y.) 621 (1836).

[6] Radford v. Folsom, 55 Iowa, 276 (1880).

[7] Pendola v. Alexanderson, 67 Cal. 337 (1885).

[8] Keogh v. McManus, 34 Hun (N. Y.) 521 (1885). In this case an

a party defendant thereto, appeals in his own behalf and secures the appointment of a receiver of the rents and profits of the mortgaged premises, he will be entitled to retain the amount collected by the receiver as against the claim of a prior mortgagee whose debt, the amount realized upon the sale of the mortgaged property under the judgment entered in the action, has been insufficient to satisfy,[1] because a junior incumbrancer can not be divested of his right to the rents and profits in favor of the party holding the first mortgage, until such party procures the appointment of a receiver to collect them for his benefit and to subordinate them to his own superior rights.[2]

In the case of Post v. Dorr,[3] it was held "to be an established rule, that a second or third mortgagee who succeeds in getting a receiver appointed, becomes thereby entitled to the rents collected during the appointment, although a prior mortgagee steps in and obtains a receivership in his behalf and fails to obtain enough out of the property to pay his debt. This is on the principle that a mortgagee acquires a specific lien upon the rents by the appointment of a receiver of them; and if he be a second or third incumbrancer, the court will give him the benefit of his superior diligence over his senior, in respect to the rents which accrued during the time that the elder mortgagee took no measure to have the receivership extended to his suit and for his benefit."

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action was brought by the plaintiff to foreclose a mortgage given by the defendants McManus and his wife, and a receiver of the rents, issues and profits of the premises was appointed. Upon the sale a sufficient amount was realized to discharge the amount due to the plaintiff, together with the costs, and to leave a surplus, which was applied upon a second mortgage given by the said McManus, and which, when so applied, still left an amount unpaid thereon. There was a balance of rents collected and in the hands of the receiver amounting to more than enough to pay the sum remaining due. The court directed that the amount due should be paid to the holder of the second mortgage, and the balance to the mortgagor.

[1] Washington Life Ins. Co. v. Fleischauer, 10 Hun (N. Y.) 117 (1877).

[2] See Washington Life Ins. Co. v. Fleischauer, 10 Hun (N. Y.) 117 (1877); Howell v. Ripley, 10 Paige Ch. (N. Y.) 43 (1843).

[3] 4 Edw. Ch. (N. Y.) 412, 414 (1844).

§ 693. **Compensation of receivers.**—The compensation of a receiver should be such as would be reasonable for the services rendered by a person competent to perform the duties of the office, rather than any fixed commission.[1] What is a reasonable and proper compensation for a receiver is to be determined by proof of the facts, and not by the opinions of witnesses. Five per centum on the amount received and disbursed seems to be the customary allowance.[2] In New York a receiver is entitled to receive commissions at the rate prescribed by statute[3] for receiving and paying out moneys, viz., one-half of the specified rate for receiving and one-half for disbursing.[4]

But where a court appoints a receiver in an action pending therein, it may determine the rate of his compensation independent of the statute and with reference to the peculiar circumstances of the case.[5] A receiver is entitled to be paid his commissions out of funds in his hands,[6] or to have them taxed as costs,[7] without regard to the result of the litigation.[8]

The expenses reasonably incurred by a receiver in the discharge of his trust are a lien upon the trust property prior to that of the bond holders or mortgagees.[9] Among the expenses which should be allowed to a receiver are reasonable fees for counsel employed by him in the proper discharge of his trust,[10] the costs of litigation and the expenses

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[1] See Jones v. Keen, 115 Mass. 170 (1874).

[2] Stretch v. Gowdey, 3 Tenn. Ch. 565 (1877).

[3] N. Y. Code Civ. Proc. § 3320, fixes the maximum rate at five per centum.

[4] Howes v. Davis, 4 Abb. (N. Y.) Pr. 71 (1856).

[5] Gardiner v. Tyler, 4 Abb. (N. Y.) Pr. N. S. 463 (1867); s. c. 3 Keyes (N. Y.) 505; 3 Trans. App. 161.

[6] Hopfensack v. Hopfensack, 61 How. (N. Y.) Pr. 498 (1880); Radford v. Folsom, 55 Iowa, 276 (1880).

[7] Hutchinson v. Hampton, 1 Mon. T. 39 (1868).

[8] Hopfensack v. Hopfensack, 61 How. (N. Y.) Pr. 498 (1880).

[9] McLane v. Placerville & S. V. R. Co., 66 Cal. 606 (1885).

[10] United States Trust Co. v. New York, W. S. & B. R. Co., 101 N. Y. 478 (1886); McLane v. Placerville & S. V. R. Co., 66 Cal. 606 (1885). As to when a receiver will not be allowed to charge against the fund, fees paid to counsel, see Ranney v. Peyser, 20 Hun (N. Y.) 11 (1880).

incurred in taking care of, protecting and repairing the property in his charge.[1] In New York, the allowance of commissions and expenses to such a receiver is governed by the provisions of the Code of Civil Procedure.[2]

§ 694. **Removal of receivers.**—A receiver appointed in a mortgage foreclosure may be removed for misconduct by the court appointing him on the application of any party interested;[3] but where such receiver has been appointed by a court having jurisdiction of the case, no other court of co-ordinate jurisdiction can remove him.[4] A receiver should not be removed without notice to the plaintiff in the action, or to the person at whose instance he was appointed.[5] Nor should he be removed without notice, also, to all persons who have appeared in the action.[6]

While under the provisions of the New York statute,[7] a court of one judicial district has power to remove a receiver appointed in an action pending in another judicial district, it has no power to appoint his successor. For that purpose the proceedings must be remitted to the district in which the action is pending.[8]

§ 695. **Discharge of receivers.**—The appointment of a receiver in an action to foreclose a mortgage will continue

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[1] McLane v. Placerville & S. V. R. Co., 66 Cal. 606 (1885).

[2] N. Y. Code Civ. Proc. § 3320; United States Trust Co. v. N. Y., W. S. & B. R. Co., 101 N. Y. 478 (1886). The Act of 1883, chap. 378, relates to receivers of corporations appointed in proceedings in bankruptcy; a receiver appointed in an action to foreclose a mortgage executed by a corporation, is not entitled to the fees specified in said section.

[3] 1 VanSant. Eq. Pr. 382. If the person who is appointed receiver, absents himself and fails to file the bond ordered, the court may, in its discretion, remove him and appoint another. *In re* Louisiana Savings Bank, &c., Co., 35 La. An. 196 (1883).

[4] Young v. Montgomery & E. R. R. Co., 2 Woods C. C. 606 (1875). See Kennedy v. Indianapolis, C. & L. R. R. Co., 2 Flipp. C. C. 704 (1880); s. c. 3 Fed. Rep. 97; 11 Cent. L. J. 89; 26 Int. Rev. Rec. 30, 90; 10 Rep. 359; Bruce v. Manchester & K. R. R. Co., 19 Fed. Rep. 342 (1884).

[5] Attrill v. Rockaway Beach Imp. Co., 25 Hun (N. Y.) 376 (1881).

[6] See Attrill v. Rockaway Beach Imp. Co., 25 Hun (N. Y.) 509 (1881).

[7] Laws 1880, chap. 537.

[8] Attrill v. Rockaway Beach Imp. Co., 25 Hun (N. Y.) 376 (1881).

during the pendency of the action, unless otherwise directed in the order appointing him.[1] Where his duties have not all been performed, a receiver should not be discharged on his own application unless he shows good cause therefor, especially if his discharge might affect other parties to the action. His mere desire to be discharged, though coupled with a statement of the complication of his accounts and the necessity of losing much time in the business of his receivership, is not sufficient.[2] And where the protection of the rights of a defendant requires the continuance of a receiver, the court will not grant a discharge, although the suit may be at an end; but it will require the defendant thus protected to file a bill forthwith to settle his rights.[3]

A receiver should not be discharged without notice to all interested parties, but the discharge of a receiver without notice is not necessarily such an irregularity as to justify a reversal of the order.[4] The payment of the mortgage debt by the mortgagor, after the appointment of a receiver, does not, *ipso facto*, discharge the receiver. The receiver may have a claim for expenses incurred in the exercise of his duties which should be paid before the property held by him is taken from his possession.[5]

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[1] Weems v. Lathrop, 42 Tex. 207 (1875).

[2] Beers v. Chelsea Bank, 4 Edw. Ch. (N. Y.) 277 (1843).

[3] Whiteside v. Prendergast, 2 Barb. Ch. (N. Y.) 471 (1847). See Murrough v. French, 2 Molloy, 497 (1827); Largan v. Bowen, 1 Sch. & Lef. 296 (1803).

[4] Coburn v. Ames, 57 Cal. 201 (1881); s. c. 28 Am. Dec. 634.

[5] Crook v. Findley, 60 How. (N. Y.) Pr. 375 (1880).

CHAPTER XXXII.

PROCEEDINGS ON SURPLUS MONEYS.

PAYING SURPLUS INTO COURT—CHARACTER OF SURPLUS, REALTY OR PERSONALTY—ADJUSTING CLAIMS AND EQUITIES—QUESTIONS OF PRIORITY—LIENS ON SURPLUS—DOWER—MECHANICS' LIENS.

§ 696. Introductory.
697. Rules of court.
698. Provisions of Code.
699. Object of the statute and court rule.
700. Payment of surplus into court.
701. When surplus not paid into court.
702. When surplus paid into surrogate's court.
703. Paying surplus into court on foreclosure by advertisement.
704. Character of surplus—Personal or real property.
705. Surplus personalty, where land so converted under will.
706. Massachusetts doctrine.
707. Character of surplus belonging to infant.
708. Who entitled to apply for surplus.
709. Protecting claims to surplus.
710. Adjusting equities.
711. Liens to be paid in order of priority in time.
712. Questions of priority—How determined.
713. Claims must be liens on mortgaged premises.
714. Equitable distribution — Claims liens on two funds.
715. Distribution of surplus — Mortgagor deceased.
716. Interest of life-tenant in surplus.
§ 717. Rights of prior incumbrancers not parties.
718. Liens attaching *pendente lite*.
719. Equitable priorities between subsequent mortgagees.
720. Burden of proof in showing priorities.
721. Rights of equal mortgagees —Senior mortgagees.
722. Several mortgages security for same debt.
723. Priority of unrecorded mortgage over subsequent judgment.
724. Second mortgage and junior judgments.
725. Preference of mortgage over mechanic's lien.
726. Lien of judgment on surplus.
727. What interests bound by lien of judgment.
728. Satisfying judgments from surplus.
729. Specific lien of judgment and executory contract.
730. Judgment by confession as an indemnity.
731. Judgment against sheriff.
732. Judgment confessed by one member of a firm.
733. Married woman's equitable right to surplus.
734. Dower in surplus moneys.
735. Inchoate right of dower.
736. Investment of dower in surplus — Payment of gross sum.

§ 737. Homestead right in surplus.
738. Where claim of collateral assignee less than mortgage.
739. Purchase of part of premises by mortgagee.
740. Interest of lessee for years in surplus.
§ 741. Mechanic's lien.
742. Rights of *cestuis que trust* in surplus.
743. Lien for attorney's fees on surplus.
744. Disposition of surplus moneys not applied for.

§ 696. **Introductory.**—Surplus moneys in mortgage foreclosures are such moneys as remain undistributed, after the referee to sell has paid from the proceeds of the sale the costs of the suit, the expenses of the sale, the amount due for taxes and assessments, and the sum or sums found to be due on the complaint, or the complaint and the cross-bills. Thus, if the holder of a note secured by a mortgage or a deed of trust receives more than enough to pay his debt and the costs on the sale under foreclosure, the amount in excess will be surplus, for which he will be legally liable as for any other debt.[1]

The disposition of the proceeds of the sale of the mortgaged premises on foreclosure, in paying the plaintiff and prior lienors or creditors, must be made as directed in the judgment. The referee or other officer making the sale is generally directed to retain from the proceeds of such sale a sum sufficient to pay his fees and commissions,[2] together with the expenses of the sale, including the sums paid, if any, for taxes, assessments and water rates, or to be paid to redeem the property from a sale or sales made thereunder,[3] and to pay to the plaintiff or his attorney the amount of his debt, interest and costs; and, if any surplus remains from the proceeds of the sale after making such payments, to pay it into court for the benefit of the persons entitled thereto.[4]

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[1] Laughlin v. Heer, 89 Ill. 119 (1878).

[2] N. Y. Code Civ. Proc. §§ 3297, 3307.

[3] Cornell v. Woodruff, 77 N. Y. 203 (1879); Catlin v. Grissler, 57 N. Y. 363 (1874); Easton v. Pickersgill, 55 N. Y. 310 (1873); Williams v. Townsend, 31 N. Y. 411, 414 (1865); Poughkeepsie Savings Bank v. Winn, 56 How. (N. Y.) Pr. 368 (1878); N. Y. Code Civ. Proc. § 1676.

[4] Beekman v. Gibbs, 8 Paige Ch. (N. Y.) 511 (1840). See DeForest v. Farley, 62 N. Y. 628 (1875); Livingston v. Mildrum, 19 N. Y. 440 (1859); N. Y. Code Civ. Proc. § 1633; Clark v. Carnall, 18 Ark. 209 (1856).

§ 697. **Rules of court.**—The rules of the supreme court in New York provide that "all surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sale, within five days after the same shall be received and be ascertainable, in the city of New York to the chamberlain of the said city, and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court, and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court."[1]

The rules also provide that "on filing the report of the sale, any party to the suit, or any other person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference, to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of the surplus moneys as may be just. The referee shall, in all cases, be selected by the court. The owner of the equity of redemption, and every party who appeared in the cause, or who shall have filed such notice with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus."[2]

"But if such claimant or such owner has not appeared, or made his claim by an attorney of this court, the notice may be served by putting the same into the post-office, directed to the claimant at his place of residence, as stated in the notice of his claim, and upon the owner in such manner as the court may direct. All official searches for conveyances

[1] N. Y. Supreme Court Rule 61. [2] N. Y. Supreme Court Rule 64.

or incumbrances, made in the progress of the cause, shall be filed with the judgment-roll, and notice of the hearing shall be given to any person having, or appearing to have, an unsatisfied lien on the moneys in such manner as the court shall direct; and the party moving for the reference shall show, by affidavit, what unsatisfied liens appear by such official searches, and whether any, and what other unsatisfied liens are known to him to exist."[1]

§ 698. **Provisions of Code.**— The New York Code of Civil Procedure[2] provides that, "if there is any surplus of the proceeds of the sale, after paying the expenses of the sale, and satisfying the mortgage debt and the costs of the action, it must be paid into court, for the use of the person or persons entitled thereto. If any part of the surplus remains in court for the period of three months, the court must, if no application has been made therefor, and may, if an application therefor is pending, direct it to be invested at interest, for the benefit of the person or persons entitled thereto, to be paid upon the direction of the court."[3]

This section of the Code is a re-enactment of the provisions of the revised statutes,[4] which obviated the necessity that prevailed before their passage of ascertaining the amounts of all incumbrances and of adjudging the rights of all the defendants, before making a decree for the sale of the mortgaged premises.[5] Under the practice as it prevailed previous to the passage of the revised statutes and the adoption of the supreme court rule as above stated, junior incumbrancers were required to be made parties prior to the entry

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[1] N. Y. Supreme Court Rule 64.

[2] N. Y. Code Civ. Proc. § 1633.

[3] See Dunning v. Ocean Nat. Bank, 61 N. Y. 497 (1875); s. c. 10 Am. Rep. 293; Bergen v. Snedeker, 8 Abb. (N. Y.) N. C. 50 (1879); s. c. 21 Alb. L. J. 54; Mutual Life Ins. Co. v. Truchtnicht, 3 Abb. (N. Y.) N. C. 135 (1877); Tator v. Adams, 20 Hun (N. Y.) 131 (1880); Savings Bank of Utica v. Wood, 17 Hun (N. Y.) 133 (1879); Hurst v. Harper, 14 Hun (N. Y.) 280 (1878); Savings Inst. v. Osley, 4 Hun (N. Y.) 657 (1875); Atlantic Sav. Bank v. Hiler, 3 Hun (N. Y.) 209 (1874); Oppenheimer v. Walker, 3 Hun (N. Y.) 30 (1874).

[4] 2 N. Y. Rev. Stat. 192, §§ 159, 160.

[5] Wheeler v. VanKuren, 1 Barb. Ch. (N. Y.) 490 (1846); Renwick v. Macomb, Hopk. Ch. (N. Y.) 277 (1824).

of the decree,[1] in order that they might set up their claims by answer and thereby preserve their liens upon the surplus moneys arising from the sale of the mortgaged premises.

§ 699. **Object of the statute and court rule.**—Under this practice it frequently happened that a mortgagee whose claim was undisputed was delayed in its enforcement, until the subsequent incumbrancers had litigated as between themselves their respective claims to the surplus. Costs being allowed to every party who appeared and answered, it not unfrequently happened that the fund was greatly diminished, if not consumed, by the expenses of the litigation. This was entirely needless where the proceeds of the property were only sufficient to pay the amount of the plaintiff's claim; it was to avoid this delay and loss that the statute was enacted.[2]

Under the statute and the rule in mortgage foreclosures, subsequent incumbrancers who have no rights or interests adverse to those of the mortgagee, although parties to the suit, are not permitted to litigate their respective claims to the surplus as between themselves, until it is ascertained that there is a surplus.[3] If there is a surplus after the sale, the defendants can then settle their claims to it by making their proofs and having their respective rights equitably determined before a referee.[4]

§ 700. **Payment of surplus into court.**— All surplus arising from the proceeds of a mortgage foreclosure sale

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[1] Renwick v. Macomb, Hopk. Ch. (N. Y.) 277 (1824). See Kenney v. Apgar, 93 N. Y. 546 (1883).

[2] Miller v. Case, Clarke Ch. (N. Y.) 395 (1840); Eagle Fire Ins. Co. v. Flanagan, 1 How. App. Cas. (N. Y.) 311 (1847); Farmers' Loan & Trust Co. v. Seymour, 9 Paige Ch. (N. Y.) 538 (1842).

[3] Miller v. Case, Clarke Ch. (N. Y.) 395 (1840); Hubbell v. Schreyer, 4 Daly (N. Y.) 365 (1873); s. c. 14 Abb. (N. Y.) Pr. N. S. 287; Eagle Fire Ins. Co. v. Flanagan, 1 How. App. Cas. (N. Y.) 311 (1847); Drury v. Clark, 16 How. (N. Y.) Pr. 424, 430 (1857); Smart v. Bement, 3 Keyes (N. Y.) 241 (1866); s. c. 4 Abb. App. Dec. (N. Y.) 253; Farmers' Loan & Trust Co. v. Seymour, 9 Paige Ch. (N. Y.) 538 (1842); Union Ins. Co. v. VanRensselaer, 4 Paige Ch. (N. Y.) 85 (1833).

[4] Miller v. Case, Clarke Ch. (N. Y.) 395, 399 (1840); Union Ins. Co. v. VanRensselaer, 4 Paige Ch. (N. Y.) 85 (1833).

must be paid into court; its subsequent distribution is regulated by the rules of the supreme court.[1] The Code requires that the surplus of the proceeds of a sale, after the payment of the expenses thereof and the satisfaction of the mortgage debt, shall be paid into court for the use of the person or persons entitled thereto.[2]

The supreme court rules[3] require "that all surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sale, within five days after the same shall be received and be ascertainable, in the city of New York to the chamberlain of said city and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of a sale shall be filed or confirmed, unless accompanied by a proper voucher for the surplus moneys, and showing that they have been paid over, deposited or disposed of in pursuance of the judgment."[4]

A judgment creditor has a right to demand that the surplus money arising upon a foreclosure shall be brought into court;[5] but where he has not answered, a judgment directing the payment of the surplus moneys to him will, of course, be improper.[6] The assignee of a mortgage, where the assignment was made after a *lis pendens* had been filed for the foreclosure of a prior mortgage, is entitled to appear and ask that the referee pay into court the surplus shown to exist by the judgment and the report of sale, even

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[1] Raht v. Attrill, 106 N. Y. 423 (1887), modifying 42 Hun (N. Y.) 414. N. Y. Supreme Court Rules 61–64.

[2] N. Y. Code Civ. Proc. § 1633.

[3] N. Y. Supreme Court Rule 61.

[4] N. Y. Supreme Court Rule 61. The non-payment by the sheriff to the mortgagor of the surplus received on a foreclosure sale will not defeat the sale, for the sheriff must account to the mortgagor for the money, even though the mortgagor fails to obtain it; and if the mortgagor redeems without obtaining it, he will still have an unquestionable right to have it taken into account. Sinclair v. Learned, 51 Mich. 335 (1883).

[5] Denton v. Nanny, 8 Barb. (N. Y.) 620 (1850).

[6] Rogers v. Ivers, 23 Hun (N. Y.) 424 (1881).

though the referee may report a deficiency.[1] If the report of sale shows that the deficiency reported was caused by the allowance of a prior mortgage which was not authorized by the judgment, and that but for such allowance there would be a surplus, the surplus thus ascertained will be ordered to be paid into court.[2]

§ 701. **When surplus not paid into court.**—Where the plaintiff has purchased the claims of judgment creditors and junior lienors, for whose benefit a mortgage has been executed, the surplus moneys arising on the sale under a prior mortgage will not be directed to be paid into court, as the plaintiff is entitled thereto, and the fund would only be burdened with the payment of fees and commissions by such payment into court.[3]

§ 702. **When surplus paid into surrogate's court.**—The New York Code provides[4] that, "where real property, or an interest in real property, is sold in an action or a special proceeding to satisfy a mortgage thereon, which accrued during the decedent's life-time, and letters testamentary or letters of administration, upon the decedent's estate, were, within four years before the sale, issued from a surrogate's court of the state, having jurisdiction to grant them, the surplus moneys arising from such sale of the premises must be paid into the surrogate's court from which the letters issued. If the sale was made pursuant to the directions contained in a judgment or order, the surplus remaining after the payment of all the liens upon the property, chargeable upon the proceeds, which existed at the time of the decedent's death, must be so paid. If the sale was made in any other manner, the surplus, exceeding the lien to satisfy which the property was sold, and the costs and expenses, must, within thirty days after the receipt of the money from which it accrues, be so paid over by the person receiving that money. The receipt of the surrogate, or the clerk

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[1] Koch v. Purcell, 45 N. Y. Supr. Ct. (13 J. & S.) 162 (1879).

[2] Koch v. Purcell, 45 N. Y. Supr. Ct. (13 J. & S.) 162 (1879).

[3] Hoffman v. Sullivan, 23 N. Y. Week. Dig. 311 (1886).

[4] N. Y. Code Civ. Proc. § 2798.

of the surrogate's court, or the county treasurer, as the case may be, is a sufficient discharge to the person paying the money."[1]

§ 703. **Paying surplus into court on foreclosure by advertisement.**—Where a mortgage is foreclosed by advertisement, the "attorney or other person who receives the money upon the sale, must, within ten days after he receives it, pay into the supreme court the surplus exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect, as if the proceedings to foreclose the mortgage were taken in an action brought in the supreme court."[2]

On the failure of the attorney, or other person receiving the money on such a sale, to pay over the surplus moneys received by him, an attachment may be issued against him, in which case the burden of proving that he has paid such surplus to the county treasurer will rest upon him.[3] Where, on such a sale, the mortgagee receives the money and holds the surplus, he is regarded as a trustee for the person or persons entitled thereto, and is liable to a subsequent judgment creditor for the balance of the surplus, after deducting the amount due upon his claim, with interest from the time of the demand.[4]

§ 704. **Character of surplus—Personal or real property.**—The proceeds of the sale, after satisfying the mortgage debt, may be said to stand in the place of the equity of redemption to those who hold the title to such equity of redemption or a lien upon it.[5] Whether such surplus is to be treated as personal property or real estate will depend upon the circumstances of each case. It is thought that

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[1] See Dunning v. Ocean Nat. Bank, 61 N. Y. 497 (1875); Stilwell v. Swarthout, 10 N. Y. Wk. Dig. 369 (1880); White v. Poillon, 25 Hun (N. Y.) 69 (1881).

[2] N. Y. Code Civ. Proc. § 2404.

[3] See Matter of Silvernail, 45 Hun (N. Y.) 575 (1887).

[4] Russell v. Dutton, 4 Lans. (N. Y.) 399 (1871).

[5] Habersham v. Bond, 2 Ga. Dec. 46 (1847). See Clarkson v. Skidmore, 46 N. Y. 297 (1871); Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844).

when such surplus is to be distributed among persons having liens upon the land, it is for that purpose to be treated as real estate, and to be governed by the rules relating to such property.[1] But where the rights and claims of the persons among whom the money is to be divided are fixed and determined, the money in their hands is to be treated as personal property;[2] surplus moneys claimed by virtue of a trust are not realty, but personalty.[3]

Where a person dies seized of real estate incumbered by a mortgage which is thereafter foreclosed, the surplus arising on the sale is to be regarded as realty, and passes to his heirs or devisees and not to his administrator; his administrator can not maintain an action to recover the surplus, although the mortgage may provide that the surplus shall be paid to the mortgagor, his executors or administrators.[4] But the rule is different where the mortgagor, or other owner of the equity of redemption, dies after the sale of the mortgaged premises has been made.[5]

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[1] Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 119 (1814); s. c. 7 Am. Dec. 478.

[2] See Cope v. Wheeler, 41 N. Y. 303 (1869).

[3] American Life Ins. & Trust Co. v. VanEps, 56 N. Y. 601 (1874), reversing 14 Abb. (N. Y.) Pr. N. S. 253.

[4] Dunning v. Ocean Nat. Bank, 61 N. Y. 497 (1875); s. c. 19 Am. Rep. 293; American Life Ins. & Trust Co. v. VanEps, 56 N. Y. 601 (1874); Sweezy v. Thayer, 11 N. Y. Leg. Obs. 50 (1852); Graham v. Dickinson, 3 Barb. Ch. (N. Y.) 169, 173 (1848); Fliess v. Buckley, 22 Hun (N. Y.) 551, 556 (1880); Roup v. Bradner, 19 Hun (N. Y.) 517 (1880); Cox v. McBurney, 2 Sandf. (N. Y.) 561 (1849); Beard v. Smith, 71 Ala. 568 (1882); Kinner v. Walsh, 44 Mo. 69 (1869); Chaffee v. Franklin, 11 R. I. 579 (1877); Freedman's Savings & Trust Co. v. Earle, 110 U. S. 718 (1883); bk. 28 L. ed. 304; Matson v. Swift, 8 Beav. 374 (1845); Bourne v. Bourne, 2 Hare, 39 (1842); Biggs v. Andrews, 5 Sim. 424 (1832); Wright v. Rose, 2 Sim. & S. 323 (1825); Van v. Barnett, 19 Ves. 102 (1812); Brown v. Bigg, 7 Ves. 279 (1802); Polley v. Seymour, 2 Younge & Coll. 708 (1837).

[5] Denham v. Cornell, 67 N. Y. 556 (1876); Horton v. McCoy, 47 N. Y. 21 (1871); Hoey v. Kinney, 10 Abb. (N. Y.) Pr. 400 (1860); Foreman v. Foreman, 7 Barb. (N. Y.) 215 (1849); Sweezey v. Willis, 1 Bradf. (N. Y.) 495 (1851); Sweezy v. Thayer, 1 Duer (N. Y.) 286 (1852); Bogert v. Furman, 10 Paige Ch. (N. Y.) 496 (1843); Davison v. DeFreest, 3 Sandf. Ch. (N. Y.) 456 (1846); Cox v. McBurney, 2 Sandf. (N. Y.) 561 (1849); Smith v. Smith, 13 Mich. 258 (1865).

§ 705. Surplus personalty, where land so converted under will.—Although the real estate may be charged with the payment of debts by mortgage or otherwise, and is regarded as thereby converted into personal property so far as may be necessary to pay such debts, yet in the absence of a distinct intention to convert it, the whole of the real estate will not be deemed converted into personalty.[1]

The surplus moneys arising from the sale of such real estate stand in the place of the land for the purpose of distribution among the persons having vested interests therein or liens thereon.[2] The devisees of a mortgagor are therefore entitled to the whole of the surplus moneys arising on a foreclosure sale, subject to the claims which have become liens thereon.[3] The fact that the surplus arising from such sale is sometimes entrusted to the surrogate for distribution, will not render it personal property.[4]

§ 706. Massachusetts doctrine.—The doctrine established in Massachusetts varies somewhat from that stated above. It is said in Varnum v. Meserve,[5] where a mortgage contains a power of sale, providing that the surplus of the proceeds after the payment of the debt and the expenses shall be paid to the mortgagor, his executors or administrators, that his executors may maintain an action for the surplus, although the mortgagor by will devised the land to others. The court recognizes the doctrine that

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[1] Bourne v. Bourne, 2 Hare, 35, 38 (1842).

[2] See Clarkson v. Skidmore, 46 N. Y. 297 (1871); Livingston v. Mildrum, 19 N. Y. 440 (1865); Matthews v. Duryee, 45 Barb. (N. Y.) 69 (1865); aff'd 4 Keyes (N. Y.) 525; Averill v. Loucks, 6 Barb. (N. Y.) 471 (1849); Blydenburgh v. Northrup, 13 How. (N. Y.) Pr. 289 (1856); Fliess v. Buckley, 22 Hun (N. Y.) 551 (1880); aff'd 90 N. Y. 286 (1882); Elmendorf v. Lockwood, 4 Lans. (N. Y.) 396 (1871); Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844). The rights of parties in the fund are not affected by the sale, and the court will apply the money according to the rights of the parties as they existed before the sale. Astor v. Miller, 2 Paige Ch. (N. Y.) 68, 76 (1830).

[3] Delafield v. White, 43 Hun (N. Y.) 641 (1887); s. c. 7 N. Y. St. Rep. 301.

[4] Dunning v. Ocean Nat. Bank, 61 N. Y. 497 (1874); s. c. 19 Am. Rep. 293.

[5] 90 Mass. (8 Allen), 158, 160 (1864). See Newhall v. Lynn Five Cent Sav. Bank, 101 Mass. 428, 437 (1869); s. c. 3 Am. Rep. 387

the surplus under such circumstances is usually real estate, but claims that the legal title to the money is vested in the executor or administrator by force of the contract with the mortgagee, and that when he collects it, he holds it in trust for the heirs or devisees, as the case may be.

This case was criticised by the court of appeals of New York in Dunning v. Ocean National Bank,[1] where it is said to be in conflict with Wright v. Rose,[2] in which case the contract was also made to pay the mortgagor, his "executors or administrators." The court held that "the true construction of these words undoubtedly is that the promise is to pay the executors or administrators whenever it might have been paid to the mortgagor, as for example when the land was sold in his life-time."

§ 707. **Character of surplus belonging to infant.**—It is provided by statute in New York,[3] that "a sale of real property, or of an interest in real property, belonging to an infant or incompetent person, made as prescribed by the statute, does not give to the infant or incompetent person, any other or greater interest in the proceeds of the sale, than he had in the property or interest sold. Those proceeds are deemed property of the same nature, as the estate or interest sold, until the infant arrives at full age, or the incompetency is removed."[4]

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[1] 61 N. Y. 497, 505 (1875); s. c. 19 Am. Rep. 293.

[2] 2 Sim. & S. 323 (1825).

[3] N. Y. Code Civ. Proc. § 2359.

This statute is said to be merely an enactment of the chancery rule as applied to sales of such property; the impress of realty which was formerly given by the rule of the court of chancery, is now given by the statute. Forman v. Marsh, 11 N. Y. 544, 548 (1854); Shumway v. Cooper, 16 Barb. (N. Y.) 556 (1853).

[4] See Forman v. Marsh, 11 N. Y. 544, 548 (1854), reversing Foreman v. Foreman, 7 Barb. (N. Y.) 215 (1849); Cutting v. Lincoln, 9 Abb. (N. Y.) Pr. N. S. 436 (1870); Shumway v. Cooper, 16 Barb. (N. Y.) 556 (1853); Denham v. Cornell, 7 Hun (N. Y.) 662 (1876); *In re* Thomas, 1 Hun (N. Y.) 473 (1874); s. c. 4 T. & C. (N. Y.) 410; Davison v. DeFreest, 3 Sandf. Ch. (N. Y.) 456, 464 (1846); State v. Hirons, 1 Houst. (Del.) 252 (1856); Nelson v. Hagerstown Bank, 27 Md. 51 (1867); Oberle v. Lerch, 18 N. J. Eq. (3 C. E. Gr.) 346 (1867); Jones v. Edwards, 8 Jones (N. C.) L. 336 (1861).

§ 708. **Who entitled to apply for surplus.**—All liens upon or interests in the mortgaged premises, which are inferior to the mortgage sought to be foreclosed, are transferred to the surplus on the sale of the premises;[1] consequently, all persons owning such liens or interests are entitled to participate in the distribution of the surplus.[2] The plaintiff not being permitted, in most cases, to allege all of his demands in his complaint, is entitled to an order of reference to enable him to assert and prove a lien junior to the mortgage foreclosed;[3] otherwise such demands as are junior to the mortgage foreclosed and are not alleged in the complaint, would be cut off unless the sale was made subject to them.[4]

The owner of a lien who was not made a party to the suit and whose lien was not cut off by the foreclosure, has no right to share in the surplus arising from the proceeds of the sale.[5] Consequently, a person whose claim upon the property is prior to the mortgage foreclosed, has no claim upon or right to the surplus;[6] and a senior mortgagee, or other person claiming the rights of a senior mortgagee by subrogation or otherwise, has no right to participate in the surplus realized from a sale on the foreclosure of a junior mortgage.[7]

§ 709. **Protecting claims to surplus.**—Where surplus moneys from the sale of mortgaged premises are brought into court, they take the place of the land, and creditors having liens upon or interests in the land subsequent to the

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[1] See Matthews v. Duryee, 45 Barb. (N. Y.) 69 (1865); s. c. 3 Abb. App. Dec. (N. Y.) 220; 17 Abb. (N. Y.) Pr. 256; Averill v. Loucks, 6 Barb. (N. Y.) 470 (1849); Blydenburgh v. Northrop, 13 How. (N. Y.) Pr. 289 (1856).

[2] Field v. Hawxhurst, 9 How. (N. Y.) Pr. 75 (1853).

[3] Mutual Life Ins. Co. v. Truchtnicht, 3 Abb. (N. Y.) N. C. 135 (1877).

[4] Homeopathic Mut. Life Ins. Co. v. Sixbury, 17 Hun (N. Y.) 424 (1879). See Wheeler v. VanKuren, 1 Barb. Ch. (N. Y.) 490 (1846); Roosevelt v. Elithorp, 10 Paige Ch. (N. Y.) 415 (1843); Tower v. White, 10 Paige Ch. (N. Y.) 395 (1843).

[5] See Emigrant Industrial Sav. Bank v. Goldman, 75 N. Y. 127 (1878); Bache v. Doscher, 67 N. Y. 429 (1876); Root v. Wheeler, 12 Abb. (N. Y.) Pr. 294 (1861); Winslow v. McCall, 32 Barb. (N. Y.) 241 (1860).

[6] See DeRuyter v. St. Peter's Church, 2 Barb. Ch. (N. Y.) 555 (1848).

[7] Firestone v. State, 100 Ind. 226 (1884).

decree under which the sale is made, have the same claim upon the surplus moneys which they had upon the land previous to the decree.[1] The rights and equities of junior claimants are before the court, and are as much the object of its care as are those of the owner of the mortgage foreclosed, and the surplus moneys can not be disposed of until such claimants are brought into court.[2]

In ordering a sale of the mortgaged premises for the satisfaction of the debt, the court should take into consideration all the liens which exist subsequent to that of the mortgage foreclosed; as all such liens are cut off by the foreclosure, they should be protected by the court in the decree of sale; otherwise they will be lost. In such cases the court should not content itself with simply giving such directions in the decree as will certainly produce payment of the plaintiff's lien, without regard to the effect such directions may have upon those liens which are subsequent, but it should make such a decree as will fully protect the rights and preserve the equities of all, at the same time maintaining the priority of the plaintiff's claim.[3]

§ 710. **Adjusting equities.**—A court will adjust the equities between subsequent lienors, whenever they can be established without regard to the manner in which the surplus is brought into court.[4] Thus, where different parcels of mortgaged premises are encumbered by separate judgments or mortgages, the equitable rules regulating the marshaling of assets will control the proceedings to determine their priorities and to distribute the surplus.[5]

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[1] Matthews v. Duryee, 45 Barb. (N. Y.) 69 (1865); s. c. 3 Abb. App. Dec. (N. Y.) 220; 17 Abb. (N. Y.) Pr. 256; Averill v. Loucks, 6 Barb. (N. Y.) 470 (1849); Wiggin v. Heywood, 118 Mass. 514 (1875).

[2] DeForest v. Farley, 62 N. Y. 628 (1875); Livingston v. Mildrum, 19 N. Y. 440 (1859); Tator v. Adams, 20 Hun (N. Y.) 131 (1880); Beekman v. Gibbs, 8 Paige Ch. (N. Y.) 511 (1840). See Union Dime Savings Bank v. Osley, 4 Hun (N. Y.) 657 (1875); Miller v. Dooley, 1 Law Bull. 50 (1879).

[3] Livingston v. Mildrum, 19 N. Y. 440 (1859). See Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844).

[4] Oppenheimer v. Walker, 3 Hun (N. Y.) 30 (1874); s. c. 5 T. & C. (N. Y.) 325; Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844); James v. Hubbart, 1 Paige Ch. (N. Y.) 228, 234 (1828).

§ 711. **Liens to be paid in order of priority in time.**—All incumbrances on mortgaged premises inferior to the mortgage on which the sale is based, must be paid in the order of time in which they respectively became liens.[1]

A mortgage will be preferred to a judgment lien in the distribution of the surplus, where, under a contract of sale, the deed was left in escrow until a certain amount should be paid, and a mortgage given to secure the remaining indebtedness, and the judgment was recovered against the purchaser prior to the delivery of the deed and the execution of the mortgage, because the equitable lien which the mortgage secured was prior in fact to the judgment.[2] A judgment will not be preferred to a prior unrecorded mortgage given to secure future advances or liabilities, unless there has been a fraudulent intention on the part of the mortgagee in withholding his mortgage from record.[3]

§ 712. **Questions of priority—How determined.**—In New York, where a surplus arises upon the foreclosure of

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[1] New York Life Ins. & Trust Co. v. Vanderbilt, 12 Abb. (N. Y.) Pr. 458 (1861); Savings Bank of Utica v. Wood, 17 Hun (N. Y.) 133 (1879); Oppenheimer v. Walker, 3 Hun (N. Y.) 30 (1874); s. c. 5 T. & C. (N. Y.) 325. See Patty v. Pease, 8 Paige Ch. (N. Y.) 277 (1840); Skeel v. Sparker, 8 Paige Ch. (N. Y.) 182 (1840); Guion v. Knapp, 6 Paige Ch. (N. Y.) 35 (1836); Jenkins v. Freyer, 4 Paige Ch. (N. Y.) 53 (1833); Iglehart v. Crane, 42 Ill. 261 (1866); Sheperd v. Adams, 32 Me. 63 (1850); Holden v. Pike, 24 Me. 427 (1844); Chase v. Woodbury, 60 Mass. (6 Cush.) 143 (1850); Allen v. Clark, 34 Mass. (17 Pick.) 47 (1835); Wikoff v. Davis, 4 N. J. Eq. (3 H. W. Gr.) 224 (1842); Shannon v. Marselis, 1 N. J. Eq. (1 Saxt.) 413 (1831); Brown v. Simmons, 44 Vt. 475 (1871); Lyman v. Lyman, 32 Vt. 79 (1859); Jones v. Myrick, 8 Gratt. (Va.) 179 (1851); Henkle v. Allstadt, 4 Gratt. (Va.) 284 (1848); Herbert's Case, 3 Coke, 11 *b* (1584). *Compare* Parkman v. Welch, 36 Mass. (19 Pick.) 231 (1837).

[1] McKinstry v. Mervin, cited in 3 Johns. Ch. (N. Y.) 466 (1815); Haines v. Beach, 3 Johns. Ch. (N. Y.) 459 (1818). See People v. Bergen, 53 N. Y. 404 (1873); Peabody v. Roberts, 47 Barb. (N. Y.) 91 (1866); Freeman v. Schroeder, 43 Barb. (N. Y.) 618 (1864); Averill v. Loucks, 6 Barb. (N. Y.) 470 (1849). As to priority of liens on surplus moneys on foreclosure, see Savings Bank of Utica v. Wood, 17 Hun (N. Y.) 133 (1879).

[2] Cook v. Kraft, 3 Lans. (N. Y.) 512 (1871); s. c. 41 How. (N. Y.) Pr. 279; 60 Barb. (N. Y.) 410.

[3] Thomas v. Kelsey, 30 Barb. (N. Y.) 268 (1859).

a first mortgage in a county court, the claims of junior mortgagees and judgment creditors must be litigated before a referee appointed in the foreclosure by the same court; an action for that purpose can not be maintained in the supreme court.[1] Where there is a surplus arising from the sale of mortgaged premises, such surplus may, in the absence of contesting creditors, be applied directly to the payment of another debt owing by the mortgagor to the assignee of the mortgage and secured upon said premises.[2] And where there are other claimants, the plaintiff will have the same right to present and establish a claim to the surplus as a defendant to the foreclosure or any other person.[3]

Where the demands of the plaintiff, in addition to the claim on his mortgage, are junior to such mortgage, they should be set out in the complaint, so that they may be litigated and disposed of by the decree of foreclosure.[4] The sale of the property can not be made subject to subsequent liens which the plaintiff may have against it.[5]

§ 713. **Claims must be liens on mortgaged premises.**—To enable a creditor to enforce his claim to the surplus moneys, he must establish a lien on the mortgaged premises. The surplus moneys arising from a sale on foreclosure take the place of the land for the purpose of distribution among the persons having claims thereto.[6] A simple contract

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[1] Fliess v. Buckley, 90 N. Y. 286 (1882), affirming 24 Hun (N. Y.) 514; s. c. 22 Hun (N. Y.) 551.

[2] Beekman's Fire Ins. Co. v. First M. E. Church of New York, 29 Barb. (N. Y.) 658 (1859); s. c. 18 How. (N. Y.) Pr. 431.

[3] Field v. Hawxhurst, 9 How. (N. Y.) Pr. 75 (1853); Mutual Ins. Co. v. Truchtnicht, 3 Abb. (N. Y.) N. C. 135 (1877). Thus, where a mortgagee sold under the statute and had a surplus in his hands, and the mortgagor's grantee sued for it, it was held that the fact that the former had a judgment lien upon the land equal to the surplus, was a sufficient defence. Eddy v. Smith, 13 Wend. (N. Y.) 488 (1835).

[4] Tower v. White, 10 Paige Ch. (N. Y.) 395 (1843). See Wheeler v. Van Kuren, 1 Barb. Ch. (N. Y.) 490 (1846); The Homeopathic Mutual Life Ins. Co. v. Sixbury, 17 Hun (N. Y.) 424 (1879).

[5] Roosevelt v. Elithorp, 10 Paige Ch. (N. Y.) 415 (1843); The Homeopathic Mutual Life Ins. Co. v. Sixbury, 17 Hun (N. Y.) 424 (1879).

[6] Clarkson v. Skidmore, 46 N. Y. 297 (1871); Livingston v. Mildrum, 19 N. Y. 440 (1859); Matthews v.

creditor can not claim any portion of the fund;[1] claims, however just, which have not been perfected into liens, under which the property could be sold on execution, can not be taken into account by the referee.[2] The general legal liens of the judgment creditors of a mortgagor, however, can not, in equity, prevail against prior equitable claims upon the mortgaged premises.[3]

The inchoate rights of mechanics and material-men, under the statute giving them a lien, seem to be claims of such a nature, however, that, although not established by judgment, they are entitled to be considered by the referee on an application for the surplus, and to share in the distribution thereof.[4]

§ 714. **Equitable distribution — Claims liens on two funds.**—In the distribution of surplus moneys arising on the sale of mortgaged premises, a prior general lien thereon will be preferred to a subsequent specific lien, especially if the holder of the former has no other fund to resort to and the owner of the specific lien has. This rule is based upon the well settled principle of equity that where one creditor has a lien upon two funds, and another creditor has a lien upon only one of those funds, the latter has a right to require the former to exhaust his remedies against the fund on which he alone has a lien before resorting to the other fund.[5]

Duryee, 45 Barb. (N. Y.) 69 (1865); aff'd 4 Keyes (N. Y.) 525; Averill v. Loucks, 6 Barb. (N. Y.) 471 (1849); Blydenburgh v. Northrop, 13 How. (N. Y.) Pr. 289 (1856); Fliess v. Buckley, 22 Hun (N. Y.) 551 (1880); affirmed 90 N. Y. 286; Elmendorf v. Lockwood, 4 Lans. (N. Y.) 396 (1871); Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844).

[1] Delafield v. White, 19 Abb. (N. Y.) N. C. 104 (1887). See People *ex rel.* Short v. Bacon, 99 N. Y. 275 (1885); Dunning v. Ocean Nat. Bank, 61 N. Y. 497 (1875); s. c. 19 Am. Rep. 293.

[2] Husted v. Dakin, 17 Abb. (N. Y.) Pr. 137 (1857); King v. West, 10 How. (N. Y.) Pr. 333 (1854). See Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618 (1866).

[3] Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 355 (1837); s. c. 31 Am. Dec. 252; Arnold v. Patrick, 6 Paige Ch. (N. Y.) 310 (1837); White v. Carpenter, 2 Paige Ch. (N. Y.) 217 (1830); *In re* Howe, 1 Paige Ch. (N. Y.) 125 (1828).

[4] Livingston v. Mildrum, 19 N. Y. 440 (1859).

[5] Mechanics' Bank v. Edwards, 1 Barb. (N. Y.) 271 (1847); s. c. 2

§ 715. **Distribution of surplus—Mortgagor deceased.** —Where, after the death of a mortgagor, an action is brought to foreclose a mortgage which accrued during his life-time, and letters testamentary or of administration were issued upon his estate by a surrogate within four years prior to the sale, the New York Code of Civil Procedure[1] requires that the surplus moneys arising from such sale shall be paid into the surrogate's court from which the letters were issued.[2]

Where, after the death of a mortgagor, an action is commenced to foreclose a mortgage on his real estate, in which a sale is had in accordance with the decree of the court, the surplus arising on the sale may be distributed by and under the direction of the court rendering such decree;[3] such surplus should be distributed ratably among all the general and judgment creditors of the deceased owner, after notice to them and after an opportunity has been given them to be heard.[4] But where a general creditor, who had no notice of the proceedings for the distribution of such surplus, until after the order of the court confirming the report of the referee as to the distribution of the moneys was granted, applies to be made a party to the proceedings and for an opportunity to be heard, his application will be granted.[5]

Where a mortgage is foreclosed after the death of the mortgagor or owner of the equity of redemption, the surplus money passes to his heirs or devisees, and can not be collected by his executor or administrator,

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Barb. (N. Y.) 545; 6 N. Y. Leg. Obs. 159.

[1] N. Y. Code Civ. Proc. §§ 2798, 2799.

[2] As to the right to have the surplus paid into the surrogate's court, see White v. Poillon, 25 Hun (N. Y.) 69 (1881); and as to the applicability of this section of the Code to sales where the foreclosure is conducted by an action, see Loucks v. VanAllen, 11 Abb. (N. Y.) Pr. N. S. 427 (1871); German Savings Bank v. Sharer, 25 Hun (N. Y.) 409 (1881).

[3] German Savings Bank v. Sharer, 25 Hun (N. Y.) 409 (1881).

[4] Loucks v. VanAllen, 11 Abb. (N. Y.) Pr. N. S. 427 (1871); German Sav. Bank v. Sharer, 25 Hun (N. Y.) 409 (1881); White v. Poillon, 25 Hun (N. Y.) 69 (1881).

[5] German Sav. Bank v. Sharer, 25 Hun (N. Y.) 409 (1881).

although the mortgage may contain an agreement to pay any surplus arising on such sale to the mortgagor, his executors or administrators.[1] In such a case creditors must be paid before legatees,[2] because debts are in the nature of charges upon the realty, and it is only the residue left after paying such debts that can be divided among the heirs or devisees.[3]

Specific devisees of the land sold are entitled to the surplus moneys arising therefrom, according to their respective liens under the will, subject, however, to the assertion of other legal claims which were liens upon the land before its sale, or which have equitably become prior liens upon the fund arising therefrom since that time.[4]

§ 716. **Interest of life-tenant in surplus.**—Upon a distribution in the surrogate's court of the surplus moneys arising from a sale of mortgaged premises on foreclosure, under the provisions of the Code,[5] where there is a life estate in the land sold, the fund must be invested under the direction of the court and the income thereof paid to the beneficiary until the determination of such life estate; the surrogate can not order the payment of a gross sum in lieu thereof.[6]

But in the matter of Zahrt,[7] it was said that where land, in which a widow, by the terms of her deceased husband's will, has a life estate, is sold upon foreclosure, leaving a surplus, it rests in the sound discretion of the court whether or not she shall recieve a gross sum for the value of such

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[1] See Dunning v. Ocean Nat. Bank, 61 N. Y. 497 (1875); s. c. 19 Am. Rep. 293, aff'g 6 Lans. (N. Y.) 296.

[2] Clark's Case, 15 Abb. (N. Y.) Pr. 227 (1862).

[3] German Sav. Bank v. Sharer, 25 Hun (N. Y.) 409 (1881). See N. Y. Code Civ. Proc. § 2750.

[4] Delafield v. White, 19 Abb. (N. Y.) N. C. 104 (1887). See People *ex rel.* Short v. Bacon, 99 N. Y. 275 (1885); Fliess v. Buckley, 90 N. Y. 286 (1882); Dunning v. Ocean Nat. Bank, 61 N. Y. 497 (1875); s. c. 19 Am. Rep. 293.

[5] N. Y. Code Civ. Proc. § 2799.

[6] See Zahrt's Estate, 11 Abb. (N. Y.) N. C. 225 (1882), citing Arrowsmith v. Arrowsmith, 8 Hun (N. Y.) 606 (1876); *In re* Igglesden, 3 Redf. (N. Y.) 375, 378 (1879). See Lewis v. Smith, 9 N. Y. 502 (1854).

[7] 94 N. Y. 605 (1884). See N. Y. Code Civ. Proc. § 2793.

estate, to be estimated by the rules of practice established by the supreme court.[1]

§ 717. **Rights of prior incumbrancers not parties.**—A prior claimant, whatever his lien may be, is not entitled to participate in the distribution of the surplus, unless he was a party to the foreclosure,[2] for where he was not made a party, his lien will not be affected, nor the land discharged of his incumbrance, nor the lien transferred to the surplus moneys.[3] Hence, where a prior incumbrancer is not made a party and his lien is not affected by the foreclosure, he will have no claim to the surplus, unless he releases to the purchaser all future claims upon the equity of redemption.[4] It is said that this rule is not technical, but is founded on the equitable principle that such a party can not have a lien upon both the land and the surplus.[5]

§ 718. **Liens attaching pendente lite.**—It is said in Koch v. Purcell,[6] that one who takes a mortgage after a *lis pendens* has been filed, will have a right to be heard on the reference for the distribution of the surplus, although he was not made a party to the foreclosure. And it has been held that the surplus remaining after the payment of the mortgage debt, may, on application, be paid to an incumbrancer not a party to the suit, if it appears that he is, in equity, entitled to receive it.[7]

Incumbrancers, and persons acquiring other interests in the mortgaged premises *pendente lite*, need not be made

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[1] N. Y. Supreme Court Rule 71.

[2] Root v. Wheeler, 12 Abb. (N. Y.) Pr. 294 (1861); Mutual Life Ins. Co. of N. Y. v. Truchtnicht, 3 Abb. (N. Y.) N. C. 135 (1877); Winslow v. McCall, 32 Barb. (N. Y.) 241 (1860). See Koch v. Purcell, 45 N. Y. Supr. Ct. (13 J. & S.) 162 (1879).

[3] Mutual Life Ins. Co. of N. Y. v. Truchtnicht, 3 Abb. (N. Y.) N. C. 135 (1877); Winslow v. McCall, 32 Barb. (N. Y.) 247 (1860); Waller v. Harris, 7 Paige Ch. (N. Y.) 167 (1838); aff'd 20 Wend. (N. Y.) 555.

[4] Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127 (1878); Bache v. Doscher, 67 N. Y. 429 (1876); Root v. Wheeler, 12 Abb. (N. Y.) Pr. 294 (1861); Winslow v. McCall, 32 Barb. (N. Y.) 241 (1860).

[5] Mutual Life Ins. Co. of N. Y. v. Truchtnicht, 3 Abb. (N. Y.) N. C. 135 (1877).

[6] 45 N. Y. Supr. Ct. (13 J. & S.) 162 (1879).

[7] Ellis v. Southwell, 29 Ill. 549 (1863).

parties to the foreclosure, because their interests in the subject matter of the suit will be bound and concluded by the decree.[1] If the liens of such persons are not presented and shown to exist, the surplus may be distributed without notice to them; where their liens are presented in proper form, they will be entitled to notice of the proceedings to distribute the surplus, and their rights will be protected by the court.[2]

§ 719. Equitable priorities between subsequent mortgagees.—Where there are several liens upon the mortgaged premises, the surplus money is to be applied to their discharge in the order of their priority,[3] and, presumptively, the mortgage first recorded is the prior lien.[4] This presumption, however, may be overcome by proof that the mortgage first recorded, by verbal agreement between the mortgagor and the mortgagee, is not to become operative until the whole consideration is paid.[5]

An agreement between a mortgagee and a mortgagor that the mortgage shall be second in time to another mortgage on the same premises will, if such agreement is made prior to the delivery of the mortgage, be binding

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[1] Cook v. Mancius, 5 Johns. Ch. (N. Y.) 89 (1821); Darling v. Osborne, 51 Vt. 158 (1878). See Harrington v. Slade, 22 Barb. (N. Y.) 161 (1856); People's Bank v. Hamilton Manuf. Co., 10 Paige Ch. (N. Y.) 481 (1843); Sedgwick v. Cleveland, 7 Paige Ch. (N. Y.) 287 (1838).

[2] Cook v. Mancius, 5 Johns. Ch. (N. Y.) 89 (1821). See N. Y. Supreme Court Rule 64.

[3] Averill v. Loucks, 6 Barb. (N. Y.) 470 (1849).

[4] Freeman v. Schroeder, 43 Barb. (N. Y.) 618 (1864); s. c. 29 How. (N. Y.) Pr. 263.

[5] Where a plaintiff on Dec. 4, 1846, executed two mortgages at the same time on the same piece of property, for the purchase money, one to secure $221.56, payable in nine equal annual installments, and the other $86.23, payable in three equal annual installments, the first installment to become due Dec. 4, 1856, it was agreed that the mortgage securing the $221.56 should be the first lien on the premises. This mortgage was subsequently assigned by the mortgagee to the defendant, and was foreclosed under the statute. Upon the sale of the premises on Jan. 5, 1850, they were struck off to M. for $431.50, a sum larger than the amount due upon the mortgage, together with the costs of foreclosure. The court held that the defendant was entitled to have the mortgage for $86.23 first satisfied out of the surplus moneys, and that the plaintiff was entitled only to the balance

upon the parties as well as upon an assignee of the mortgagee,[1] because, as between the holders of different mortgages, an assignee occupies no better position than did his assignor.[2]

Thus, in a case where a mortgage was assigned, but the assignment was not recorded, and subsequently a satisfaction piece was executed by the original mortgagee, which was duly recorded, and a second mortgage was executed upon the same premises, it was held that the recording act protected the second mortgagee and that he had a prior lien upon the surplus.[3]

§ 720. **Burden of proof in showing priorities.**—To overcome the presumption as to priority, the burden of proof is upon the holder of the subsequent claim to show his prior right by positive evidence.[4] If the mortgage first recorded is shown not to have been a valid lien for its amount at the time a subsequent mortgage was given, by reason of the consideration not having been fully paid, and there was a verbal agreement between the mortgagor and the mortgagee that it should not become operative until the whole consideration was paid, the presumption of priority will be destroyed.[5] And where a mortgage is recorded with notice to the mortgagee of the existence of a prior unrecorded mortgage, such notice will destroy the priority of the lien of the mortgage last executed.[6]

§ 721. **Rights of equal mortgagees — Senior mortgagees.**—Where the liens are equal in rank they will be protected by the court, and the power of the court to

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remaining after paying that mortgage, with interest. Barber v. Cary, 11 Barb. (N. Y.) 549 (1851).

[1] Freeman v. Schroeder, 43 Barb. (N. Y.) 618 (1864); s. c. 29 How. (N. Y.) Pr. 263.

[2] Yerger v. Barz, 56 Iowa, 77 (1881).

[3] Bacon v. VanSchoonhoven, 19 Hun (N. Y.) 158 (1879).

[4] People, etc. v. Bergen, 15 Abb. (N. Y.) Pr. N. S. 97 (1873); s. c. 53 N. Y. 404; Peabody v. Roberts, 47 Barb. (N. Y.) 91 (1866); Freeman v. Schroeder, 43 Barb. (N. Y.) 618 (1864); s. c. 29 How. (N. Y.) Pr. 263.

[5] Freeman v. Schroeder, 43 Barb. (N. Y.) 618 (1864); s. c. 29 How. (N. Y.) Pr. 263.

[6] Haywood v. Shaw, 16 How. (N. Y.) Pr. 119 (1858).

protect such equality will not be impaired by an error into which the referee may have fallen in conducting the sale.[1]

A senior mortgagee, or one who has acquired his prior rights by subrogation, can claim no right to the surplus moneys realized on the foreclosure of a junior mortgage,[2]

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[1] Eleventh Ward Savings Bank v. Hay, 55 How. (N.Y.) Pr. 444 (1878). In this case three actions were commenced to foreclose separate mortgages of equal date, lien, time of record, and amount of purchase money upon the same parcel of land, the three mortgages having been originally made to secure a separate amount to each of the several grantors of the premises. The actions were numbered 1, 2 and 3; three separate judgments were entered, all of which were dated Nov. 20, and were filed on Nov. 22. The referee appointed by said judgments to sell the mortgaged premises, offered them for sale under the judgment in action No. 1, and the premises were sold for $34,500. Afterwards the same premises were offered for sale under judgment No. 2, and were struck off to the same purchaser for $250, and immediately thereafter the same premises were offered by the referee for sale under the third judgment, and were struck off to the same purchaser for $250. On the petition of one of the sureties for the payment of said mortgage debt, asking that an order be made in said actions directing the referee to apply the amount of the proceeds of the sales under said judgments equally to each, the court held: (1) that no one of the mortgages had any priority over the others and that the referee should not be permitted to give precedence to one of the judgments simply because he found it marked No. 1; that the court itself had no power to give that judgment or that mortgage priority; (2) that it is the duty of the court to protect the equality of liens where it exists, and that, in performing that duty, it will look behind the proceedings of the referee to the transaction out of which the liens arose: (3) that, as the three mortgages were equal liens, equity required that the money received at the sale should be divided among them equally.

[2] See Brown v. Crookston Agricultural Assoc., 34 Minn. 545 (1886). See Ward v. McNaughton, 43 Cal. 159 (1872); Soles v. Sheppard, 99 Ill. 616 (1881). In a recent case it appeared that M. and C. each owned a one-half interest in a piece of real estate on which D., as a special guardian, held a mortgage executed by M. At the request of both M. and C., and upon their promise to give him a second mortgage upon the same property, which would amply secure his claims, without an order of the court, D. released his mortgage so that they could raise money on a first mortgage. This mortgage was given to plaintiff's testator to secure $1,500, C. signing as surety for M. thereon; before another mortgage was given to D., M. executed a mortgage upon his undivided share to C. to secure her against loss on the mortgage given to plaintiff's testator. The mortgage subsequently given to D. was not executed by C. In proceedings to obtain the surplus arising on the foreclosure of the mortgage given to

because his lien is not disturbed thereby and his remedy is to foreclose his senior mortgage.[1] And where one purchases at a judicial sale "subject to all incumbrances," he is not entitled to have the surplus moneys applied to the payment of a prior recorded mortgage, the existence of which was unknown to all the parties because of an error in indexing it.[2]

§ 722. **Several mortgages security for same debt.**— In a case where the plaintiff, who owned two mortgages against the same defendant upon two distinct parcels of land, brought actions to foreclose both mortgages, and on the sale of one of the parcels there was a surplus, and of the other a deficiency, the court held that the surplus of the one could not be applied to supply the deficiency of the other.[3]

And it has been held that a junior mortgage, taken as collateral security for another obligation, does not entitle the mortgagee to receive his debt out of the surplus arising from the foreclosure of a mortgage prior to his collateral mortgage until he has exhausted his principal security.[4] It was held in Cox v. Wheeler,[5] however, that where a mortgagee, whose mortgage was payable in installments, sold the premises for the payment of one installment subject to the future installments, he was entitled to the surplus moneys arising from the foreclosure beyond the installment which was due and the costs of the sale.

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plaintiff's testator, the court held that as between D's and C's mortgages, the former was the prior lien and entitled to have the surplus applied thereon. Plumb v. Thompson, 15 N. Y. Wk. Dig. 310 (1882).

In Savings Bank of Utica v. Wood, 17 Hun (N. Y.) 133 (1879), it appeared that a mortgage was made for the benefit of a brother on two tracts of land, one owned by himself and his sisters as tenants in common, the other owned by himself individually; a judgment was afterwards obtained against him, and subsequently the sisters mortgaged their interest. It was held by the court, that upon the foreclosure of the first mortgage, the mortgage executed by the sisters was entitled to priority over the judgment in the surplus moneys.

[1] Firestone v. State, 100 Ind. 226 (1884).

[2] Buttron v. Tibbitts, 10 Abb. (N. Y.) N. C. 41 (1881).

[3] Bridgen v. Carhartt, Hopk. Ch. (N. Y.) 234 (1824). See Fliess v. Buckley, 24 Hun (N. Y.) 514 (1881).

[4] Soule v. Ludlow, 3 Hun (N. Y.) 503 (1875); s. c. 6 T. & C. (N. Y.) 24. See *post* § 730.

[5] 7 Paige Ch. (N. Y.) 248 (1838).

§ 723. **Priority of unrecorded mortgage over subsequent judgment.**—In order that mortgages may stand in the relation of being prior and subsequent to one another, they must cover the same land.[1] It has been held that an unrecorded mortgage to secure future advances is entitled to priority over a subsequently docketed judgment,[2] unless there has been a fraudulent intention on the part of the mortgagee in withholding his mortgage from record.[3]

A mortgage to secure future indorsements, if recorded, will have priority over subsequent judgments against the mortgagor, as well for indorsements made after the judgments as before.[4] And where a mortgage is given on property, while a judgment against the mortgagor is marked "secured on appeal," on which it would otherwise be a lien, and such judgment is thereafter restored as a lien, the mortgage will be entitled, as against such judgment, to priority of payment out of the surplus moneys arising on the foreclosure of a prior mortgage.[5]

§ 724. **Second mortgage and junior judgments.**—Where mortgaged premises are sold under a prior judgment and the surplus arising from such sale is brought into court, it will belong to the second mortgagee, and subsequent mortgagees of the land will be preferred to judgment creditors of the mortgagor, if the mortgages are based upon equitable matters which arose prior to the

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[1] Westervelt v. Voorhis, 42 N. J. Eq. (15 Stew.) 179 (1886).

[2] Thomas v. Kelsey, 30 Barb. (N. Y.) 268 (1859). See Savings Bank of Utica v. Wood, 17 Hun (N. Y.) 133 (1879); Wheeler v. Kirtland, 24 N. J. Eq. (9 C. E. Gr.) 552 (1873).

[3] In the case of the Central Trust Co. v. Sloan, 65 Iowa, 655 (1885), the Central Iowa Railway Co. took the title to its property under a decree and order of the circuit court of the United States, which bound it to pay defendant's claim. Afterwards, but before the defendant had put his claim into judgment against the railway company, it mortgaged its property to the plaintiff's trust company. It was held that the trust company knew, or was bound to know, that the title of the railway company was based on the decree and order, and that its mortgage was inferior as a lien to the defendant's judgment. See Sloan v. Central Iowa R. Co., 62 Iowa, 728 (1883).

[4] Ackerman v. Hunsicker, 85 N. Y. 43 (1881); s. c. 39 Am. Rep. 621.

[5] Union Dime Sav. Inst. v. Duryea, 3 Hun (N. Y.) 210 (1874).

docketing of the judgments, notwithstanding the fact that the judgments were recovered before the execution of the second and subsequent mortgages; because, a judgment creditor is entitled only to such rights in the real estate as the judgment debtor rightfully possessed at the time the judgment was perfected.[1]

§ 725. **Preference of mortgage over mechanic's lien.**—In the distribution of the proceeds arising from the sale of mortgaged premises, a mortgage executed prior to the performance of work by means of which a mechanic secures a lien on the premises, is to be preferred by the referee to such mechanic's lien.[2]

§ 726. **Lien of judgment on surplus.**—A judgment recovered against the owner of the equity of redemption in mortgaged premises prior to a sale on foreclosure, will be a lien on the surplus moneys arising from such sale; but if the judgment is not perfected until after the sale is made, although docketed before the surplus moneys are distributed, it will not be a lien on such surplus.[3] A mistake in docketing a judgment, by stating erroneously the date on which it was recovered, has been held not to affect its lien, even against subsequent judgment creditors.[4]

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[1] Tallman v. Farley, 1 Barb. (N. Y.) 280 (1847). As to when second mortgagees have priority over judgment creditors, whose judgments are prior to the recording of the mortgage, see Tallman v. Farley, 1 Barb. (N. Y.) 280 (1847); Ray v. Adams, 4 Hun (N. Y.) 332 (1875); Cook v. Kraft, 3 Lans. (N. Y.) 512, 515 (1871).

[2] Oppenheimer v. Walker, 3 Hun (N. Y.) 30 (1874).

[3] Denham v. Cornell, 67 N. Y. 556, 562 (1876); Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 355 (1837); s. c. 31 Am. Dec. 352; Douglass v. Huston, 6 Ohio, 156 (1833). See Shepard v. O'Neil, 4 Barb. (N. Y.) 125 (1848); Hull v. Spratt, 1 Hun (N. Y.) 298 (1874); Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844); German Savings Bank v. Carrington, 14 N. Y. Week. Dig. 475 (1882); affirmed 89 N. Y. 632; Dempsey v. Bush, 18 Ohio St. 376 (1868). Judgments over ten years old are not liens on the surplus. Floyd v. Clark, 2 Law Bull. 36 (1880).

[4] Fish v. Emerson, 44 N. Y. 376 (1871); Sears v. Burnham, 17 N. Y. 445 (1858); Sears v. Mack, 2 Bradf. (N. Y.) 394 (1853); Edwards v. Sams, 3 Ill. App. 168 (1879). See Neele v. Berryhill, 4 How. (N. Y.) Pr. 16 (1849); Hodgen v. Guttery, 58 Ill. 431 (1871); Stedman v. Perkins, 42 Me. 130 (1856).

A judgment creditor, who is properly made a defendant while his judgment is alive, will not lose his right to share in the surplus by the fact that the lien of his judgment expires pending the action.[1] But a judgment creditor, whose judgment was not a lien on the mortgaged premises, will have no right to share in the proceeds of a sale of the decedent's real estate.[2] Thus, the vendee of land, who in an action for specific performance, has recovered a judgment for the purchase money paid, which was adjudged to be a lien, from the time of filing his *lis pendens*, on the surplus arising from a sale made upon the foreclosure of a prior mortgage, is entitled to priority in the payment of his judgment out of such surplus, as against a judgment creditor whose judgment was recovered after the filing of such *lis pendens*.[3]

A judgment creditor, who purchases mortgaged premises at an execution sale under his judgment, is entitled to the surplus arising on a sale made under a prior mortgage, in preference to the holder of a junior judgment.[4] But a mortgagee, on recovering a judgment for deficiency against his mortgagor's administrator, can not maintain an action to have his judgment declared a lien upon the surplus moneys arising upon the foreclosure of a mortgage on other lands given by the same mortgagor to another mortgagee.[5] The only remedy of such a judgment creditor, besides that against the personalty in the administrator's hands, is an action against the mortgagor's heirs or devisees; if they are insolvent, the court may direct the surplus to be held and applied in satisfaction of the judgment.[6]

§ 727. What interests bound by lien of judgment.— The only interest bound by a judgment lien is the actual

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[1] Dempsey v. Bush, 18 Ohio St. 376 (1868).

[2] Davis v. Davis, 4 Redf. (N. Y.) 355 (1879).

[3] Hull v. Spratt, 1 Hun (N. Y.) 298 (1874). But he is not entitled to interest thereon from the time of filing his *lis pendens*.

[4] Shepard v. O'Neil, 4 Barb. (N. Y.) 125 (1848); Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844).

[5] Fliess v. Buckley, 24 Hun (N. Y.) 514 (1881); aff'd 90 N. Y. 291.

[6] Fliess v. Buckley, 24 Hun (N. Y.) 514 (1881); aff'd 90 N. Y. 291. See *ante* § 216.

interest which the debtor has in the property at the time the judgment is docketed; when the judgment debtor has no interest in the premises other than the mere naked legal title, the lien of the judgment will not attach.[1] Thus, if a judgment debtor is in possession merely under a contract to purchase, a court of equity will permit the actual owner of the premises to show that the judgment debtor has no real interest therein.

A lien thus acquired constitutes no legal interest in the land itself, but is merely a general claim as distinguished from a specific lien securing a preference on subsequently acquired interests in the property;[2] still, a court of equity will always protect the equitable rights of third parties existing at the time the judgment lien attaches to the property.[3]

§ 728. **Satisfying judgments from surplus.**—Where there are judgment liens upon the mortgaged premises when sold, such liens are, by the sale, transferred to the surplus and must be satisfied therefrom in the order of their priority, before the owner of the equity of redemption will be entitled to receive any part thereof;[4] such lienors will be

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[1] Hays v. Reger, 102 Ind. 527 (1885); s. c. 3 West. Rep. 308; Thomas v. Kennedy, 24 Iowa, 397 (1868); s. c. 95 Am. Dec. 740; Brown v. Pierce, 74 U. S. (7 Wall.) 205 (1868); bk. 19 L. ed. 134. See Wheeler v. Wheedon, 9 How. (N. Y.) Pr. 303 (1853).

[2] White v. Carpenter, 2 Paige Ch. (N. Y.) 217 (1830); Baker v. Morton, 79 U. S. (12 Wall.) 158 (1870); bk. 20 L. ed. 265. See Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165 (1847); s. c. 47 Am. Dec. 305; Ells v. Tousley, 1 Paige Ch. (N. Y.) 280 (1828); Massingill v. Downs, 48 U. S. (7 How.) 767 (1849); bk. 12 L. ed. 906; Conard v. Atlantic Ins. Co., 26 U. S. (1 Pet.) 443 (1828); bk. 7 L. ed. 213.

[3] Ells v. Tousley, 1 Paige Ch. (N. Y.) 280 (1828); Snyder v. Martin, 17 W. Va. 276 (1880); s. c. 41 Am. Rep. 671. See Morris v. Mowatt, 2 Paige Ch. (N. Y.) 586 (1831); Coster v. Bank of Georgia, 24 Ala. 37 (1853); O'Rourke v. O'Connor, 39 Cal. 442 (1870); Orth v. Jennings, 8 Blackf. (Ind.) 420 (1847); Churchill v. Morse, 23 Iowa, 229 (1867); s. c. 92 Am. Dec. 422; Walke v. Moody, 65 N. C. 599 (1871); Shryock v. Waggoner, 28 Pa. St. 430 (1857); Cover v. Black, 1 Pa. St. 493 (1845); Ashe v. Livingston, 2 Bay (S. C.) 80 (1797); Withers v. Carter, 4 Gratt. (Va.) 407 (1848); s. c. 50 Am. Dec. 78; Brown v. Pierce, 74 U. S. (7 Wall.) 205 (1868); bk. 19 L. ed. 134.

[4] Eddy v. Smith, 13 Wend. (N. Y.) 488 (1835).

entitled to the payment of their claims before a widow can receive an assignment of her dower from the surplus.[1]

Where there is a surplus fund in court arising from a foreclosure against the executors or administrators of a deceased mortgagor, a creditor who has obtained a proper decree in a surrogate's court will be preferred in its distribution to legatees claiming the fund.[2]

§ 729. Specific lien of judgment and executory contract.—Judgment creditors who obtain a specific lien upon the land before foreclosure, are entitled to priority of payment out of the surplus according to the dates of their respective judgments.[3] Where mortgaged premises have been sold upon execution under a judgment junior to the mortgage, and the time for redemption has not expired at the time of the foreclosure sale, the general lien of the judgment will become a specific lien upon the surplus to the extent of the purchaser's bid on the execution sale, and of the interest thereon.[4]

But where a mortgagee obtained a decree of foreclosure, by virtue of which the property was sold, and being also a judgment creditor of the mortgagor, had an execution levied on the mortgaged premises, to which, however, the mortgagor had no title at the time of the levy, it was held that such judgment creditor was not entitled to participate in the surplus, even though the mortgagor, during the

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[1] New York Life Ins. Co. v. Mayer, 19 Abb. (N. Y.) N. C. 92 (1887).

[2] Clark's Case, 15 Abb. (N. Y.) Pr. 227 (1862).

[3] Purdy v. Doyle, 1 Paige Ch. (N. Y.) 558 (1829). As to the proposition that specific liens, whether legal or equitable, secured on mortgaged premises before the sale, will be respected by courts of equity, see Codwise v. Gelston, 10 Johns. (N. Y.) 522 (1812); Atlas Bank v. Nahant Bank, 44 Mass. (3 Met.) 581 (1842); Tennant v. Stoney, 1 Rich. (S. C.) Eq. 222 (1845); s. c. 44 Am. Dec. 213; Fremoult v. Dedire, 1 P. Wms. 429 (1718); Finch v. Earl of Winchelsea, 1 P. Wms. 277 (1715); Lovegrove v. Cooper, 2 Sm. & G. 271 (1854); Wilson v. Fielding, 2 Vern. 763 (1718); s. c. 10 Mod. 426; Adams Eq. 256; 1 Story Eq. Jur. §§ 551, 553; 2 White & T & L. Cas. pt. 1, 290.

[4] Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 (1844).

pendency of the foreclosure suit, became the owner of the equity of redemption.[1]

It is thought that an agreement to execute a mortgage on particular lands described therein, is in equity a specific lien on such lands, and that in the distribution of the surplus arising on a sale under a prior mortgage, it will be preferred to subsequent judgment liens.[2] While an oral agreement to execute a mortgage is executory and within the statute of frauds and not enforceable, yet if the promisor has actually completed the agreement by properly executing and delivering a formal mortgage, it will become as effective for all purposes as if it had been reduced to writing originally.[3]

§ 730. **Judgment by confession as an indemnity.**—A judgment by confession, given to secure and indemnify a party as a surety, is a lien upon the equity of redemption of the defendant's mortgaged premises, and will be entitled to payment out of the surplus in the order of its lien, although the party may not have been damnified. The security will be transferred from the equity of redemption to the surplus arising on the sale, and its lien can be discharged only by the full discharge of the surety from all liability.[4]

§ 731. **Judgment against sheriff.**—It has been held that where a judgment creditor is entitled to the surplus, or a part thereof, the fact that he has recovered a judgment against the sheriff for not returning his execution upon the judgment will not affect his claim to the surplus, nor the claim of his assignee of the first judgment, where such judgment has been assigned, in the absence of a showing that the assignment was made for the benefit of the sheriff; the

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[1] Smith v. Smith, 13 Mich. 258 (1865).

[2] See Otis v. Sill, 8 Barb. (N. Y.) 119 (1849); White v. Carpenter, 2 Paige Ch. (N. Y.) 217 (1830).

[3] Dodge v. Wellman, 1 Abb. App. Dec. (N. Y.) 512 (1869); Burdick v. Jackson, 7 Hun. (N. Y.) 490 (1876); Arnold v. Patrick, 6 Paige Ch. (N. Y.) 310 (1837). See Siemon v. Schurck, 29 N. Y. 598 (1864).

[4] Lansing v. Clapp, 3 How. (N. Y.) Pr. 238 (1847). See *ante* § 726.

mere fact that the assignee purchased the judgment at the request of the sheriff does not show that it was purchased for the sheriff's benefit.[1]

§ 732. **Judgment confessed by one member of a firm.** —A judgment confessed by two members of a firm of three, for a partnership debt, has a priority of lien over a subsequent judgment recovered against all the members of the firm.[2]

In a proceeding under the general rules of practice of the New York supreme court,[3] to ascertain the priorities of the several liens upon the surplus moneys arising upon the foreclosure of a mortgage, the rule in equity as to the application of partnership and individual property among firm and individual creditors does not apply, but the rule of law controls which gives a judgment creditor of the firm, who has acquired a lien upon the lands of a partner by docketing the judgment, a claim upon the surplus superior to the claim of a junior judgment creditor of the partner.[4]

§ 733. **Married woman's equitable right to surplus.**— It has been said that upon the foreclosure of a mortgage upon real property belonging to a married woman, the surplus brought into court is subject to its jurisdiction as a court of equity; and that, independently of the married woman's acts,[5] the court will not allow the fund to be reached by the husband's creditors without first making suitable provision for the wife and her children.[6] It seems that where the surplus is small and not more than sufficient to support her, the whole thereof should be paid to the wife.[7]

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[1] Lansing v. Clapp, 3 How. (N. Y.) Pr. 238 (1847).

[2] Stevens v. Bank of Central N. Y., 31 Barb. (N. Y.) 290 (1859).

[3] N. Y. Supreme Court Rule 64.

[4] Meech v. Allen, 17 N. Y. 300 (1858); New York Life Ins. Co. v. Mayer, 19 Abb. (N. Y.) N. C. 92 (1887); Averill v. Loucks, 6 Barb. (N. Y.) 470 (1849).

[5] N. Y. Laws of 1848, chap. 200; 1849, chap. 375.

[6] See Udall v. Kenney, 3 Cow. (N. Y.) 590 (1824); Sleight v. Read, 18 Barb. (N. Y.) 159 (1854); s. c. 9 How. (N. Y.) Pr. 278; Dumond v. Magee, 4 Johns. Ch. (N. Y.) 318 (1820); Wiswall v. Hall, 3 Paige Ch. (N. Y.) 313 (1832); Mumford v. Murray, 1 Paige Ch. (N. Y.) 620 (1829).

[7] Sleight v. Read, 18 Barb. (N. Y.) 159 (1854); s. c. 9 How. (N. Y.) Pr. 278.

§ 734. **Dower in surplus moneys.**—Since surplus moneys arising upon the sale of mortgaged lands take the place of the lands for parties having liens or vested rights therein, the widow of the owner of the equity of redemption is entitled to dower in the surplus the same as she was in the land before the sale.[1] But where she unites with her husband in the execution of a mortgage on real estate belonging to him, and the property is afterwards sold under such mortgage, she will be entitled to dower only in the surplus after the payment of the mortgage,[2] because her mortgage will operate to its extent to extinguish her right.[3]

The right of the wife of a mortgagor to dower in the surplus remaining after discharging the mortgage lien, was once doubted in those cases where the husband survived the foreclosure sale but died before the distribution of the surplus;[4] but it is now well settled in New York[5] and in other

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[1] See Matthews v. Duryee, 17 Abb. (N. Y.) Pr. 256 (1864); affirmed 4 Keyes (N. Y.) 525; Vartie v. Underwood, 18 Barb. (N. Y.) 564 (1854); Denton v. Nanny, 8 Barb. (N. Y.) 618 (1850); Titus v. Neilson, 5 Johns. Ch. (N. Y.) 458 (1821); Tarbele v. Tarbele, 1 Johns. Ch. (N. Y.) 45 (1814); Elmendorf v. Lockwood, 4 Lans. (N. Y.) 393 (1871); Kling v. Ballentine, 40 Ohio St. 394 (1883).

[2] Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28 (1834); Titus v. Neilson, 5 Johns. Ch. (N. Y.) 458 (1821); Hawley v. Bradford, 9 Paige Ch. (N. Y.) 200 (1841); s. c. 37 Am. Dec. 390; Bank of Commerce v. Owens, 31 Md. 320 (1869); s. c. 1 Am. Rep 63; Hinchman v. Stiles, 9 N. J. Eq. (1 Stockt.) 361 (1853); Hartshorne v. Hartshorne, 2 N. J. Eq. (1 H. W. Gr.) 349 (1840).

[3] Elmendorf v. Lockwood, 4 Lans. (N. Y.) 393 (1871). In the case of New York Life Ins. Co. v. Mayer, 19 Abb. (N. Y.) N. C. 92 (1887), it was questioned whether a claim of the wife to dower, not being a vested interest in the lands or a lien upon them, which is cut off by foreclosure, can be entertained in proceedings for the distribution of the surplus, citing Dunning v. Ocean Nat. Bank, 61 N. Y. 497 (1875); s. c. 10 Am. Rep. 293; Mutual Life Ins. Co. of N. Y. v. Truchtnicht, 3 Abb. (N. Y.) N. C. 135 (1877); Matthews v. Duryee, 45 Barb. (N. Y.) 69 (1865); German Savings Bank v. Sharer, 25 Hun (N. Y.) 409 (1881); Fliess v. Buckley, 24 Hun (N. Y.) 514 (1881); aff'd in 90 N. Y. 286.

[4] Frost v. Peacock, 4 Edw. Ch. (N. Y.) 678 (1846).

[5] Malloney v. Horan, 49 N. Y. 111 (1872); s. c. 10 Am. Rep. 335; Matthews v. Duryee, 45 Barb. (N. Y.) 69 (1865); aff'd 3 Abb. App. Dec. (N. Y.) 220; 17 Abb. (N. Y.) Pr. 256; Denton v. Nanny, 8 Barb. (N. Y.) 618 (1850); Blydenburgh v. Northrop, 13 How. (N. Y.) Pr. 289 (1856); Titus v. Neilson, 5 Johns.

states,[1] that where a widow joins her husband in a mortgage on land of which he was seized, she is entitled to dower in the surplus moneys arising from the foreclosure sale. She will have a right of dower in the equity of redemption merely, however, and not in the whole premises.[2]

It is said that if a husband dies after a foreclosure sale and the distribution of the surplus, the wife can not claim an interest in such surplus, but that if he dies after the sale and while the surplus, or any part of it, is within the control of the court, she will be dowable of the surplus so far as her right can be equitably paid from the portion remaining undistributed. If the husband is living, one-third of such surplus should be invested for her during their joint lives; if he is dead, she will be entitled to the income of one-third thereof for life.[3]

A widow is dowable only in that portion of the surplus which still remains in the hands of the court at the time her application therefor is made; if any of those interested in the surplus have received their portion, they can not be called upon to refund it; neither can those who have not received their share be required to suffer loss by reason of the demand made.[4]

§ 735. Inchoate right of dower.—Some courts have gone to the extent of protecting the inchoate right of dower of the wife during coverture in the surplus from a mortgage sale by permitting her, as against subsequent lienors, to have one-third of such surplus invested for her benefit, and

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Ch. (N. Y.) 452 (1821); Bell v. Mayor, etc. of New York, 10 Paige Ch. (N. Y.) 49 (1843); Hawley v. Bradford, 9 Paige Ch. (N. Y.) 200 (1841); s. c. 37 Am. Dec. 390.

[1] Hinchman v. Stiles, 9 N. J. Eq. (1 Stockt.) 454 (1853); Taylor v. Fowler, 18 Ohio, 567 (1849); s. c. 51 Am. Dec. 469; Rands v. Kendall, 15 Ohio, 671 (1846); Fox v. Pratt, 27 Ohio St. 512 (1875); Culver v. Harper, 27 Ohio St. 464 (1875); State Bank of Ohio v. Hinton, 21 Ohio St. 509 (1871).

[2] Hawley v. Bradford, 9 Paige Ch. (N. Y.) 200 (1841).

[3] Vartie v. Underwood, 18 Barb. (N. Y.) 561 (1854); Denton v. Nanny, 8 Barb. (N. Y.) 618 (1850); Matthews v. Duryee, 4 Keyes (N. Y.) 525 (1868). In Indiana, Iowa and possibly some other states, she is entitled to one-third in fee.

[4] State Bank of Ohio v. Hinton, 21 Ohio St. 509 (1871).

kept invested during the joint lives of herself and her husband, the interest to be subject to the order of the court during the life of the husband and to be paid to her during her life, in case she survives him.[1]

In the case of the New York Life Insurance Company v. Mayer,[2] it was held that the claim of the wife of a mortgagor, who joined in the execution of the mortgage, upon the surplus moneys arising on a foreclosure, for the value of her inchoate right of dower, is superior to the claims of judgment creditors of the mortgagor, notwithstanding the fact that there was a provision in the mortgage for the return of the surplus, if any, to the mortgagor, his heirs or assigns.[3]

§ 736. **Investment of dower in surplus—Payment of gross sum.**—It is thought that where the widow of a mortgagor, or owner of the equity of redemption, who has answered as such and submitted to the decree of the court, is entitled to dower in the surplus proceeds of the sale of the mortgaged premises, one-third thereof may be ordered to be invested at interest for her benefit;[4] or, under the provisions of the New York Code of Civil Procedure[5] and the rules of the supreme court,[6] such widow may consent to accept a gross sum in lieu of the annual interest

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[1] Vartie v. Underwood, 18 Barb. (N. Y.) 561 (1854). See Malloney v. Horan, 49 N. Y. 111 (1872); s. c. 10 Am. Rep. 335; Mills v. VanVoorhies, 20 N. Y. 412 (1859); Denton v. Nanny, 8 Barb. (N. Y.) 618 (1850); Blydenburgh v. Northup, 13 How. (N. Y.) Pr. 289 (1856); Matthews v. Duryee, 4 Keyes (N. Y.) 525 (1868); Vreeland v. Jacobus, 19 N. J. Eq. (4 C. E. Gr.) 231 (1868).

[2] 19 Abb. (N. Y.) N. C. 92 (1887).

[3] See Simar v. Canaday, 53 N. Y. 298 (1873); s. c. 13 Am. Rep. 523; Mills v. VanVoorhies, 20 N. Y. 412 (1859); Matthews v. Duryee, 3 Abb. (N. Y.) App. Dec. 220 (1868), affirming 45 Barb. (N. Y.) 69; s. c. 17 Abb. (N. Y.) Pr. 256; Vartie v. Underwood, 18 Barb. (N. Y.) 561 (1854); Denton v. Nanny, 8 Barb. (N. Y.) 618 (1850); Douglas v. Douglas, 11 Hun (N. Y.) 406 (1877); Jackson v. Edwards, 7 Paige Ch. (N. Y.) 386 (1839); Hawley v. Bradford, 9 Paige Ch. (N. Y.) 200 (1841). *Contra*, Aikman v. Harsell, 98 N. Y. 186 (1885); Moore v. Mayor, 8 N. Y. 110 (1853); Frost v. Peacock, 4 Edw. Ch. (N. Y.) 678 (1846); Titus v. Neilson, 5 Johns. Ch. (N. Y.) 453 (1821); Bell v. Mayor, &c., 10 Paige Ch. (N. Y.) 55 (1843).

[4] Tabele v. Tabele, 1 Johns. Ch. (N. Y.) 45 (1814).

[5] N. Y. Code Civ. Proc. § 2793.

[6] N. Y. Supreme Court Rule 71.

or income for life from the one-third so invested, and such gross sum shall be estimated according to the then value of an annuity of five per centum on the principal sum, during the probable period of her life as ascertained from the Portsmouth or Northampton annuity tables.[1]

Where the husband is living, the value of the wife's inchoate right of dower is ascertained by computing the value of an annuity for her life, in one-third of the proceeds of the estate to which her inchoate right of dower attaches, and deducting therefrom the value of a similar annuity for his life; the difference between these two sums will be the present value of her inchoate right of dower.[2]

§ 737. **Homestead right in surplus.**—It has been held that where a mortgaged homestead is sold for more than enough to pay the mortgage debt, the surplus, to the extent allowed by statute for a homestead, should be delivered to the debtor for the purchase of another homestead; in case of his death, such portion should be invested in a home for his widow or his children.[3] It is believed where a sale is made under a mortgage containing a waiver of exemption, that the mortgagor is, nevertheless, entitled to the exemption allowed by law to heads of families out of the surplus proceeds of such sale, as against subsequent judgment creditors.[4]

§ 738. **Where claim of collateral assignee less than mortgage.**—A mortgagee holding several notes secured by mortgage may assign the security to an assignee of one of the notes, so as to give him a preference in the application

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[1] See Schell v. Plumb, 55 N. Y. 592 (1874); s. c. 16 Abb. (N. Y.) Pr. N. S. 19; 46 How. (N. Y.) Pr. 19; Winslow v. McCall, 32 Barb. (N. Y.) 249 (1860); Davis v. Standish, 26 Hun (N. Y.) 616 (1882); Tabele v. Tabele, 1 Johns. Ch. (N. Y.) 45 (1814); Matthews v. Duryee, 4 Keyes (N. Y.) 525 (1868); Wager v. Schuyler, 1 Wend. (N. Y.) 553 (1828).

[2] Jackson v. Edwards, 7 Paige Ch. (N. Y.) 386, 408 (1839). See Doty v. Baker, 11 Hun (N. Y.) 225 (1877); Gordon v. Tweedy, 74 Ala. 232 (1883); s. c. 49 Am. Rep. 813.

[3] McTuggert v. Smith, 14 Bush (Ky.) 414 (1878).

[4] Quinn's Appeal, 86 Pa. St. 417 (1878); Hill v. Johnson, 29 Pa. St. 362 (1857).

of the proceeds realized from a sale of the mortgaged premises; and where the assignment of the mortgaged premises purports to "bargain, sell and assign" the same to secure the payment of the note so assigned, it is a transfer of the entire legal estate or interest of the mortgagee therein, and he will retain only an equitable interest in the surplus after satisfying the amount due to the assignee.[1]

Where a bond and mortgage are assigned as collateral security for a loan, with an agreement on the part of the lender, that on payment of the mortgage he will account for the excess of the principal over and above the amount of the loan, and the mortgage is foreclosed by the lender without making the borrower a party to the action and the premises are bid in by the lender, the equitable interest which the borrower had in the mortgage will attach to the land, and he will be entitled to the surplus in case of a sale thereof by the lender for more than the amount of his claim.[2]

If one mortgagor is surety for another, where they own undivided shares in the property, the surety will have a right to require that the share of his principal shall be sold first on a foreclosure, if enough can be realized in that way to pay the mortgage debt; if the entire premises are sold and a surplus is produced, the surety will be entitled to have such surplus, to the extent of his entire undivided share, paid to him.[3]

§ 739. **Purchase of part of premises by mortgagee.**— It has been said that where one who holds a mortgage, purchases an absolute title to a portion of the premises, and afterwards forecloses the mortgage and sells the whole premises under a decree, he will be entitled in the distribution

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[1] Solberg v. Wright, 33 Minn. 224 (1885).

[2] Dalton v. Smith, 86 N. Y. 176 (1881); Hoyt v. Martense, 16 N. Y. 231 (1857); Slee v. Manhattan Ins. Co., 1 Paige Ch. (N. Y.) 48 (1828).

[3] Erie County Sav. Bank v. Roop, 80 N. Y. 591 (1880). See Bank of Albion v. Burns, 46 N. Y. 170 (1871); Smith v. Townsend, 25 N. Y. 479 (1862); Vartie v. Underwood, 18 Barb. (N. Y.) 561 (1854); Neimcewicz v. Gahn, 3 Paige Ch. (N. Y.) 614 (1832); Loomer v. Wheelwright, 3 Sandf. Ch. (N. Y.) 135 (1845).

of the surplus, not to the amount which he paid for the portion purchased by him, but only to so much as his portion ratably contributed to the price brought by the whole tract.[1]

§ 740. **Interest of lessee for years in surplus.**—Where a tenant for years holds under a lease without covenants, which is subject to a mortgage, he will not be entitled to share in the surplus arising from the sale upon the foreclosure of such mortgage.[2] But a lessee for years of mortgaged premises, holding under a lease containing a covenant for quiet enjoyment, is entitled, on the contrary, to receive from the surplus moneys arising on the sale, the value of the use of the premises during the remainder of his term, less the rents reserved and other payments to be made by him under the lease.[3]

In the absence of proof that the value of the leasehold is in excess of the rents reserved, or that it has such value, the lessee of mortgaged premises is not entitled to receive any portion of the surplus arising from a sale thereof, because in the absence of such proof, the presumption is that the rent reserved is the fair value of the use and that no injury is sustained by the lessee.[4] Where, therefore, a lessee and the owner of the equity of redemption were the only claimants for the surplus arising on a foreclosure sale, and no evidence was produced by the former tending to show that the leasehold estate had any value in excess of the rents, it was held that the whole surplus was properly awarded to the owner.[5]

§ 741. **Mechanic's lien.**—The inchoate rights of mechanics and material men under the statute giving them liens, are entitled to share in the surplus funds arising on a mortgage foreclosure sale, although such liens may not be established

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[1] Frost v. Peacock, 4 Edw. Ch. (N. Y.) 678 (1846).

[2] Burr v. Stenton, 43 N. Y. 462 (1871).

[3] Clarkson v. Skidmore, 46 N. Y. 297 (1871).

[4] Larkin v. Misland, 100 N. Y. 212 (1885); Clarkson v. Skidmore, 46 N. Y. 297, 303 (1871).

[5] Larkin v. Misland, 100 N. Y. 212 (1885).

by judgment;[1] but they will always be inferior to the lien of a prior *bona fide* mortgage.[2]

The delivery and acceptance of a deed to premises, "subject to all contracts outstanding relating to said premises and buildings" then in course of erection, and all "moneys now due or to grow due on account of said contracts or either of them, and all incumbrances of whatsoever nature and kind now a lien upon said premises or any part thereof," has been held to charge the premises with an equitable lien in favor of the mechanics and material men for their claims; and such lien will attach to the surplus moneys arising on the foreclosure of a prior mortgage.[3]

But such a clause in a deed covers only claims in existence at the time of the execution of the deed, and not claims arising pursuant to contracts made after the transfer. It is immaterial that such claims arise upon contracts with the husband of the grantor for the erection of the building, so that the grantor is not personally liable for their payment; the consideration for the equitable liens so created is the transfer of the land.[4]

§ 742. **Rights of cestuis que trust in surplus.**—In the distribution of the surplus arising from the sale of mortgaged premises made under the foreclosure of a mortgage executed by one who held the legal title to the premises as trustee *ex maleficio*, the owner of the equitable title under such trust *ex maleficio* is entitled to claim the surplus after the payment of the mortgage debt, to the exclusion of judgment creditors of the mortgagor.[5]

Where the grantee in a deed of trust subsequently conveyed the premises by a deed of warranty and afterwards

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[1] Livingston v. Mildrum, 19 N. Y. 440 (1859). See Bergen v. Snedeker, 8 Abb. (N. Y.) N. C. 50, 56 (1879). As to the right to the surplus under a mechanic's lien not continued by the court, after the expiration of one year, where the premises are sold under foreclosure, see Emigrant Industrial &c., Bank v. Goldman, 75 N. Y. 127 (1878).

[2] See Oppenheimer v. Walker, 3 Hun (N. Y.) 30 (1874).

[3] Crombie v. Rosenstock, 19 Abb. (N. Y.) N. C. 312 (1887).

[4] Crombie v. Rosenstock, 19 Abb. (N. Y.) N. C. 312 (1887).

[5] Landell's Appeal, 105 Pa. St. 152 (1884).

transferred them again by a deed of trust, the beneficiary in the latter knowing of the warranty deed, and upon a foreclosure under the first incumbrance there was a surplus, the grantor being insolvent and a non-resident, it was held that the grantee in the warranty deed was entitled to the surplus in preference to the beneficiary in the deed of trust.[1]

§ 743. **Lien for attorney's fees on surplus.**—The lien of an attorney on a judgment for his fees extends to the surplus moneys arising on a foreclosure, as such fees are a part of the judgment,[2] and will be protected.[3] In the case of Atlantic Savings Bank v. Hetterick,[4] the order of reference for the distribution of the surplus moneys on a foreclosure sale directed that the amount due to the claimant thereof be ascertained by the referee, and also the amount due to any other person having a lien on such surplus moneys. The court held that the lien of the attorney who procured the judgment for the claimant, upon which he founded his claim to the surplus moneys and another judgment decreeing it to be paid out of such moneys, was properly sustained.[5]

§ 744. **Disposition of surplus moneys not applied for.**—The New York Code of Civil Procedure[6] provides that "if there is any surplus of the proceeds of the sale of mortgaged

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[1] Johnson v. Wilson, 77 Mo. 639 (1883).

[2] Atlantic Savings Bank v. Hetterick, 5 T. & C. (N. Y.) 239 (1875). In the case of Kennedy v. Brown, 50 Mich. 336 (1883), the mortgagee bid off the premises on foreclosure at a figure exceeding the amount of the debt, costs, taxes, and insurance by about $40; the mortgage provided for an attorney's fee of $50; the court held that the mortgagee was bound to pay over the surplus of $40 to the sheriff for the benefit of the owner of the equity of redemption, and that if he did not do so, the latter could sue him for money had and received to his use.

[3] Atlantic Savings Bank v. Hiler, 3 Hun (N. Y.) 209 (1874); Atlantic Savings Bank v. Hetterick, 5 T. & C. (N. Y.) 239 (1875).

[4] 5 T. & C. (N. Y.) 239 (1875).

[5] The claimant having appeared before the reference and been heard, without objecting to the examination of the attorney's account on which his demand was based, it was held, that the proceeding amounted to an arbitration, if not a reference, to determine the attorney's demand, by which the claimant was bound. Atlantic Savings Bank v. Hetterick, 5 T. & C. (N. Y.) 239 (1875).

[6] N. Y. Code Civ. Proc. § 1633.

premises, after paying the expenses of the sale and satisfying the mortgage debt and the costs of the action, it must be paid into court for the use of the person or persons entitled thereto.[1] If any part of the surplus remains in court for the period of three months, the court must, if no application has been made therefor, and may, if an application therefor is pending, direct it to be invested at interest, for the benefit of the person or persons entitled thereto, to be paid upon the direction of the court."[2]

The rules of the supreme court[3] provide for the deposit and investment of surplus moneys, the taking of securities therefor, and the inspection of the county treasurer's and chamberlain's accounts thereof.

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[1] The surplus moneys derived from a sale under foreclosure, belong to the mortgagor or owner of the equity of redemption, and not to the purchaser on the foreclosure sale. Day v. Town of New Lots, 11 N. Y. State Rep. 361 (1887).

[2] N. Y. Code Civ. Proc. § 1633 See White v. Bogart, 73 N. Y. 256 (1878); Dunning v. Ocean Nat. Bank, 61 N. Y. 497 (1875); s. c. 19 Am. Rep. 293; Mutual Life Ins. Co of N. Y. v. Truchtnicht, 3 Abb. (N. Y.) N. C. 135 (1877); Tator v. Adams, 20 Hun (N. Y.) 131 (1880); Savings Bank of Utica v. Wood, 17 Hun (N. Y.) 133 (1879); Hurst v. Harper, 14 Hun (N. Y.) 280 (1878); Savings Institution v. Osley, 4 Hun (N. Y.) 657 (1875); Oppenheimer v. Walker, 3 Hun (N. Y.) 30 (1874); Atlantic Savings Bank v. Hiler, 5 T. & C. (N. Y.) 239 (1874); s. c. 3 Hun (N. Y.) 209.

[3] N. Y. Supreme Court Rules 68, 69, 70.

CHAPTER XXXIII.

PROCEEDINGS ON SURPLUS MONEYS.

PRACTICE—DISTRIBUTION BY SURROGATE'S AND SUPREME COURTS —APPLICATION FOR SURPLUS—APPOINTING REFEREE—HIS POWERS AND DUTIES—WHAT MAY BE LITIGATED —TESTIMONY SIGNED—REFEREE'S REPORT —CONFIRMATION—ORDER FOR DISTRIBUTION—APPEAL.

§ 745. Distribution of surplus by surrogate.
746. Distribution of surplus by surrogate—Foreclosure by advertisement.
747. Distribution by supreme court.
748. Action to enforce claim to surplus.
749. Recovering surplus wrongfully paid.
750. Application for surplus moneys.
751. Who entitled to notice—How served.
752. Certificate and proof of depositing surplus.
753. Appointment of referee.
754. Order of reference and oath of referee.
755. Presenting proof of claim.
§ 756. Conduct of the reference.
757. Powers of the referee.
758. What claims may be litigated.
759. Extent of referee's inquiry.
760. Right of claimant not filing notice to appear.
761. Testimony to be signed and filed.
762. Referee's report — Filing same.
763. Exceptions to the referee's report.
764. Hearing exceptions to report.
765. Confirmation of referee's report.
766. Opening and setting aside referee's report.
767. Appeal from order for distribution.

§ 745. **Distribution of surplus by surrogate.**— The New York Code of Civil Procedure[1] provides, that "where real property, or an interest in real property, liable to be disposed of as prescribed by the statute, is sold in an action or a special proceeding, to satisfy a mortgage or other lien thereupon, which accrued during the decedent's life-time, and letters testamentary or letters of administration upon the decedent's estate, were, within four years before the sale,[2]

[1] N. Y. Code Civ. Proc. §§ 2798, 2799.

[2] The words "within four years before the sale," as used in the Code Civ.

issued from a surrogate's court of the state, the surplus money must be paid into the surrogate's court from which the letters issued." "Where money is thus paid into a surrogate's court, and a petition for the disposition of property, as prescribed by the statute, is pending before him, or is presented at any time before the distribution of the money, the money must be distributed as if it was the proceeds of the decedent's real property, sold pursuant to the decree."

These sections of the Code of Civil Procedure are very similar in language to those of the former statute.[1] The former statute was held not to apply to a foreclosure by advertisement,[2] and for that reason it is thought by some that these sections of the Code do not now apply, where a foreclosure is conducted by advertisement. It is certain, however, that whether these sections do or do not apply to such proceedings, the surplus proceeds of a sale made under a decree of foreclosure, rendered more than four years after a grant of letters testamentary or of administration, are to be distributed in the action, though the judgment directing the sale was entered within the four years.[3]

§ 746. **Distribution of surplus by surrogate — Foreclosure by advertisement.**—The New York Code of Civil

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Proc. § 2798, and the words "making the sale" in Laws of 1871, chap. 834,—relating to the payment into the proper surrogate's court of surplus moneys arising on the sale of real property, if letters testamentary or of administration have been issued within a certain time,—refer to the date of the sale, and not to the commencement of the action or proceedings resulting in the sale; White v. Poillon, 25 Hun (N. Y.) 69 (1881).

[1] See Laws of 1867, chap. 658, as amended by Laws of 1870, chap. 170.

[2] See Loucks v. VanAllen, 11 Abb. (N. Y.) Pr. N. S. 427 (1871); German Sav. Bank v. Sharer, 25 Hun (N. Y.) 409 (1881); Fliess v. Buckley, 24 Hun (N. Y.) 514 (1881).

[3] See White v. Poillon, 25 Hun (N. Y.) 69 (1881). Upon the distribution in the surrogate's court, under § 2799, of surplus moneys arising on a foreclosure, where there is, under a will, a life tenancy in the lands sold, the fund must be invested and the income paid to the beneficiary until the determination of the life estate. The surrogate can not order the payment of a gross sum in lieu thereof. Zahrt's Estate, 11 Abb. (N. Y.) N. C. 225 (1882), citing Arrowsmith v. Arrowsmith, 8 Hun (N. Y.) 606 (1876);

Procedure[1] provides, that "the commencement or pendency of an action or special proceeding, having for its object the sale, either absolutely or contingently, of property liable to be disposed of as prescribed by this statute; or the foreclosure by advertisement of a mortgage thereupon; or any proceeding to sell such property, taken pursuant to a judgment, or by virtue of an execution, does not affect any of the proceedings taken in the surrogate's court for the sale of such property, unless the surrogate so directs. After making a decree directing a mortgage, lease or sale, the surrogate may, and in a proper case, he must, stay the order to execute the decree, with respect to the property affected by the action, or special proceeding, or by the proceedings then pending, until the determination thereof, or the further order of the surrogate with respect thereto. If, in the course thereof, a sale of any of the property has been made, before making the decree in the surrogate's court, the decree must provide for the application of the surplus proceeds belonging to the decedent's estate. If such a sale is made afterwards, the directions contained in the decree, relating to the property sold, are deemed to relate to those proceeds."[2]

§ 747. **Distribution by supreme court.**—The New York Code of Civil Procedure provides, that "an attorney or other person who receives any money, arising upon a sale, made as prescribed in the title regulating foreclosures by advertisement, must, within ten days after he receives it, pay into the supreme court the surplus, exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect, as if the proceedings to foreclose the mortgage were taken in an action, brought in the supreme court, and triable in the county where the sale took place."[3]

The Code provides further, that "a person who had, at the time of the sale, an interest in or lien upon the property

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In re Igglesden, 3 Redf. (N. Y.) 375, 378 (1877).

[1] N. Y. Code Civ. Proc. § 2797.

[2] See Hoey v. Kinney, 10 Abb. (N. Y.) Pr. 400 (1860); Brevoort v. McJimsey, 1 Edw. Ch. (N. Y.) 551 (1833); Stilwell v. Swarthout, 10 N. Y. Week. Dig. 369 (1880).

[3] N. Y. Code Civ. Proc. § 2404.

sold, or a part thereof, may, at any time before an order is made, as prescribed by the statute, file in the office of the clerk of the county, where the sale took place, a petition stating the nature and extent of his claim, and praying for an order, directing the payment to him of the surplus money, or a part thereof."[1]

"A person filing a petition, as prescribed in the above section, may, after the expiration of twenty days from the day of sale, apply to the supreme court, at a term held within the judicial district, embracing the county where his petition is filed, for an order, pursuant to the prayer of his petition. Notice of the application must be served, in the manner prescribed by statute for the service of a paper upon an attorney in an action, upon each person, who has filed a like petition, at least eight days before the application; and also upon each person, upon whom a notice of sale was served, as shown in the affidavit of sale, or upon his executor or administrator. But, if it is shown to the court, by affidavit, that service upon any person, required to be served, can not be so made with due diligence, notice may be given to him in any manner which the court directs."[2]

§ 748. **Action to enforce claim to surplus.**—A party entitled to the surplus moneys arising from a sale on foreclosure may maintain an action therefor.[3] Thus, where an attaching creditor recovered a judgment, and the land attached was sold on a prior mortgage under a power of sale contained therein, it was held that the attaching creditor could, by an action in equity, enforce his lien against the surplus proceeds of the sale remaining in the hands of the first

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[1] N. Y. Code Civ. Proc. § 2405.

[2] N. Y. Code Civ. Proc. § 2406.

[3] See Cope v. Wheeler, 41 N. Y. 303, 308 (1869); Matthews v. Duryee, 45 Barb. (N. Y.) 69 (1865); Bevier v. Schoonmaker, 29 How. (N. Y.) Pr. 411 (1864). The remedy of parties having a lien on the surplus, is by motion and not by action, and, except where the surplus is distributed by the surrogate's court, contract creditors are in no better position to assert any further equitable lien against moneys arising from the sale of a decedent's real estate, than they would be if he were living. Delafield v. White, 19 Abb. (N. Y.) N. C. 104, 109 (1887); s. c. 7 N. Y. St. Rep. 301.

mortgagee.[1] And it has been held, that after the surplus has been paid, under an order of the court, to an assignee of the mortgagor, if the widow, who neglected to appear in the foreclosure, was not notified of the reference for the distribution of the surplus, she can maintain an action against such assignee to recover her dower in the surplus.[2]

Where a surplus arises upon the foreclosure of a first mortgage, the claims thereon of a second mortgagee and of judgment creditors may be determined before a referee appointed by the court in which the judgment of foreclosure was rendered, and an action can not be maintained for that purpose.[3]

A mortgagee on recovering a judgment of deficiency against the administrators of a deceased mortgagor, can not maintain an action to have his claim declared a lien on the surplus arising on the foreclosure of a mortgage on other lands given by the same mortgagor to another mortgagee; his only remedy, aside from that against the personal estate of the decedent, is by an action against the mortgagor's heirs or devisees; if they are insolvent, the court may direct the surplus to be held and applied to the judgment.[4]

§ 749. **Recovering surplus wrongfully paid.** — It is believed that where surplus moneys have been paid to a person not entitled thereto, under an order irregularly obtained, the court has authority by a summary proceeding to compel such person to restore the fund thus irregularly obtained without the proper order of the court.[5]

§ 750. **Application for surplus moneys.**—In New York, on filing the referee's report of the sale, "any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice, stating that he is entitled to such surplus moneys or some part thereof, and

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[1] Wiggin v. Heywood, 118 Mass. 514 (1875).

[2] Matthews v. Duryee, 45 Barb. (N. Y.) 69 (1865).

[3] Fliess v. Buckley, 90 N. Y. 286 (1882).

[4] Fliess v. Buckley, 24 Hun (N. Y.) 514 (1881); aff'd 90 N. Y. 286.

[5] Burchard v. Phillips, 11 Paige Ch. (N. Y.) 66, 70 (1844).

the nature and extent of his claim, may have an order of reference, to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. The referee shall, in all cases, be selected by the court.[1]

Questions of priority between parties having claims upon the equity of redemption may be properly litigated upon the application for the surplus after it has been paid into court;[2] but until it is ascertained that there is a surplus, such parties should not be permitted to litigate their claims as between themselves.[3]

An application for surplus moneys, made either by petition or on motion, will be fatally defective, unless it establishes a *prima facie* right to a part at least of the surplus; and it does not do this unless it shows how the parties cited claim an interest in the mortgaged lands.[4]

§ 751. **Who entitled to notice—How served.**—"The owner of the equity of redemption, and every party who appeared in the cause, or who shall have filed a notice of claim with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant or such owner has not appeared, or made his claim by an attorney of this court, the notice may be served by putting the same into the post-office, directed to the claimant at his place of residence, as stated in the notice of his claim, and upon the owner in such manner as the court may direct."[5]

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[1] N. Y. Supreme Court Rule 64.

[2] Schenck v. Conover, 13 N. J. Eq. (2 Beas.) 31 (1860); s. c. 78 Am. Dec. 95.

[3] Union Ins. Co. v. VanRensselær, 4 Paige Ch. (N. Y.) 85 (1883).

[4] Allen v. Wayne Circuit Judges, 57 Mich. 198 (1885).

[5] N. Y. Supreme Court Rule 64. See Franklin v. VanCott, 11 Paige Ch. (N. Y.) 129 (1844); Hulbert v. McKay, 8 Paige Ch. (N. Y.) 652 (1841);

§ 752. **Certificate and proof of depositing surplus.**—On an application for the distribution of the surplus, the moving party should produce to the referee the certificate of the county treasurer or of the chamberlain of New York, if the suit is pending there, or of the person with whom the surplus is required to be deposited, either by law or by the decree of the court, showing the amount thereof;[1] and showing also, that no notice of claim to such surplus was annexed to the report of sale, and that no claim to the same was filed previous to the order of reference; or, if claims have been filed, the certificate should set forth the names of the claimants, and of their attorneys, if any, and their places of residence.[2]

The party moving for the reference should also show by affidavit, what unsatisfied liens appear by the official searches used in the progress of the action, where there are any, and what other unsatisfied liens are known to exist.[3]

§ 753. **Appointment of referee.**—Upon the filing of a claim to the surplus moneys by a party to the suit, or by any person who claims an interest in such surplus, the court may appoint a referee to ascertain and determine the rights of the several claimants.[4] Such a reference is not a collateral action;[5] it is a special proceeding,[6] and decides direct issues necessary to be determined before the court can finally and completely distribute the surplus arising from the sale of the mortgaged premises.[7]

In re Solomon, 4 Redf. (N. Y.) 509 (1880); Allen v. Wayne Circuit Judges, 57 Mich. 198 (1885); Smith v. Smith, 13 Mich. 258 (1865); N. Y. Code Civ. Proc. § 2406.

[1] N. Y. Supreme Court Rules 61, 64.

[2] Hulbert v. McKay, 8 Paige Ch. (N. Y.) 651 (1841). See Franklin v. VanCott, 11 Paige Ch. (N. Y.) 129 (1845).

[3] N. Y. Supreme Court Rule 64.

[4] According to the practice in some courts such a reference is allowed as a matter of course; but in others, it is allowed only on application upon notice. Ward v. Montclair R. R. Co. 26 N. J. Eq. (11 C. E. Gr.) 260 (1875).

[5] Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618 (1866).

[6] Mutual Life Ins. Co. v. Anthony, 23 N. Y. Week. Dig. 427 (1886).

[7] Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618 (1866).

Where there are surplus moneys in the hands of a mortgagee, arising upon the foreclosure of a mortgage by advertisement, and two separate actions have been brought by judgment creditors of the mortgagor to have such surplus applied towards the payment of their respective judgments, and a reference has been ordered to determine to whom such surplus shall be paid, and neither party appeals from such order, or applies for an order requiring the referee to report the evidence, the proceeding must be treated in all respects as a reference made in pursuance of the supreme court rule to settle claims to surplus moneys in foreclosure cases. By neglecting to appeal from such order of reference, both parties tacitly consent to that method of determining their respective rights.[1]

§ 754. **Order of reference and oath of referee.**—The New York Code of Civil Procedure[2] provides, that "upon the presentation of the petition, with due proof of notice for application, the court must make an order, referring it to a suitable person, to ascertain and report the amount due to the petitioner, and to each other person, which is a lien upon the surplus money, and the priorities of the several liens thereupon. Upon the coming in and confirmation of the referee's report, the court must make such an order, for the distribution of the surplus money, as justice requires."

The referee in a proceeding for the distribution of surplus moneys, before proceeding to examine the certificates or to receive evidence, should be sworn faithfully and fairly to try the issues referred to him, according to the best of his understanding;[3] the neglect of the referee to take such oath, is not a fatal error, however, and the omission may be subsequently supplied.[4]

§ 755. **Presenting proofs of claims.**—The parties prosecuting a reference for the distribution of surplus moneys,

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[1] Kirby v. Fitzgerald, 31 N. Y. 417 (1865).

[2] § 2407.

[3] N. Y. Code Civ. Proc. § 1016.

[4] N. Y. Code Civ. Proc. § 721. See Mutual Life Ins. Co. v. Anthony, 23 N. Y. Week. Dig. 427 (1886).

must establish their respective claims and the amounts thereof before the referee, in the same manner as is required of creditors coming in under a decree in the settlement of the estate of an insolvent debtor; the referee should examine the parties upon oath concerning their respective claims.[1]

In a case where the claimants offered in evidence a transcript of a judgment recovered by them, in an action commenced against a person of the same name as the owner of the equity, it was held that there was a presumption that the owner of the equity and the judgment debtor were the same person.[2]

Under the former chancery rules the correct practice, where a person had an equitable lien upon the surplus moneys, was to deliver a notice of his claim to the master who made the sale, or to file it with the clerk in whose office the surplus moneys were deposited by the master; or, in case an order of reference was entered upon the application of some other claimant before he became aware of his rights, to appear before the master, upon the reference, and to present and establish his claim there. If he neglected to do this, without a sufficient excuse, the court would not hear his claim to such surplus moneys upon a petition.[3]

But now any party to the suit, or any person not a party to the suit, who has a lien on the mortgaged premises at the time of the sale, is entitled to appear before the referee and to prove his claim.[4] A plaintiff who holds mortgages or other liens which are junior to the mortgage foreclosed, is entitled to appear and prove such liens the same as any other party to the action or any other holder of a lien.[5]

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[1] Hulbert v. McKay, 8 Paige Ch. (N. Y.) 651 (1841). See DeRuyter v. St. Peter's Church, 2 Barb. Ch. (N. Y.) 555 (1848). A referee appointed to take and report testimony, is not bound to take irrelevant testimony. *In re* Silvernail, 45 Hun (N. Y.) 575 (1887).

[2] Bowery Sav. Bank v Keenan, 14 New York Week. Digest, 143 (1882).

[3] DeRuyter v. St. Peter's Church, 2 Barb. Ch. (N. Y.) 555 (1848).

[4] Field v. Hawxhurst, 9 How. (N. Y.) Pr. 75 (1853).

[5] Mutual Life Ins. Co. of N. Y. v. Truchtnicht, 3 Abb. (N. Y.) N. C. 135 (1877).

§ 756. **Conduct of the reference.**—The Code of Civil Procedure and the rules of the supreme court do not prescribe the general powers of the referee on a reference for the distribution of surplus moneys.[1] The object of such a proceeding is to ascertain the amount due to each of the persons having liens upon the surplus and the priorities of such liens, in order that on the coming in of the report, the court may make an order for the distribution of such fund.[2] The proceedings on such a reference are similar to those taken earlier in the foreclosure to compute the amount due on the mortgage.

The referee appointed in proceedings to distribute the surplus, is a substitute for the former master in chancery under the old chancery practice, and his general powers and duties, not being prescribed by statute nor by the rules of the supreme court, are the same as those possessed by a master in chancery, and that part of the former practice, which is not inconsistent with the Code, is thought to be still in force in its application to such references.[3]

§ 757. **Powers of the referee.**—The proceedings on a reference to ascertain the priority of liens on surplus moneys are a part of the original action; the reference is not a collateral matter, and any issue may be litigated in it, which must be determined by the court before the whole of the fund can be fully and completely distributed.[4] Thus, it has been held that the referee has authority to inquire into the validity of conveyances or liens; and such conveyances as well as liens may be attacked as fraudulent;[5] he also has power to examine into questions

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[1] N. Y. Code Civ. Proc. § 1018, applies only to the trial of issues joined in an action.

[2] See Laws of 1868, chap. 804, § 3.

[3] Ketchum v. Clark, 22 Barb. (N. Y.) 319 (1856); Palmer v. Palmer, 13 How. (N. Y.) Pr. 363 (1856); VanZandt v. Cobb, 10 How. (N. Y.) Pr. 348 (1854); Graves v. Blanchard, 4 How. (N. Y.) Pr. 303 (1850); 1 Van Sant. Eq. Pr. 21, 22, 523.

[4] Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618 (1866).

[5] Fliess v. Buckley, 90 N. Y. 288 (1882); Bergen v. Carman, 79 N. Y. 146 (1879), citing Halsted v. Halsted, 55 N. Y. 442 (1874); Schafer v. Reilly, 50 N. Y. 61 (1872); McRoberts v. Pooley, 12 N. Y. Civ. Proc. Rep. 139 (1887).

of usury;[1] but he can not examine into an allegation of usury as against a prior judgment.[2]

A referee is authorized to make an equitable adjustment of all claims to the surplus moneys. He has full power to hear all the evidence that may be offered affecting the matters in controversy. The reference is provided to afford an opportunity to the parties interested to litigate and dispose of their claims and liens upon the surplus. He may receive proof that an asserted lien is for any cause without foundation, or that it has been over stated in amount or satisfied and discharged, or that the claimant has placed himself in a position where the law will not permit him to participate in the distribution of the surplus. In fact, the authority which the referee is entitled to exercise in the hearing and disposition of claims, is as extensive as the claims themselves, or as the legal and equitable objections that may be made to their allowance.[3]

The court held in the case of Tator v. Adams,[4] that although there had previously been some doubt as to the powers of referees in proceedings to distribute surplus moneys, the decision of Bergen v. Snedeker[5] has settled the matter. It was held there, that a question of fraud may be investigated before the referee; and it follows, by analogy, than any question may be examined tending to show the equities of the claimants.[6]

The power of a referee, to determine the validity of a claim in proceedings to distribute surplus moneys, is not confined to so much thereof only as will exhaust the surplus, but his decision sustaining a claim and overruling defences

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[1] Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618 (1866).

[2] Slosson v. Duff, 1 Barb. (N. Y.) 432 (1847).

[3] Kingsland v. Chetwood, 39 Hun (N. Y.) 602, 607 (1886), which holds that this measure of authority seems to be within the decision of Bergen v. Carman, 79 N. Y. 146 (1879), and Fliess v. Buckley, 90 N. Y. 286 (1882), which very much enlarged the rule, as it was supposed to exist when the case of the Union Dime Savings Institution v. Osley, 4 Hun (N. Y.) 657 (1875), was decided.

[4] 20 Hun (N. Y.) 131 (1880).

[5] 8 Abb. (N. Y.) N. C. 50, 57 (1879); s. c. 21 Alb. L. J. 54.

[6] See Schafer v. Reilly, 50 N. Y. 61 (1872); Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618 (1866).

thereto will be binding and conclusive upon the parties in all other matters.[1] Whenever the facts in a case would warrant an action in equity to declare a claim to be a lien on a fund, a referee in surplus money proceedings may hear and determine an application to establish such lien, and if he is of the opinion that it should be granted, he may report directly in favor thereof.[2]

§ 758. **What claims may be litigated.**—The only claims that can be considered in a proceeding before a referee for the distribution of surplus moneys, are such liens as would subject the estate to be sold without the further intervention of the court; claims which have not been perfected into liens can not be considered, however equitable they may be.[3] It would seem, however, that the inchoate rights of mechanics and material-men, where liens are given to them by statute, are claims of such a nature that, although not established by judgment, they are entitled to be considered by the referee and to share in the distribution of the surplus moneys.[4]

On a reference to ascertain to whom surplus moneys arising on a foreclosure belong, the referee is authorized to state the account of a tenant in common who has been in possession of the premises and collected the rents, and to charge his

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[1] Bergen v. Carman, 79 N. Y. 146 (1879); Halsted v. Halsted, 55 N. Y. 442 (1874); Husted v. Dakin, 17 Abb. (N. Y.) Pr. 137 (1857); King v. West, 10 How. (N. Y.) Pr. 333 (1854); Sleight v. Read, 9 How. (N. Y.) Pr. 278 (1854); Rogers v. Ivers, 23 Hun (N. Y.) 424 (1881); Tator v. Adams, 20 Hun (N. Y.) 131 (1880); Union Dime Sav. Inst. v. Osley, 4 Hun (N. Y.) 657 (1875); Mutual Life Ins. Co. v. Salem, 5 T. & C. (N. Y.) 246 (1875); Atlantic Sav. Bank v. Hetterick, 5 T. & C. (N. Y.) 239 (1875); Bergen v. Snedeker, 21 Alb. L. J. 54 (1880); s. c. 8 Abb. (N. Y.) N. C. 50; McRoberts v. Pooley, 12 N. Y. Civ. Proc. Rep. 139 (1887).

[2] Crombie v. Rosentock, 19 Abb. (N. Y.) N. C. 312 (1887). See Fliess v. Buckley, 90 N. Y. 286 (1882); Bergen v. Carman, 79 N. Y. 146 (1879); Halsted v. Halsted, 55 N. Y. 442 (1874); Kingsland v. Chetwood, 39 Hun (N. Y.) 602 (1886); Tator v. Adams, 20 Hun (N. Y.) 131 (1880); Bowen v. Kaughran, 1 N. Y. State Rep. 121 (1886).

[3] Husted v. Dakin, 17 Abb. (N. Y.) Pr. 137 (1857); Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618 (1866); King v. West, 10 How. (N. Y.) Pr. 333 (1854).

[4] Livingston v. Mildrum, 19 N. Y. 440 (1859).

share of the surplus with the excess so collected over the part to which he was entitled ;[1] and it was held in the case of Atlantic Savings Bank v. Hiler,[2] that where an attorney for a judgment creditor claims a lien upon the judgment for his fees in procuring it, the referee may protect such lien by ordering a portion of the amount due on the judgment to be paid to such attorney.

So the referee may determine whether or not a clause reserving a life estate to the mortgagor, appearing in a mortgage produced by a claimant, was inserted by mistake: and if he finds that it was so inserted, he may give the mortgage priority as against subsequent judgment creditors who ask to have the value of such life estate first set apart from the surplus and applied to the payment of their debts.[3]

Where it appears that the intention in executing certain written instruments was to assign the rights of the parties in the surplus moneys, though express words of assignment were not used, such instruments will be held to be equitable assignments, and the referee may report directly in favor of the equitable assignee.[4]

A judgment lien upon surplus moneys can not be attacked on such a reference by a junior claimant, because of a mere irregularity not affecting the jurisdiction of the court in which it was rendered.[5] Subsequent incumbrancers of mortgaged premises have no claim upon and are not entitled to share in the surplus moneys arising upon a statutory foreclosure of which they had no notice, because their liens are not affected by the proceedings and are not transferred from the land to the surplus.[6]

In a proceeding for the distribution of surplus moneys, arising from the sale of mortgaged premises under a decree for the foreclosure of a first mortgage, where the holders of

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[1] Kingsland v. Chetwood, 39 Hun (N. Y.) 602 (1886).

[2] 3 Hun (N. Y.) 209 (1874).

[3] Tator v. Adams, 20 Hun (N. Y.) 131 (1880).

[4] Bowen v. Kaughran, 1 N. Y. State Rep. 121 (1886).

[5] White v. Bogart, 73 N. Y. 256 (1878).

[6] Root v. Wheeler, 12 Abb. (N. Y.) Pr. 294 (1861); Winslow v. McCall, 32 Barb. (N. Y.) 241 (1860).

a fourth mortgage set up before the referee usury in a third mortgage, it was held that the third mortgage, being affected or tainted with usury, was void as to the holders of the fourth mortgage, and was no lien, either at law or in equity, on the surplus moneys.[1]

§ 759. **Extent of referee's inquiry.**—It has been said that where an order of reference directs the referee to inquire and report, not only as to the amount due to the party obtaining such order, but also as to the liens of any other persons upon the surplus moneys, the referee therefor should ascertain the whole amount of such surplus by the certificate of the treasurer of the county or of the city chamberlain, as the case may be, and if the lien of the party obtaining the reference and entitled to priority is not large enough to exhaust the whole surplus, it is then the duty of the referee to go further and to ascertain who is entitled to the residue of such surplus; so that, upon the coming in of the report, an order may be made which will dispose of the whole surplus fund. *Prima facie* the owner of the equity of redemption is entitled to the surplus, and if no one attends before the referee and produces evidence of a better right, and there is no evidence before him that the person entitled thereto *prima facie* has parted with his right, it is the duty of the referee to report that the residue of such suplus belongs to the owner of the equity of redemption.[2]

§ 760. **Right of claimant not filing notice to appear.**—An incumbrancer or lienor who has neglected to file a notice of his claim upon the surplus moneys, may appear before the referee pending the reference as to such surplus, and file his claim in proper manner; he will then be entitled to be heard upon the reference as to the validity of his claim, upon such equitable terms as to costs as the referee may direct.[3]

Where an order of reference has been entered upon the application of another claimant, before the petitioner became

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[1] Mutual Life Ins. Co. of N. Y. v. Bowen, 47 Barb. (N. Y.) 618 (1866).
[2] Franklin v. VanCott, 11 Paige Ch. (N. Y.) 129 (1844).
[3] Hulbert v. McKay, 8 Paige Ch. (N. Y.) 651 (1841).

aware of his rights, he will, nevertheless, be authorized to appear on the reference and to present and establish his claim to the surplus.[1] But he can not, pending such reference, maintain an independent proceeding by a new petition or motion.[2]

§ 761. **Testimony to be signed and filed.**—Under the New York practice, the testimony upon a reference in proceedings for the distribution of the surplus, must be signed by the witnesses and filed with the report of the referee; a note of the time of the filing must be entered by the clerk in a proper book under the title of the foreclosure; and such report will become absolute and stand in all things confirmed, unless exceptions thereto are filed and served within eight days after the service of the notice of the filing.[3]

This rule is imperative, unless its provisions are waived by some act of the parties; the mere omission of the parties to request that the signatures of the witnesses be affixed to their testimony, will not amount to a waiver.[4]

Where a witness fails to sign his testimony, the remedy for the irregularity is by motion for the purpose of securing its correction and not by filing exceptions to the report of the referee.[5] The testimony taken by a referee must be filed with his report; until this is done, the filing will be incomplete, and the time within which exceptions to the report must be filed and served will not begin to run.[6]

§ 762. **Referee's report—Filing same.**—Upon a reference to ascertain who are entitled to the surplus moneys brought into court under a foreclosure, the referee must

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[1] See DeRuyter v. St. Peter's Church, 2 Barb. Ch. (N. Y.) 555 (1848); Hulbert v. McKay, 8 Paige Ch. (N. Y.) 651 (1841).

[2] DeRuyter v. St. Peter's Church, 2 Barb. Ch. (N. Y.) 555 (1848).

[3] N. Y. Supreme Court Rule 30.

[4] Bowne v. Leveridge, 2 Month. Law Bull. 88 (1880).

[5] National State Bank v. Hibbard, 45 How. (N. Y.) Pr. 281, 287 (1873). See Greene v. Bishop, 1 Cliff. C. C. 186 (1858).

[6] Pope v. Perault, 22 Hun (N. Y.) 468 (1880). And it is said that although a court stenographer is not obliged to part with his notes until his fees are paid, yet if he delivers them to the referee to be examined by him or used as the basis of his report, but not to be filed until his fees are paid, the referee must,

ascertain and report the facts as directed in the order of his appointment; such report should show on its face that every party entitled to notice to attend upon the reference, was duly summoned to appear; it should also state what parties appeared on the reference.[1]

After the report of the referee has been prepared it should be filed, and an order for the confirmation thereof should be entered with the order for the distribution of the surplus. The latter will be granted as a matter of course, unless exceptions to the report have been filed within the time allowed. The order of distribution, however, should never be granted until the time has expired within which exceptions to the report may be filed.[2]

§ 763. **Exceptions to the referee's report.**—Any person interested in the distribution of the surplus moneys may file exceptions to the report of the referee, if he considers himself aggrieved thereby; if two or more persons wish to file the same objections to the report, they may do so either by joining in the same exceptions or by stating their exceptions separately. Parties who have appeared on the reference, are entitled to notice of the filing of the referee's report,[3] and their exceptions thereto, if any, must be filed within eight days from the date of the service of such notice, or the report will stand confirmed. If such exceptions to the referee's report are filed and served as above specified, they may be brought to a hearing at any special term of the court, on the notice of any party interested therein.[4]

Where parties who have appeared on the reference are entitled to file exceptions to the report, they must be served

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nevertheless, file them with his report, even though the stenographer's fees remain unpaid. Pope v. Perault, 22 Hun (N. Y.) 468 (1880).

[1] Franklin v. VanCott, 11 Paige Ch. (N. Y.) 129 (1844); Hulbert v. McKay, 8 Paige Ch. (N. Y.) 651 (1841). See Cram v. Mitchell, 3 N. Y. Leg. Obs. 163 (1844); Burchard v. Phillips, 3 N. Y. Leg. Obs. 35 (1844).

[2] Franklin v. VanCott, 11 Paige Ch. (N. Y.) 129 (1844); *Ex parte* Allen, 2 N. J. Eq. (1 H. W. Gr.) 388 (1841).

[3] N. Y. Supreme Court Rule 64.

[4] N. Y. Supreme Court Rule 30.

with notice of the filing thereof; unless exceptions are served and filed by them within eight days after the service of the notice of filing the referee's report, such report will become absolute.[1] And where no exceptions are taken to the report by such parties, it must be confirmed by the entry of the usual order; proof by certificate or affidavit that such report has become absolute must be produced, before an order to pay the amounts reported will be granted.[2]

§ 764. **Hearing exceptions to report.**—Where exceptions have been filed to the referee's report and a motion for the final hearing is brought on, the party excepting must furnish the court with copies of the report and of the exceptions and proofs of claims.[3] The rules of the New York supreme court[4] require that the testimony taken by the referee shall be signed and filed.[5] But in those states where the testimony is not required to be annexed to and returned with the report, if the party excepting thereto desires to review some question upon the evidence taken before the referee, or if any party desires to use such evidence on the argument of the exceptions, a duly certified copy thereof must be obtained from the referee.[6]

At such hearing the court will not only look to the proofs of claims, but it will also receive any other evidence in its discretion, such as stipulations, and the admissions of the parties presented on the hearing.[7] But affidavits taken subsequently to the report can not be read at such hearing, and no evidence can be produced which was not introduced before the referee.[8]

If the court allows the exceptions or any of them, it may modify or set aside the report, or send it back to the referee with proper directions to proceed thereon *de novo*, or to

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[1] Catlin v. Catlin, 2 Hun (N. Y.) 378 (1874); N. Y. Supreme Court Rule 30.

[2] Franklin v. VanCott, 11 Paige Ch. (N. Y.) 129 (1844).

[3] 1 VanSant Eq. Pr. 571.

[4] N. Y. Supreme Court Rule 30.

[5] See *ante* § 761.

[6] *In re* Merritt, 1 VanSant. Eq. Pr. 566 n; 1 Hoff. Ch. Pr. 545; 1 Barb. Ch. Pr. 549.

[7] Gregory v. Campbell, 16 How. (N. Y.) Pr. 417 (1858).

[8] Hedges v. Cardonnel, 2 Atk. 408 (1742). See Jenkins v. Eldredge, 3 Story C. C. 299, 306 (1845).

correct specified defects therein, as by ascertaining some fact which may be necessary to enable the court to reach a proper decision. In any event, a new order of reference should be made, reserving the distribution of the surplus and the costs of the proceeding until the coming in of the new report.

§ 765. **Confirmation of referee's report.**—The court has power in its discretion to confirm, or set aside, or refer back the report of a referee appointed to ascertain the rights of claimants to surplus moneys on foreclosure, and is not restricted in the exercise of this power by the rules governing a motion for a new trial.[1]

§ 766. **Opening and setting aside referee's report.**—After a sale under a foreclosure, and before the distribution of the surplus moneys, a party who has a judgment lien on the premises at the time of the sale may have the proceedings opened, so that he may be heard upon his right to share in the surplus;[2] because, while the moneys remain in the court undistributed, it may at any time vacate an order confirming the report and refer the matter back to the referee for a further report.[3] Thus, it has been held that where a general creditor, who had no notice of the proceedings to distribute the surplus until after the entry of the order confirming the report of the referee, applies to be made a party to the proceeding, his application should be granted.[4]

But where the report of the referee directs a distribution of the surplus as it should be legally and equitably made, his report will not be set aside or disregarded, or the order confirming it vacated, simply on account of an irregularity

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[1] Mutual Life Ins. Co. v. Anthony, 23 N. Y. Week. Dig. 427 (1886); Dold v. Haggerty, 24 Hun (N. Y.) 383 (1881); s. c. 11 Rep. 746; Mutual Life Ins. Co. v. Salem, 3 Hun (N. Y.) 117 (1874); s. c. 5 T. & C. (N. Y.) 246.

[2] Citizens' Savings Bank v. Van Tassel, N. Y. Daily Reg., May 28 (1883); s. c. 5 Month. Law Bull. 50.

[3] Mutual Life Ins. Co. v. Salem, 3 Hun (N. Y.) 117 (1874); s. c. 5 T. & C. (N. Y.) 246.

[4] German Savings Bank v. Sharer, 25 Hun (N. Y.) 409 (1881).

in receiving or considering claims which were not filed with the county clerk.[1]

§ 767. Appeal from order for distribution.—Where a party finds himself aggrieved by the decision of the court on a motion for the confirmation of a referee's report, his remedy is by appeal.[2] But it was held in the case of the Mutual Life Insurance Company v. Anthony,[3] that an order of the general term reversing an order of the special term, which confirmed the report of a referee appointed to decide conflicting claims to surplus moneys arising on a foreclosure sale, and ordering a new hearing before another referee, is not reviewable by the court of appeals.[4]

If the inquiry is considered as a special proceeding under the Code, then the order of the general term is not final and consequently not reviewable. If it is regarded as an inquiry made for the information of the court, then the order is not appealable, both because it is not final and because it is discretionary. But where such an order imposes costs of the appeal upon the appellant absolutely, and not conditionally, it is in that respect a final determination from which an appeal can be taken.[5]

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[1] Kingsland v. Chetwood, 39 Hun (N. Y.) 602 (1886).

[2] McRoberts v. Pooley, 12 N. Y. Civ. Proc. Rep. 139 (1887).

[3] 105 N. Y. 57 (1887).

[4] See Bergen v. Carmen, 79 N. Y. 146 (1879); s. c. *sub nom.* Bergen v. Snedeker, 8 Abb. (N. Y.) N. C. 50 (1879).

[5] Bergen v. Snedeker, 8 Abb. (N. Y.) N. C. 50 (1879).

CHAPTER XXXIV.

STATUTORY FORECLOSURE OR FORECLOSURE BY ADVERTISEMENT.

POWER OF SALE—NOTICE OF SALE—PUBLISHING, POSTING, SERVING—CONTENTS OF NOTICE—CONDUCT OF SALE—SETTING ASIDE—ENJOINING—EFFECT OF SALE—AFFIDAVITS OF PROCEEDINGS—RECORDING SAME—OPERATE AS DEED TO PASS TITLE—U. S. LOAN COMMISSIONERS' MORTGAGES.

§ 768. General nature.
769. Stipulation for foreclosure by advertisement.
770. What mortgages may be foreclosed by advertisement.
771. Foreclosure by advertisement, where part of debt otherwise collected.
772. Who may foreclose by advertisement.
773. Notice of sale—Publication.
774. What is a valid publication of the notice.
775. Posting notice of sale.
776. Delivering notice of sale to county clerk—His duty.
777. Personal service of notice—Who entitled to.
778. Service on personal representatives.
779. Service of notice on subsequent grantees and lienors.
780. Service of notice on wife or widow of mortgagor or his grantee.
781. Service of notice upon subsequent lienors.
782. Service of notice of sale—How made.
783. Service of notice by mail.
784. Contents of notice of sale.
785. Description of mortgaged premises in notice.
786. Description of mortgage in notice.
§ 787. Notice should state place of sale.
788. Stating amount due in notice.
789. Stating amount where only part of debt is due.
790. Statement in notice of prior incumbrances.
791. Date of sale and signature to notice.
792. Objections to notice of sale
793. Postponement of sale.
794. Place of sale.
795. By whom sale to be conducted.
796. Sale in parcels.
797. Terms of sale.
798. Mortgagee may become purchaser.
799. Setting sale aside.
800. Grounds for setting sale aside.
801. Enjoining sale.
802. Damages for wrongful injunction.
803. Lands situated in another state.
804. Sale under loan commissioners' mortgage.
805. Notice of sale by loan commissioners—Contents.
806. Publication of notice of loan commissioners' sale.
807. Posting notice of loan commissioners' sale—Terms.
808. Validity of loan commissioners' sale.

§ 809. Purchaser presumed to know authority of loan commissioners.
810. Conduct of sale—Deed of loan commissioners.
811. Effect of sale by advertisement.
812. Sale firm and binding on all parties.
813. Effect of sale on omitted parties—Rights of tenants.
814. Purchaser's title—What passes by sale.
815. Defective foreclosure.
§ 816. Affidavits of the proceedings.
817. Sufficiency of the affidavits.
818. Contents of affidavits.
819. Amending affidavits.
820. Recording affidavits.
821. Necessity of recording affidavits.
822. Contradicting affidavits.
823. Effect of affidavits.
824. A deed not necessary.
825. Purchaser obtaining possession — Summary proceedings.

§ 768. **General nature.**—Statutory foreclosure, or foreclosure by advertisement, is exclusively a creature of legislative enactment in the various states where it is allowed;[1] every requirement of the statute must be strictly complied with, as failure to comply with any of its material directions will render the foreclosure irregular and void.[2]

§ 769. **Stipulation for foreclosure by advertisement.**—While it is true that the parties to a mortgage may contract for a private sale of the premises without notice,[3] in the

[1] As to the provisions in New York, see N. Y. Code Civ. Proc § 2387, *et seq.*

[2] Cole v. Moffitt, 20 Barb. (N. Y.) 18 (1854); St. John v. Bumpstead, 17 Barb. (N. Y.) 100 (1852); Stanton v. Kline, 16 Barb. (N. Y.) 9 (1852); Cohoes v. Goss, 13 Barb. (N. Y.) 137 (1852); King v. Duntz, 11 Barb. (N. Y.) 191 (1851); VanSlyke v. Shelden, 9 Barb. (N. Y.) 278 (1850); Low v. Purdy, 2 Lans. (N. Y.) 422 (1869). See Lawrence v. Farmers' Loan & Trust Co., 13 N. Y. 200 (1855); s. c. 64 Am. Dec. 512; Powell v. Tuttle, 3 N. Y. 396, 401 (1850); People v. Board of Police, 6 Abb. (N. Y.) Pr. 162, 164 (1858); Doughty v. Hope, 3 Den. (N. Y.) 594 (1847); s. c. 1 N. Y. 79; Striker v. Kelly, 2 Den. (N. Y.) 323, 330 (1845); Sherwood v. Reade, 6 Hill (N. Y.) 431 (1844); Sharp v. Johnson, 4 Hill (N. Y.) 92, 99 (1843); s. c. 40 Am. Dec. 259; Sharp v. Spear, 4 Hill (N. Y.) 76, 84 (1843); Bloom v. Burdick, 1 Hill (N. Y.) 141 (1841); s. c. 37 Am. Dec. 299; Thatcher v. Powell, 19 U. S. (6 Wheat.) 119 (1821); bk. 5 L. ed. 221; Lockett v. Hill, 1 Wood C. C. 552 (1873).

For a history of the statute for foreclosure by advertisement in New York, see Mowry v. Sanborn, 68 N. Y. 153 (1877); s. c. 72 N. Y. 534 (1878); 65 N. Y. 581 (1875); 62 Barb. (N. Y.) 223 (1872); 11 Hun (N. Y.) 545 (1877); 7 Hun (N. Y.) 380 (1876).

[3] Elliott v. Wood, 45 N. Y. 71, 78 (1871). See Lawrence v. Farmers' Loan & Trust Co., 13 N. Y. 200 (1855); Montague v. Dawes, 94 Mass. (12 Allen), 397 (1866) The validity of such a power was at first

absence of a positive statutory prohibition, yet such contracts are contrary to the general policy of statutes providing for foreclosure by advertisement; to render such sales valid and to bar the equity of redemption, they must be made strictly in accordance with the requirements of such statutes.[1]

The statute of a state regulating the foreclosure of mortgages by advertisement, does not apply to mortgages on real estate without the state;[2] consequently, the courts of New York have refused to enjoin a resident mortgagee of lands situated without the state, from selling them by public sale within the state according to the terms of the mortgage, merely on the allegation that such power is void, where it does not appear that the power is void by the law of the state, or territory, where the lands are situated.[3]

While it is necessary under the statute to have a mortgage duly recorded in the county where the premises are situated, before it can be foreclosed by advertisement,[4] such provision is wholly for the benefit of the purchaser, and an omission to have it so recorded will not affect the validity of the sale.[5]

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doubted, although it is believed that there is no case in which sales, thereunder, were held void. This doubt first appeared in the case of Croft v. Powel, Comyns. 603 (1739), and was subsequently fortified by the remarks of Lord Eldon in the case of Roberts v. Bozon, 1 Pow. Mort. 9a, note, (1825). There seems, however, to be no reason why the absolute owner of the fee should not have the power to authorize any one to sell it for his benefit, except that when such a power is given to the mortgagee for his own benefit he may abuse the trust. See Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129 (1817); s. c. 8 Am. Dec. 467; Waters v. Randall, 47 Mass. (6 Metc.) 479 (1843); Kinsley v. Ames, 43 Mass. (2 Metc.) 29 (1840); Eaton v. Whiting, 20 Mass. (3 Pick.) 484 (1826); Clark v. Condit, 18 N. J. Eq. (3 C. E. Gr.) 358 (1867); Corder v. Morgan, 18 Ves. 344 (1811).

[1] Lawrence v. Farmers' Loan & Trust Co., 13 N. Y. 200, 211 (1855).

[2] Elliott v. Wood, 45 N. Y. 71 (1871).

[3] Central Gold Mining Co. v. Platt, 3 Daly (N. Y.) 263 (1870). See Carpenter v. Black Hawk Co., 65 N. Y. 43 (1875); Elliott v. Wood, 45 N. Y. 71 (1871), aff'g 53 Barb. (N. Y.) 285.

[4] Wells v. Wells, 47 Barb. (N. Y.) 416 (1867).

[5] Jackson v. Colden, 4 Cow. (N. Y.) 266 (1825); Wilson v. Troup, 2 Cow. (N. Y.) 195 (1823); s. c. 14 Am. Dec. 458, aff'g 7 Johns. Ch. (N. Y.) 25 (1825); and see Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 1 (1804). *Compare* Wells v. Wells, 47 Barb. (N. Y.) 416 (1867).

§ 770. **What mortgages may be foreclosed by advertisement.**—Every mortgage containing a power of sale may be foreclosed by advertisement, providing it was executed by parties of competent age; but if it was executed by persons under the statutory age, it can not be so foreclosed.[1] Where a mortgage, containing a power of sale, covenants for insurance, a failure to comply with the covenant will constitute such a default as to entitle the mortgagee to sell under the power contained in the mortgage, even though it may be impossible to comply with the covenant.[2]

To this general rule, however, there are some exceptions. Thus, it has been held that a mortgage given to secure unliquidated damages can not be foreclosed by advertisement under the statute,[3] and that a mortgage upon the property of an habitual drunkard can not be so foreclosed, because proceedings for foreclosure can not be instituted against the property of an habitual drunkard unless leave of the supreme court is first obtained.[4] In VanBergen v. Demarest,[5] it was held that on the application of an infant heir of the mortgagor, chancery will intervene and order the sale to be made under the direction of a master or referee, associated with the mortgagee.

§ 771. **Foreclosure by advertisement, where part of debt otherwise collected.**—Where a mortgage has been foreclosed by an action for a part of the debt, and the decree provided for a second sale on a subsequent default, a foreclosure can not be conducted by advertisement.[6] And if a suit or a proceeding at law has been commenced to recover the debt secured by a mortgage, a foreclosure by advertisement can not be had, unless such suit or proceeding is first discontinued, or an execution issued on the

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[1] Burnet v. Denniston, 5 Johns. Ch. (N. Y.) 35 (1821).

[2] Walker v. Cockey, 38 Md. 75 (1873).

[3] Ferguson v. Kimball, 3 Barb. Ch. (N. Y., 519 (1846). See Ferguson v. Ferguson, 2 N. Y. 360 (1849).

[4] *In re* Parker, 6 Alb. L. J. 324 (1872).

[5] 4 Johns. Ch. (N. Y.) 37 (1819).

[6] Cox v. Wheeler, 7 Paige Ch. (N. Y.) 248, 250 (1838). See Grosvernor v. Day, Clarke Ch. (N. Y.) 109 (1839).

judgment recovered therein has been returned unsatisfied in whole or in part.[1]

It is thought, however, that the right to foreclose will not be extinguished, where an assignee of the mortgage takes a quit-claim deed of one-half of the mortgaged premises; at most, such a deed can operate only to extinguish a portion of the mortgage debt, and the assignee will be at liberty to foreclose for the residue,[2] because, in the absence of any words of restriction, an assignment of a legal interest in a mortgage passes the power of sale with the debt secured.[3]

The payment of a mortgage extinguishes the power of sale contained in it; if a statutory foreclosure is conducted thereafter, a *bona fide* purchaser at the sale will acquire no title in the premises.[4] A sale under a power, after a tender of the mortgage debt by one entitled to redeem, will be irregular and void.[5]

§ 772. **Who may foreclose by advertisement.**—The foreclosure of a mortgage by advertisement must be made by or in the name of the real party in interest.[6] In those states where mortgages are regarded as mere chattel interests in the premises, the personal representatives of a deceased mortgagee may prosecute a statutory foreclosure.[7] This rule includes the assignee of a mortgage,[8] or his executors or administrators. A surviving executor may foreclose by advertisement;[9] so may a foreign executor or administrator.[10]

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[1] Grosvenor v. Day, Clarke Ch. (N. Y.) 109 (1839).

[2] Klock v. Cronkhite, 1 Hill (N. Y.) 107 (1841).

[3] Slee v. Manhattan Ins. Co., 1 Paige Ch. (N. Y.) 48 (1828).

[4] Cameron v. Irwin, 5 Hill (N. Y.) 272 (1843). See Warner v. Blakeman, 36 Barb. (N. Y.) 501 (1862); aff'd 4 Keyes (N. Y.) 487.

[5] Burnet v. Denniston, 5 Johns. Ch. (N. Y.) 35 (1821).

[6] Cohoes Co. v. Goss, 13 Barb. (N. Y.) 137 (1852); Wilson v. Troup, 2 Cow. (N. Y.) 195 (1823).

[7] Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129 (1817).

[8] Cohoes Co. v. Goss, 13 Barb. (N. Y.) 137 (1852); Wilson v. Troup, 2 Cow. (N. Y.) 195, 231 (1823); s. c. 14 Am. Dec. 458.

[9] Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129 (1817); s. c. 8 Am. Dec. 467.

[10] Averill v. Taylor, 5 How. (N. Y.) Pr. 476 (1850); s. c. 1 N. Y. Code Rep. N. S. 213; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45 (1823).

It has been held in Wilson v. Troup,[1] that the fact that a mortgagee has attempted to convey portions of the mortgaged premises will not affect his right to foreclose in his own name.

Where a mortgage secures several notes held by different parties, only the holder of the mortgage is entitled to foreclose under the power of sale. After a foreclosure and sale, he will be deemed to hold the proceeds as trustee for the parties in interest.[2] It is believed, however, to be the better practice in those cases where two or more persons are jointly interested in the mortgage, for all to join in its foreclosure.[3]

§ 773. **Notice of sale—Publication.**—The New York Code of Civil Procedure provides,[4] that the person entitled to execute a power of sale, must give notice to all parties in the manner prescribed,[5] that the mortgage will be foreclosed by a sale of the mortgaged premises, or a part thereof, at the time and place specified in the notice. It requires that "a copy of the notice must be published, at least once in each of the twelve weeks, immediately preceding the day of the sale,[6] in a newspaper published in the county wherein the property to be sold, or a part thereof, is situated."[7]

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[1] 7 Johns. Ch. (N. Y.) 25 (1823), aff'g 2 Cow. (N. Y.) 195; s. c. 14 Am. Dec. 458.

[2] Solberg v. Wright, 33 Minn. 224 (1885); Bottineau v. Ætna Ins. Co., 31 Minn. 125 (1883); Brown v. Delaney, 22 Minn. 349 (1876). See Wilson v. Troup, 2 Cow. (N. Y.) 195 (1823); s. c. 14 Am. Dec. 458; Slee v. Manhattan Ins. Co., 1 Paige Ch. (N. Y.) 48 (1828).

[3] Wilson v. Troup, 7 Johns. Ch. (N. Y.) 25 (1823), aff'g 2 Cow. (N. Y.) 195, 231; s. c. 14 Am. Dec. 458.

[4] N. Y. Code Civ. Proc. § 2388.

[5] The provisions of the statute as to the publication, posting and service of the notice must be strictly complied with, or the proceedings will be void. Cole v. Moffitt, 20 Barb. (N. Y.) 18 (1854); Stanton v. Kline, 16 Barb. (N. Y.) 9 (1852); King v. Duntz, 11 Barb. (N. Y.) 191 (1851); VanSlyke v. Shelden, 9 Barb. (N. Y.) 278 (1850).

[6] In computing the time for the publication, posting and service of the notice, the first day is to be excluded and the last day included. Bunce v. Reed, 16 Barb. (N. Y.) 347 (1853); Hornby v. Cramer, 12 How. (N. Y.) Pr. 490, 493 (1855); Westgate v. Handlin, 7 How. (N. Y.) Pr. 372 (1853).

[7] N. Y. Code Civ. Proc. § 2388. As to the notice of sale by publication, see *ante* § 477. Where the land is situated in more than one county, the

Where the notice is published once in each week for twelve successive weeks, it will be sufficient, even though all the publications are made within seventy-eight days, provided the first publication is eighty-four days prior to the day of sale, excluding the day on which the sale is made.[1] The first publication, to be sufficient, must in all cases be at least eighty-four days before the day of sale, the first day being excluded and the last one included.[2]

§ 774. **What is a valid publication of the notice.**—The validity of the publication will not be affected by the fact that the paper in which the notice was published was not calculated to give general information of the sale.[3] Neither will a change in the name of the paper in which the notice is inserted, and its removal to and consolidation with another paper in the same county, affect the validity of the publication of the notice, provided the paper otherwise retains its identity and the advertisement is regularly inserted.[4]

Where the publication of the notice of sale is defective, in not being made as required by statute, the proceedings will be void. Thus, the publication of such a notice in a weekly newspaper dated on Saturday, the greater part of the edition being printed on Friday, has been held not to be a sufficient publication within the statute for the foreclosure of a mortgage maturing on such Friday.[5] Where the original publication of a notice is defective, a republication thereof, with several notices of postponement, for twelve weeks, will be a sufficient compliance with the statute.[6]

The Code requires that the first publication of the notice must be eighty-four days prior to the day of sale specified

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publication required by statute may be made in a newspaper in either county. Wells v. Wells, 47 Barb. (N. Y.) 416 (1867).

[1] Howard v. Hatch, 29 Barb. (N. Y.) 297 (1859). See Anonymous, 1 Wend. (N. Y.) 90 (1828). See *post* § 774.

[2] Bunce v. Reed, 16 Barb. (N. Y.) 347 (1853).

[3] Blake v. Dennett, 49 Me. 102 (1861). See Bragdon v. Hatch, 77 Me. 433 (1885).

[4] Perkins v. Keller, 43 Mich. 53 (1880).

[5] Pratt v. Tinkcom, 21 Minn. 142 (1874).

[6] Cole v. Moffitt, 20 Barb. (N. Y.) 18 (1854).

in the notice, but it is thought that the twelve publications may be made in less than eighty-four days, if they are made once a week for twelve weeks.[1]

§ 775. **Posting notice of sale.**—The Code provides,[2] that "a copy of the notice must be fastened up, at least eighty-four days before the day of sale, in a conspicuous place, at or near the entrance of the building, where the county court of each county, wherein the property to be sold is situated, is directed to be held; or, if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property; or, in the city and county of New York, in a like place, at or near the entrance of the building, where the court of common pleas for that city and county is directed by law to be held."

It is only required that the notice should be affixed to the door of the building where the county courts are held; it is not necessary for the person who affixed the notice to see it there afterwards,[3] because, where the notice is once affixed, it is presumed that it will remain so. Affixing the notice once seems to satisfy the words of the statute, and it is said that a weekly inspection, though prudent, is not necessary.[4] Where the land is situated in two or more counties, the notice of sale must be fastened up at or near the court house door in each county, in order to sustain the sale of the land in that county.[5]

§ 776. **Delivering notice of sale to county clerk—His duty.**—The Code also provides,[6] that "a copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged

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[1] N. Y. Code Civ. Proc. § 2388. Howard v. Hatch, 29 Barb. (N. Y.) 297 (1859); George v. Arthur, 2 Hun (N. Y.) 406 (1874); Gantz v. Toles, 40 Mich. 725 (1879). See *ante* § 773.

[2] N. Y. Code Civ. Proc. § 2388.

[3] Merrit v. Bowen, 7 Cow. (N. Y.) 13 (1827); Hornby v. Cramer, 12 How. (N. Y.) Pr. 490 (1855).

[4] Hornby v. Cramer, 12 How. (N. Y.) Pr. 490 (1855).

[5] Wells v. Wells, 47 Barb. (N. Y.) 416 (1867).

[6] N. Y. Code Civ. Proc. § 2388.

property, or any part thereof, is situated."[1] Where a notice of sale filed in the clerk's office and published for the first four weeks, was, by mistake, dated April 23, 1858, instead of 1868, the court held that the mistake was obvious on inspection and could not have misled any one, and for that reason did not invalidate the proceedings.[2]

"A county clerk, to whom a copy of a notice of sale is delivered, as prescribed by the Code, must forthwith affix it in a book, kept in his office for that purpose; must make and subscribe a minute, at the bottom of the copy, of the time when he received and affixed it; and must index the notice to the name of the mortgagor."[3]

§ 777. **Personal service of notice — Who entitled to.**—The parties who are to be served with the notice of sale on a foreclosure by advertisement, are those whom the statute directs to be served and no others, because a sale under a power, which conforms to the statute regulating such sales, forecloses all rights and interests which are subject to the power,[4] and service upon parties not subject to such power is invalid.

The Code requires that a copy of the notice must be served on the mortgagor, or his personal representatives, on the wife or widow of the mortgagor, and on all subsequent grantees and lienors.[5] Service of the notice on the mortgagor, subsequent grantees, mortgagees and judgment creditors, is as necessary as the publication or posting thereof.[6]

"The notice is required to be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent."[7] If service of

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[1] Wells v. Wells, 47 Barb. (N. Y.) 416 (1867).

[2] Mowry v. Sanborn, 68 N. Y. 163 (1877), reversing 62 Barb. (N. Y.) 223 (1872); s. c. 65 N. Y. 581 (1875).

[3] N. Y. Code Civ. Proc. § 2390.

[4] Brackett v. Baum, 50 N. Y. 8 (1872).

[5] N. Y. Code Civ. Proc. § 2388.

[6] Rathbone v. Clarke, 9 Abb. (N. Y.) Pr. 66 (1859), note; Cole v. Moffitt, 20 Barb. (N. Y.) 18 (1854); Stanton v. Kline, 16 Barb. (N. Y.) 9 (1852); King v. Duntz, 11 Barb. (N. Y.) 191 (1851); VanSlyke v. Sheldon, 9 Barb. (N. Y.) 278 (1850).

[7] N. Y. Code Civ. Proc. § 2388.

the notice is not made upon a party entitled thereto, his claim will not be barred or foreclosed, nor will his rights be affected by the sale; the assignee of a subsequent incumbrance stands in the place of the original owner thereof. Actual notice of the sale will not be sufficient.[1]

Notice of the sale must be given to the mortgagor,[2] and also to the owner of the equity of redemption, or the sale will be void as to them.[3]

§ 778. **Service on personal representatives.**—Where the mortgagor is dead, the notice must be served on his executor or administrator,[4] and where there is none, one must be appointed, and the prescribed service must be made upon him, in order to secure a valid foreclosure.[5]

It has been said, however, that if personal representatives have not been appointed, the provision requiring notice to be served on them is inoperative, and the foreclosure must be conducted by an action in equity.[6] The words "personal representative," as used in the statute regulating foreclosures by advertisement, mean "executor or administrator," and not heir or devisee.[7]

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[1] Mowry v. Sanborn, 65 N. Y. 581 (1875); Root v. Wheeler, 12 Abb. (N. Y.) Pr. 294 (1861); Dwight v. Phillips, 48 Barb. (N. Y.) 116 (1865); Winslow v. McCall, 32 Barb. (N. Y.) 241 (1860); Wetmore v. Roberts, 10 How. (N. Y.) Pr. 51 (1853); Mickles v. Dillaye, 15 Hun (N. Y.) 296 (1878).

[2] N. Y. Code Civ. Proc. § 2388.

[3] St. John v. Bumpstead, 17 Barb. (N. Y.) 319 (1852).

[4] Cole v. Mollitt, 20 Barb. (N. Y.) 18 (1854); St. John v. Bumpstead, 17 Barb. (N. Y.) 100 (1852); Mackenzie v. Alster, 64 How. (N. Y.) Pr. 388 (1882); VanSchaack v. Saunders, 32 Hun (N. Y.) 515 (1884); Low v. Purdy, 2 Lans. (N. Y.) 422 (1869); N. Y. Code Civ. Proc. § 2388.

[5] Mackenzie v. Alster, 64 How. (N. Y.) Pr. 388 (1882); VanSchaack v. Saunders, 32 Hun (N. Y.) 515 (1884).

[6] Anderson v. Austin, 34 Barb. (N. Y.) 319 (1861).

[7] See Anderson v. Austin, 34 Barb. (N. Y.) 319 (1861), where the rule that, under a statutory foreclosure by advertisement, notice of the sale must be given to the personal representatives of a deceased mortgagor, was construed in an action for partition between the heirs at law of such mortgagor, and a purchaser upon such a foreclosure sale,—where two mortgagors, husband and wife, owning separate parcels, united in a mortgage covering both parcels, and the husband left a will devising the premises and naming executors, but none were ever appointed or qualified, nor were administrators with

§ 779. **Service of notice on subsequent grantees and lienors.**—It is necessary to give the owner of the equity of redemption notice, in order to make a foreclosure valid as against him.[1] As it is also necessary to give notice to a junior mortgagee, or his assignee, in order to render the foreclosure of a senior mortgage valid as against him, the assignment should be recorded, or the assignee will not be entitled to notice.[2] The holder of a junior mortgage, through an unrecorded assignment, must be served with notice, where the foreclosing mortgagee has actual knowledge of the interest of such assignee.[3]

Subsequent grantees and mortgagees, whose conveyances or mortgages are not recorded at the time of the first publication of the notice, are not entitled to service thereof, where their interests are unknown to the foreclosing mortgagee;[4] but where the statute requires notice to be served, not only on those subsequent grantees and mortgagees "whose conveyances shall be upon record at the time of the first publication of the notice," but also upon all persons having a lien by or under a judgment, it has been held, that the lien of a judgment perfected after the publication of the

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the will annexed ever appointed upon his estate, and the wife died intestate, and no letters of administration were issued upon her estate. VanSchaack v. Saunders, 32 Hun (N. Y.) 515 (1884), citing Mowry v. Sanborn, 68 N. Y. 153 (1877); *In re* Second Ave. Methodist Episc. Church, 66 N. Y. 395 (1876); Hartnett v. Wandell, 60 N. Y. 346, 349 (1875); s. c. 19 Am. Rep. 194; Lawrence v. Farmers' Loan & Trust Co., 13 N. Y. 211 (1855); Anderson v. Austin, 34 Barb. (N. Y.) 319 (1861); Bryan v. Butts, 27 Barb. (N. Y.) 503 (1857); Cole v. Moffitt, 20 Barb. (N. Y.) 18 (1854); Cohoes Co. v. Goss, 13 Barb. (N. Y.) 137 (1852); King v. Duntz, 11 Barb. (N. Y.) 191 (1851); Mackenzie v. Alster, 64 How. (N. Y.) Pr. 388 (1882); s. c. 12 Abb. (N. Y.) N. C. 110; Northrup v. Wheeler, 43 How. (N. Y.) Pr. 123 (1872); Leonard v. Morris, 9 Paige Ch. (N. Y.) 90 (1841); Shillaber v. Robinson, 97 U. S. (7 Otto), 68 (1877); bk. 24 L. ed. 967; 2 Barb. Ch. Pr. (2d ed.) 176.

[1] St. John v. Bumpstead, 17 Barb. (N. Y.) 100 (1852); N. Y. Code Civ. Proc. § 2288.

[2] Winslow v. McCall, 32 Barb. (N. Y.) 241 (1860); Wetmore v. Roberts, 10 How. (N. Y.) Pr. 51 (1853); Decker v. Boice, 19 Hun (N. Y.) 152 (1879).

[3] Soule v. Ludlow, 3 Hun (N. Y.) 503 (1875); s. c. 6 T. & C. 24.

[4] See Decker v. Boice, 19 Hun (N. Y.) 152 (1879); aff'd 83 N. Y. 215 (1880); N. Y. Code Civ. Proc. § 2388, subd. 4.

first notice, but before the sale, will not be extinguished, unless notice is served upon the judgment creditor as required by statute.[1]

§ 780. Service of notice on wife or widow of mortgagor or his grantee.—The Code requires,[2] that a copy of the notice of sale shall be served "upon the wife or widow of the mortgagor, and upon the wife or widow of each subsequent grantee, whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgage." Where a wife has joined her husband in the execution of a mortgage, she thereby becomes a mortgagor, and as such is entitled to service of notice.[3]

The inchoate dower of the wife of the owner of premises, which are subject to a mortgage for purchase money, will not be barred by foreclosure by advertisement, unless she is served with a notice of the sale.[4] Service on her husband alone will not be sufficient, for while a wife does not derive title from her husband, yet she claims under him within the meaning of the statute, and a sale under the power must be regularly made in order to bar her dower.[5]

While an omission to serve the notice on the mortgagor's widow, where she joined him in the execution of the mortgage, is probably not fatal to the foreclosure, yet it is such a defect that her dower will not be barred.[6] The wife of a subsequent grantee of mortgaged premises, is entitled to service of the notice of foreclosure by advertisement; if she is not served, her right of dower will not be cut off.[7] And the wife of a grantee of premises already mortgaged for

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[1] Groff v. Morehouse, 51 N. Y. 503 (1873).

[2] N. Y. Code Civ. Proc. § 2388.

[3] Anderson v. Austin, 34 Barb. (N. Y.) 319 (1861); King v. Duntz, 11 Barb. (N. Y.) 191 (1851); Low v. Purdy, 2 Lans. (N. Y.) 422 (1869).

[4] Northrop v. Wheeler, 43 How. (N. Y.) Pr. 122 (1872).

[5] Brackett v. Baum, 50 N. Y. 8 (1872).

[6] King v. Duntz, 11 Barb. (N. Y.) 191 (1851).

[7] Raynor v. Raynor, 21 Hun (N. Y.) 36 (1880). See Northrop v. Wheeler, 43 How. (N. Y.) Pr. 122 (1872).

part of the purchase money, should be served with the notice, in order to bar her inchoate right of dower.[1]

§ 781. **Service of notice upon subsequent lienors.**—The Code requires the notice to be served upon every "person having a lien upon the property subsequent to the mortgage, by virtue of a judgment or decree, duly docketed in the county clerk's office, and constituting a specific or general lien upon the property."[2] It seems that the lien of a person entitled to notice, but upon whom the notice was not served, is not destroyed nor in any way affected by the sale, even though he had actual notice of such sale.[3]

All judgment creditors, whose liens were perfected subsequently to the mortgage, are entitled to notice; and where the statute requires the notice to be served upon every person having a lien by or under a judgment, the lien of a judgment perfected after the publication of the first notice, and before the sale, will not be cut off, and the lienor's right of redemption will not be barred, unless notice is served upon him as prescribed by the statute.[4]

§ 782. **Service of notice of sale—How made.**—The New York Code of Civil Procedure provides,[5] that service of the notice of sale must be made as follows: (1) "Upon the mortgagor, his wife, widow, executor, or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow; by delivering a copy of the notice, as prescribed in article first of title first of chapter fifth of this act, for delivery of a copy of a summons, in order to make personal service thereof upon the person to be served; or by leaving such a copy, addressed to the person to be served, at his dwelling-house, with a person of suitable age and discretion, at least fourteen days before the day of sale. If said mortgagor is a foreign corporation, or being a natural person, he, or his

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[1] Northrop v. Wheeler, 43 How. (N. Y.) Pr. 122 (1872).

[2] N. Y. Code Civ. Proc. § 2388.

[3] Root v. Wheeler, 12 Abb. (N. Y.) Pr. 294 (1861); Wetmore v. Roberts, 10 How. (N. Y.) Pr. 51 (1853).

[4] Groff v. Morehouse, 51 N. Y. 503 (1873).

[5] N. Y. Code Civ. Proc. § 2389.

wife, widow, executor, or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow, is not a resident of or within the state, then service thereof may be made upon them in like manner, without the state, at least twenty-eight days prior to the day of sale."[1]

(2) "Upon any other person, either in the same method, or by depositing a copy of the notice in the post-office, properly inclosed in a post-paid wrapper, directed to the person to be served, at his place of residence, at least twenty-eight days before the day of sale."[2]

§ 783. **Service of notice by mail.**—In foreclosing a mortgage by advertisement, personal service of the notice of sale is not always necessary, though the parties to be served may reside in the same town as the party foreclosing, or his attorney. It will be a sufficient compliance with the statute, if properly directed copies of the notice of sale are deposited in the post-office, addressed to the parties to be served at the places where they reside.[3]

Notice of the sale may be served on the mortgagor by mail, by depositing a properly directed copy thereof in any post-office in the state.[4] If, by mistake, the notice is addressed to the mortgagor at a place other than his residence, the sale made thereunder will be void.[5] The affidavit of service must show that the places to which the notices were mailed to the parties addressed, were the actual residences of such parties.[6] Where the affidavit fails to show these facts, the omission will be fatal, because the proceedings to foreclose a mortgage by advertisement are strictly statutory, and omissions can not be subsequently supplied, nor defects in the affidavits remedied, in a court of equity.[7]

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[1] N. Y. Code Civ. Proc. § 2389, as amended by Laws of 1887, chap. 685; see also § 419 *et seq.*

[2] N. Y. Code Civ. Proc. § 2389.

[3] Stanton v. Kline, 11 N. Y. 196 (1854).

[4] Bunce v. Reed, 16 Barb. (N. Y.) 347 (1853).

[5] Robinson v. Ryan, 25 N. Y. 320 (1862).

[6] Dwight v. Phillips, 48 Barb. (N. Y.) 116 (1865).

[7] Dwight v. Phillips, 48 Barb. (N. Y.) 116 (1865). *Contra*, Bunce v. Reed, 16 Barb. (N. Y.) 347 (1853).

It has been said, that under a statute requiring the notice to be folded and directed, the direction must be written on the notice itself, if it is sent unsealed; if the direction is written upon an unsealed envelope, containing a notice sent as a circular, the service will not be sufficient.[1] If service of the notice is made by mail, the time is to be counted from its deposit, and not from the date of the post-mark, or the time of forwarding.[2] Where the service is made by mail upon a person, naming him as "administrator," such service will be sufficient, if the notice is addressed to the proper person, without adding the word "administrator."[3]

§ 784. **Contents of notice of sale.**—The New York Code of Civil Procedure requires,[4] that the notice of sale must specify: "(1) The names of the mortgagor, of the mortgagee and of each assignee of the mortgage. (2) The date of the mortgage, and the time when, and the place where, it is recorded. (3) The sum claimed to be due upon the mortgage, at the time of the first publication of the notice, and, if any sum secured by the mortgage is not then due, the amount to become due thereupon. (4) A description of the mortgaged property, conforming substantially to that contained in the mortgage."

The notice should show that the purpose of the sale is to foreclose the mortgage, or what is equivalent, that a sale will be had by virtue of a power contained in the mortgage.[5] It is believed that most persons would readily perceive the purpose of the notice, even if it were not distinctly stated; for that reason it is not necessary to state distinctly that the mortgage will be foreclosed, if notice of a sale according

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[1] Rathbone v. Clarke, 9 Abb. (N. Y.) Pr. 66 n. (1859).

[2] Hornby v. Cramer, 12 How. (N. Y.) Pr. 490 (1855). Thus, were the act requires the letter containing the notice to be deposited in the post-office twenty-eight days prior to the time specified for the sale, the twenty-eight days are to be counted from the time of deposit, and not from the time of the post-mark or the forwarding of the letter.

[3] George v. Arthur, 2 Hun (N. Y.) 406 (1874); s. c. 4 T. & C. (N. Y.) 635. See Howard v. Hatch, 29 Barb. (N. Y.) 297 (1859).

[4] N. Y. Code Civ. Proc. § 2391.

[5] Judd v. O'Brien, 21 N. Y. 186 (1860).

to the requirements of the statute is given.[1] Words which would import a sale of the mortgage, instead of a sale of the land, if literally construed, will not vitiate the notice, if the apparent meaning is that a sale of the land is intended.[2]

The notice need not state that the subscribers have a lawful right or authority to foreclose;[3] and where executors or administrators seek to foreclose by advertisement, it is not necessary that their authority to do so should be set forth in the notice. It will be sufficient if they subscribe the notice as "administrators" or as "executors" of the last will and testament of the deceased mortgagee.[4]

§ 785. **Description of mortgaged premises in notice.**—The description of the mortgaged premises in the notice of sale must conform substantially to that contained in the mortgage, or the sale will be invalid.[5] Thus, in a case where the mortgage referred to a map on file, and stated that the premises contained a particular number of acres, and the notice gave the number of the lot, but gave neither its meets, nor bounds, nor stated the quantity of land, and did not refer to the map or show whether the land was a village lot or a farm, it was held that the foreclosure did not comply with the statute, and was void. In such a case, a statement of the quantity of land and a reference to the map are substantial parts of the description, and must be given.[6]

§ 786. **Description of mortgage in notice.**—The notice of sale must specify the names of the mortgagor and the mortgagee, and of each assignee of the mortgage.[7] Where two mortgages are being foreclosed, it is believed that a

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[1] Leet v. McMaster, 51 Barb. (N. Y.) 236 (1868).

[2] Judd v. O'Brien, 21 N. Y. 186 (1860).

[3] People *ex rel.* Bridenbecker v. Prescott, 3 Hun (N. Y.) 419 (1875).

[4] People *ex rel.* Bridenbecker v. Prescott, 3 Hun (N. Y.) 419 (1875).

[5] Rathbone v. Clarke, 9 Abb. (N. Y.) Pr. 66 n. (1859).

[6] Rathbone v. Clarke, 9 Abb. (N. Y.) Pr. 66 n. (1859).

[7] N. Y. Code Civ. Proc. § 2391. It is thought, where a mortgage has been assigned as collateral security for a debt, and the debt is paid before notice of the sale is given, that the notice need not name such assignee, he no longer having any interest in such mortgage. See

single notice will be insufficient, especially if the descriptions of the premises are not identical.[1] The notice will sufficiently specify the place where the mortgage is recorded, if it states the clerk's book and the date of record, although the number of the book may be erroneously given.[2]

It seems that the omission of the name of the mortgagee from the notice is not a fatal error, where there is an accurate reference to the record of the mortgage in the clerk's office, and no intention to mislead is shown;[3] but an omission or a mistake which tends to mislead will always be fatal, such as using the word "mortgagee" for the word "mortgagor."[4]

§ 787. **Notice should state place of sale.**—To be valid, the notice should state the place of sale.[5] It has been said that a notice, stating that the sale will take place at the city hall, but not stating in what part of the city hall, is good, since by usage the rotunda is the established part of the building for such sales; this is also true of a notice of sale at the Merchants' Exchange.[6]

§ 788. **Stating amount due in notice.**—As the notice of sale is required to state the amount due at the time of the first publication thereof, it follows that a mortgage given as security for unliquidated damages, can not be foreclosed by advertisement.[7] For the convenience of the parties, though not required by statute, the amount claimed to be due at

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White v. McClellan, 62 Md. 347 (1884).

[1] Morse v. Byam, 55 Mich. 594 (1885).

[2] Judd v. O'Brien, 21 N. Y. 186 (1860). A notice giving correctly the clerk's office and the date of recording the mortgage, though with an error in the number of the book, is a substantial compliance with the statute. The place where the mortgage is recorded will be sufficiently indicated by naming the office and the date of the record, and possibly by mentioning the office alone. It was so held, where there was no book in the office of so high a number as the one designated. Judd v. O'Brien, 21 N. Y. 186, 189 (1860).

[3] Candee v. Burke, 1 Hun (N. Y.) 546 (1874); s. c. 4 T. & C. (N. Y.) 143.

[4] Abbott v. Banfield, 43 N. H. 152 (1861).

[5] Burnet v. Denniston, 5 Johns. Ch. (N. Y.) 35 (1821).

[6] Hornby v. Cramer, 12 How. (N. Y.) Pr. 490 (1855).

[7] N. Y. Code Civ. Proc. § 2391; Ferguson v. Kimball, 3 Barb. Ch. (N. Y.) 616, 619 (1846); except, perhaps, where it contains within itself a measure by which to ascertain the

the time of the first publication of the notice,[1] should be given in dollars and cents; yet a statement that it is claimed that a particular sum was due at any designated day prior to the notice, will doubtless be sufficient.[2]

If the advertisement of sale contains a false statement, tending to deceive the public as to the amount of the incumbrances, and thereby deters bidders, the sale will be irregular and void.[3] But this is not true as to a mistake, a correction of which is published with the notice, before it can be presumed to have influenced persons intending to bid; as where, by mistake, the notice of sale stated a prior incumbrance upon the mortgaged property, at twice its actual amount, and a correction thereof was published with the notice two weeks before the sale.[4]

§ 789. Stating amount where only part of debt is due.—Where a sale is made under a power contained in a mortgage, a portion of which is not due at the time of the first publication, the notice must state the sum due and also the amount to become due.[5] And where a sale is made subject to future installments, part of which have been paid, without specifying the amount of such installments, the notice will be void,[6] and a sale under such a notice, for a single installment,[7] will extinguish the lien of the mortgagee on the

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amount of damages; Jackson v. Turner, 7 Wend. (N. Y.) 458 (1831). See Mowry v. Sanborn, 68 N. Y. 153 (1877).

[1] Stating in the notice the amount due on the day before the first publication, is not fatal. It is surplusage to state that the premises are subject to a lease; and the neglect to state how long the lease mentioned in a notice has to run will not affect the sale. Hubbell v. Sibley, 5 Lans. (N. Y.) 51 (1871); aff'd 50 N. Y. 468 (1872).

[2] Judd v. O'Brien, 21 N. Y. 186, 189 (1860).

[3] Burnet v. Denniston, 5 Johns. Ch. (N. Y.) 35 (1821); Hubbell v. Sibley, 5 Lans. (N. Y.) 55 (1871). See Klock v. Cronkhite, 1 Hill (N. Y.) 107 (1841); Jencks v. Alexander, 11 Paige Ch. (N. Y.) 619 (1845).

[4] Hubbell v. Sibley, 5 Lans. (N. Y.) 51 (1871); aff'd 50 N. Y. 468 (1872). See Mowry v. Sanborn, 62 Barb. (N. Y.) 223 (1872); rev'd on another point, 65 N. Y. 581 (1875); Jencks v. Alexander, 11 Paige Ch. (N. Y.) 619 (1845).

[5] N. Y. Code Civ. Proc. § 2391. See Jencks v. Alexander, 11 Paige Ch. (N. Y.) 619, 626 (1845).

[6] Jencks v. Alexander, 11 Paige Ch. (N. Y.) 619, 626 (1845); N. Y. Code Civ. Proc. § 2391.

[7] Minor v. Hill, 58 Ind. 176 (1877);

entire premises.[1] In such a case, however, the mortgagee will be entitled to retain out of the proceeds of the sale, the sums due and to become due upon the mortgage, besides the costs and the expenses of the foreclosure.[2]

§ 790. **Statement in notice of prior incumbrances.**—It is not necessary to set forth in the notice of sale incumbrances subject to which the sale is to be made. Thus, the unexpired term of a lease, subject to which the premises are to be sold, need not be recited in the notice of sale.[3] Where unnecessary matters are recited in the notice, they will not render it defective, and the sale thereunder void, unless perhaps, such matters mislead the public, and thereby prevent persons from bidding who might otherwise have become purchasers. If, however, such matters are inserted in the notice of sale by mistake, and are corrected before it can be presumed that persons entitled to bid would be influenced thereby, the proceedings will not be prejudiced.[4]

§ 791. **Date of sale and signature to notice.**—The date of the sale should be correctly given; but where, by mistake, an incorrect date is given, which is obvious on inspection and could not mislead, it will not invalidate the proceedings; as where, by mistake, 1858 was inserted, instead of 1868.[5]

The Code requires the notice to be subscribed by the person entitled to execute the power of sale;[6] where the name of the mortgagee was omitted from the body of a notice of sale, but was signed at the bottom thereof, it was held to be sufficient.[7] A notice signed by a duly authorized

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s. c. 26 Am. Rep. 71. *Compare* Hill v. Minor, 79 Ind. 48 (1881).

[1] Poweshiek Co. v. Dennison, 36 Iowa, 244 (1873); s. c. 14 Am. Rep. 524.

[2] N. Y. Code Civ. Proc. § 2404.

[3] Hubell v. Sibley, 5 Lans. (N. Y.) 51 (1871).

[4] See *ante* § 788; Klock v. Cronkhite, 1 Hill (N. Y.) 107 (1841); Burnet v. Denniston, 5 Johns. Ch. (N. Y.) 35, 42 (1821); Jencks v. Alexander, 11 Paige Ch. (N. Y.) 619 (1845).

[5] Mowry v. Sanborn, 68 N. Y. 153 (1877), reversing 7 Hun (N. Y.) 380 (1876).

[6] N. Y. Code Civ. Proc. § 2388.

[7] Candee v. Burke, 1 Hun (N. Y.) 546 (1874); s. c. 4 T. & C. (N. Y.) 143.

person as "executor" has been held to contain a sufficient statement of his interest in the mortgage, and how it was acquired;[1] and where the name of the person entitled to execute the power of sale, distinctly appears in the body of the notice, it may be subscribed by his attorney or agent.[2]

§ 792. **Objections to notice of sale.**—Where the notice is irregular or defective, objections thereto should be promptly made. It has been said, that after the lapse of fifteen years, a mortgagor, or other party interested, can not question the regularity of the notice of sale, and that apparent deficiencies will be supplied by intendment.[3]

A sale on foreclosure by advertisement is entirely *ex parte*, and legal objections thereto can be taken whenever the proceedings are properly brought in question.[4] Thus, if a tender to redeem was refused by a mortgagee, a sale made by him thereafter would be illegal and void, and a fraud upon subsequent judgment creditors and incumbrancers.[5]

§ 793. **Postponement of sale.**—The New York Code of Civil Procedure provides,[6] that "a sale may be postponed from time to time. In that case, a notice of the postponement must be published, as soon as practicable thereafter, in the newspaper in which the original notice was published; and the publication of the original notice, and of each notice of postponement, must be continued, at least once in each week, until the time to which the sale is finally postponed."[7]

The usual practice is for the party conducting the sale to attend at the time and place appointed for the sale, and to give public notice of the postponement by announcement:

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[1] People *ex rel.* Brideubecker v. Prescott, 3 Hun. (N. Y.) 419 (1875). See N. Y. Code Civ. Proc. §§ 2388, 2391.

[2] N. Y. Code Civ. Proc. § 2388.

[3] Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 1 (1804); s. c. 2 Am. Dec. 281; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129 (1817); s. c. 8 Am. Dec. 467.

[4] Hall v. Bartlett, 9 Barb. (N. Y.) 300 (1850); Burnet v. Denniston, 5 Johns. Ch. (N. Y.) 35 (1821).

[5] See Miller v. Finn, 1 Neb. 254 (1867).

[6] N. Y. Code Civ. Proc. § 2392.

[7] Westgate v. Handlin, 7 How. (N. Y.) Pr. 372 (1853); Sayles v. Smith, 12 Wend. (N. Y.) 57 (1834); s. c. 27 Am. Dec. 117. See Jackson v. Clark, 7 Johns. (N. Y.) 217 (1810).

and it is believed that this practice should be followed, because a departure from the established practice might be regarded as evidence of bad faith.[1]

If a postponement is made at the time and place appointed for the sale, by stating the adjourned time and place to those present, the subsequent notice, to be published until the time of sale, must conform to the adjournment, as thus announced. Thus, where the announcement, made at the time and place first fixed for the sale, was of an adjournment to the tenth of the month, but the printed notice was, by mistake, to the sixteenth, a sale had on the sixteenth was held void.[2]

Where a mortgagee published a notice under his advertisement of sale, that the sale was to be adjourned, but neglected to post a notice of such adjournment, the court held that he was bound by his adjournment, and that his sale made on the original notice, disregarding the adjournment, was irregular and void.[3] It has been held that where the notice of sale was for Sunday, the mortgagee might, before the day of sale, postpone it to another day and make a valid sale under the notice.[4]

§ 794. **Place of sale.**—The New York Code of Civil Procedure provides,[5] that the sale must be made "at public auction, in the day time, on a day other than Sunday or a public holiday,[6] in the county in which the mortgaged property, or a part thereof, is situated; except that, where the mortgage is to the people of the state, the sale may be made at the Capitol." The mortgagee's deed will not convey a title, unless the sale was held at public auction pursuant to the statutory notice, even though the mortgage

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[1] Circumstances tending to show fraud in the adjournment of a sale, previously advertised on proceedings which were abandoned, have been held not to amount to fraud in the sale. See Leet v. McMaster, 51 Barb. (N. Y.) 236 (1868).

[2] Miller v. Hull, 4 Den. (N. Y.) 104 (1847).

[3] Jackson v. Clark, 7 Johns. (N. Y.) 217 (1810).

[4] Westgate v. Handlin, 7 How. (N. Y.) Pr. 372 (1853).

[5] N. Y. Code Civ. Proc. § 2393.

[6] Selling on Sunday is not unlawful, for selling land under a statutory foreclosure is not a judicial proceeding. Sayles v. Smith, 12 Wend.

may contain a power of sale, expressly authorizing the mortgagee, on default, to sell the premises at private sale.[1]

§ 795. **By whom sale to be conducted.**—A sale is usually conducted by the mortgagee, but if it is made to appear likely to the court that he will exercise his power in a harsh, oppressive, or improper manner, the court will associate a referee with him to see that the sale is properly conducted, and that only so much of the mortgaged premises is sold as will be sufficient to satisfy the mortgage debt.[2]

Where the sale is conducted by the mortgagee, he is regarded, in equity, as a trustee, and is bound to conduct the proceedings in a fair and just manner, and in good faith,[3] and is governed by substantially the same rules as control a sale made by a referee in a foreclosure by action.[4]

§ 796. **Sale in parcels.**—The New York Code of Civil Procedure requires,[5] that "if the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and as many only of the distinct farms, tracts, or lots, shall be sold, as it is necessary to sell, in order to satisfy the amount due at the time of the sale, and the costs and expenses allowed by law. But where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together."

If the land consists of distinct farms, tracts, or lots, and they are sold together, the sale will be voidable, at least, if not absolutely void;[6] but where the premises do not consist of distinct farms, parcels, or lots, they need not be sold separately.[7] It is believed that where lands are mortgaged

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(N. Y.) 57 (1834); s. c. 27 Am. Dec. 117. Where the day first set is Sunday, a postponement from that day will be regular. Westgate v. Handlin, 7 How. (N. Y.) Pr. 372 (1853).

[1] Lawrence v. Farmers' Loan and Trust Co., 13 N. Y. 200 (1855).

[2] VanBergen v. Demarest, 4 Johns. Ch. (N. Y.) 37 (1819).

[3] Soule v. Ludlow, 3 Hun (N. Y.) 503 (1875); s. c. 6 T. & C. (N. Y.) 24. See Ellsworth v. Lockwood, 42 N. Y. 89 (1870).

[4] See *ante* chap. xxv.; also Soule v. Ludlow, 3 Hun (N. Y.) 503 (1875); s. c. 6 T. & C. (N. Y.) 24.

[5] N. Y. Code Civ. Proc. § 2393.

[6] Wells v. Wells, 47 Barb. (N. Y.) 416 (1867).

[7] Anderson v. Austin, 34 Barb.

as one undivided lot, or parcel, and are subsequenty subdivided, the mortgagee is not bound to sell them in parcels.[1]

It seems, however, that a court of equity can give relief against a sale of the whole mortgaged property in one parcel, even where mortgaged as one tract, if a party standing in the position of a junior mortgagee, or as owner of the property, requests a sale in parcels, and offers in good faith to bid the amount of the mortgage, with the costs and expenses of the sale.[2] Where the parcels are so situated that they can be conveniently sold and conveyed separately, the general rule governing a sale in parcels under a decree and order of sale,[3] will govern a sale in a foreclosure by advertisement.

While a mortgagee is not bound by the notice of sale to sell the mortgaged premises in parcels in the absence of a request as above stated, unless they are described in parcels in the mortgage,[4] yet he may do so, where the premises are so situated that he can sell them to better advantage;[5] and he may also reserve certain rights for the benefit of the owner of the equity of redemption, where the property is amply sufficient to pay the mortgage debt.[6]

§ 797. **Terms of sale.**—The Code does not require that the published notice shall contain the terms of sale; while it is the practice to conform the terms of a sale to those made under decrees of foreclosure, by stating in writing the conditions upon which the purchaser is to pay for and receive the title, yet the mortgagor, or those claiming under him, can not object to the sale on the ground that the terms thereof were not given in the notice of foreclosure, nor in

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(N. Y.) 319 (1861); Bunce v. Reed, 16 Barb. (N. Y.) 347, 350 (1853); Holden v. Gilbert, 7 Paige Ch. (N. Y.) 211 (1838).

[1] Lamerson v. Marvin, 8 Barb. (N. Y.) 9 (1850); followed in Ellsworth v. Lockwood, 9 Hun (N. Y.) 548 (1877); Hubbell v. Sibley, 5 Lans. (N. Y.) 51 (1871). See *ante* §§ 489, 492 and chap. xxiii.

[2] Ellsworth v. Lockwood, 42 N. Y. 89 (1870); aff'd 9 Hun (N. Y.) 548 (1877).

[3] See *ante* chap. xxiii.

[4] Sherman v. Willett, 42 N. Y. 146, 150 (1870); Griswold v. Fowler, 24 Barb. (N. Y.) 135 (1857); Lamerson v. Marvin, 8 Barb. (N. Y.) 9 (1850).

[5] Sherman v. Willett, 42 N. Y. 146, 151 (1870).

[6] Sherman v. Willett, 42 N. Y. 146 (1870).

the affidavits of sale, and that the owner of the equity of redemption had no knowledge or notice of the terms of sale, and had never ratified them.[1]

The sale may be made for cash or upon time, as to a part or the whole of the amount, in the discretion of the mortgagee, and where time is given for the payment of the whole, or a portion of the purchase money, the mortgagee may determine what security he will require.[2] Where the sale is made for cash, a reasonable deposit may be required, although the advertisement may not specify such terms, nor state that the terms would be made known on the day of the sale.[3] Where a sale is made for cash, payment may be made by a check;[4] or, by discharging a debt due from the mortgagee to the purchaser.[5]

Upon a sale under the foreclosure of a second mortgage by advertisement, it is proper for the mortgagee to make the sale subject to the prior mortgage;[6] or he may advertise and sell the property free and clear of all incumbrances, if the prior mortgage is due, and pay it off out of the proceeds of the sale.

§ 798. **Mortgagee may become purchaser.**—The Code provides,[7] that "the mortgagee, or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale."[8] The sale may be made by the mortgagee, or the owner of the mortgage, and he may himself become the

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[1] Story v. Hamilton, 20 Hun (N. Y.) 133; aff'd 86 N. Y. 428 (1881).

[2] Cox v. Wheeler, 7 Paige Ch. (N. Y.) 248, 251 (1838); Whitfield v. Riddle, 78 Ala. 99 (1884).

[3] Pope v. Burrage, 115 Mass. 282 (1874); Model House Assoc. v. Boston, 114 Mass. 133 (1873); Gooddale v. Wheeler, 11 N. H. 424 (1840).

[4] McConneaughey v. Bogardus, 106 Ill. 321 (1883).

[5] Cooper v. Hornsby, 71 Ala. 62 (1881); Tartt v. Clayton, 109 Ill. 579 (1884).

[6] Story v. Hamilton, 86 N. Y. 428 (1881), aff'g 20 Hun (N. Y.) 133 (1880).

[7] N. Y. Code Civ. Proc. § 2394.

[8] Mowry v. Sanborn, 68 N. Y. 160 (1877); Hollingsworth v. Spalding, 54 N. Y. 636 (1873); Hubbell v. Sibley, 50 N. Y. 468 (1872), aff'g 5 Lans. (N. Y.) 51; Jackson v. Colden, 4 Cow. (N. Y.) 266 (1825); Valentine v. Belden, 20 Hun (N. Y.) 537 (1880); Cox v. Wheeler, 7 Paige Ch. (N. Y.) 248 (1838).

purchaser and make the affidavit which stands in the place of a deed.[1]

It has been held, that even without the above statutory provision, the mortgagee, or his assignee, or the legal representative of either, would have a right to purchase the premises.[2] The better opinion, however, seems to be that a court of equity will not allow the person holding a mortgage containing a power of sale to become the purchaser at a sale made thereunder, unless he is expressly authorized so to purchase, by the terms of the mortgage.[3]

But where the mortgage contains a provision allowing the mortgagee to become the purchaser, he may make the deed in his own name, directly to himself.[4] Such a purchase, made by the mortgagee for his sole benefit, is valid, and will effectually foreclose the entire equity of redemption, if he faithfully discharges, in all respects, the duties imposed upon him as donee of the power.[5]

If a mortgagee purchases on a sale for an installment due, his mortgage will be merged; but it seems that if a third person purchases, the mortgagor, on being compelled by suit on the bond to pay the balance of the debt, is entitled to an assignment of the mortgage to enable him to secure repayment of the debt out of the land.[6]

The payment of a mortgage extinguishes the power of sale under it; if a statutory foreclosure thereof is afterwards made for the benefit of an assignee of the mortgage, and he bids in the property, he will acquire no title, because one who has no power to sell is not a purchaser in good

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[1] Hubbell v. Sibley, 5 Lans. (N. Y.) 51 (1871); aff'd 50 N. Y. 468 (1872).

[2] Elliott v. Wood, 53 Barb. (N. Y.) 285 (1869); aff'd 45 N. Y. 71.

[3] Hall v. Bliss, 118 Mass. 554, 558 (1875); s. c. 19 Am. Rep. 476, 480; Dyer v. Shurtleff, 112 Mass. 165 (1873); s. c. 17 Am. Rep. 77; Downes v. Grazebrock, 3 Meriv. 200 (1817).

[4] Wilson v. Troup, 7 Johns. Ch. (N. Y.) 25 (1823); s. c. 2 Cow. (N. Y.) 195; Hall v. Bliss, 118 Mass. 554, 558 (1875); s. c. 19 Am. Rep. 476, 480; Dexter v. Shepard, 117 Mass. 480 (1875).

[5] See Wilson v. Troup, 7 Johns. Ch. (N. Y.) 25 (1823); s. c. 2 Cow. (N. Y.) 195; Hall v. Bliss, 118 Mass. 554, 558 (1875); s. c. 19 Am. Rep. 476, 480; Dexter v. Shepard, 117 Mass. 480 (1875).

[6] Cox v. Wheeler, 7 Paige Ch. (N. Y.) 248 (1838).

faith at his own sale.[1] Whether any person can acquire a good title at such a sale, is questionable.[2]

§ 799. **Setting sale aside.**—The proceedings in a foreclosure by advertisement may be set aside for fraud, mistake, unfairness, or bad faith, under the same circumstances and in the same cases, in which a sale would be set aside in a foreclosure by an equitable action.[3] Any person, whose interests are injuriously affected by the sale, may apply to have it set aside ; but on such an application, a *bona fide* purchaser will be protected.[4] To entitle a person to protection by the court as a *bona fide* purchaser, it must be made clearly to appear that the purchase was made in good faith, and that the consideration was paid, before notice of defects in the title, or of irregularities in the sale, was received.[5]

On an application to have a sale set aside as illegal and fraudulent, the purchaser at the sale, as well as all persons claiming rights under him, must be made parties to the proceeding.[6] And where a sale is set aside on such application, it will have the effect of re-instating and preserving unimpaired, the lien of the mortgage.[7] In such a case, the purchaser will stand as the assignee of the mortgagee, and will be vested with all of his rights.[8]

§ 800. **Grounds for setting sale aside.**—Mere inadequacy of price is not of itself a ground for setting aside a sale, made pursuant to a power contained in a mortgage,[9]

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[1] Warner v. Blakeman, 4 Abb. App. Dec. (N. Y.) 530 (1863); s. c. 4 Keyes (N. Y.) 487, aff'g 36 Barb. (N. Y.) 501 ; Cameron v. Irwin, 5 Hill (N. Y.) 272 (1843).

[2] Warner v. Blakeman, 4 Abb. App. Dec. (N. Y.) 530 (1863); s. c. 4 Keyes (N. Y.) 487.

[3] Soule v. Ludlow, 3 Hun (N. Y.) 503 (1875); s. c. 6 T. & C. (N. Y.) 24 ; Hubbell v. Sibley, 5 Lans. (N. Y.) 51 (1871); Clevinger v. Ross, 109 Ill. 349 (1884). See *ante* chap. xvi.

[4] Warner v. Blakeman, 36 Barb. (N. Y.) 501 (1862), aff'g 4 Keyes (N. Y.) 487.

[5] Grover v. Hale, 107 Ill. 638 (1883); Redden v. Miller, 95 Ill. 336 (1880); Brown v. Welch, 18 Ill. 343 (1857); s. c. 68 Am. Dec. 549.

[6] See Candee v. Burke, 1 Hun (N. Y.) 546 (1874); s. c. 4 T. & C. (N. Y.) 143.

[7] Stackpole v. Robbins, 47 Barb. (N. Y.) 212 (1866); Lash v. McCormick, 17 Minn. 407 (1871).

[8] Jackson v. Bowen, 7 Cow. (N. Y.) 13 (1827); Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 526 (1834).

[9] See *ante* § 539; also Laclede Bank v. Keeler, 109 Ill. 385 (1884); Cleaver v. Green, 107 Ill. 67 (1883).

unless the inadequacy is so gross as to amount to evidence of fraud against the debtor's rights.[1] An application for setting aside a sale, made pursuant to a power, is always addressed to the sound discretion of the court, the same as an application to set aside a sale made pursuant to a decree in a foreclosure by action;[2] and the application will be denied, if the party applying has been guilty of laches.[3]

It is no ground for setting a sale aside that the mortgagee refused, at the request of the owner of the premises, who had assumed the payment of the mortgage, to sell a part of the tract first, if such part did not correspond to any prior known division, and no description thereof was suggested at the time by which a conveyance could be made.[4]

§ 801. **Enjoining sale.**—Where it is inequitable that the mortgagee should sell the property under the power of sale contained in the mortgage, an injunction restraining such sale will be granted on the application of the mortgagor,[5] or of any other person interested in preventing the sale.

Thus, if the mortgagee claims a larger amount in his notice than is actually due,[6] and the party applying for the injunction offers to pay the amount really due,[7] or if the mortgage is usurious,[8] or if the amount due can be

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[1] Magnusson v. Williams, 111 Ill. 450 (1886).

[2] See *ante* § 529.

[3] Depew v. Depew, 46 How. (N. Y.) Pr. 441 (1874).

[4] Ellsworth v. Lockwood, 9 Hun (N. Y.) 547 (1877). It was held in New York, prior to the revised statutes, that the omission to record a power of sale before a conveyance did not vitiate the sale. Jackson v. Colden, 4 Cow. (N. Y.) 266 (1825); Wilson v. Troup, 2 Cow. (N. Y.) 195 (1823); s. c. 14 Am. Dec. 458.

[5] Where there is a defence to the mortgage, the mortgagor may protect himself either by commencing an action to restrain the sale, or by attending the sale and giving notice of the facts.

[6] Cole v. Savage, Clarke Ch. (N. Y.) 482 (1841). Thus, where less than the face of the mortgage was advanced when it was given, and the mortgagee advertised under the power, claiming the whole face of the mortgage as being due, it was held, that the mortgagor's grantee might maintain a bill in equity to restrain the sale and to ascertain the amount actually due. Cole v. Savage, Clarke Ch. (N. Y.) 482 (1841).

[7] Vechte v. Brownell, 8 Paige Ch. (N. Y.) 212 (1840).

[8] Hyland v. Stafford, 10 Barb. (N. Y.) 558 (1850); Cole v. Savage, Clarke Ch. (N. Y.) 482 (1841); Burnet v. Denniston, 5 Johns. Ch. (N. Y.) 35, 41 (1821).

determined only by a judicial finding, an injunction restraining the sale may be properly granted.[1]

Where the mortgage is valid and due, and the mortgagee is conducting the foreclosure according to statute, the sale will not be enjoined.[2] The mortgagee is entitled to foreclose at any time after default, and the simple fact that the time selected for the sale is at a season of the year when property will not sell to the best advantage, or when the sale is inconvenient to subsequent incumbrancers, is not a ground for interfering with the sale.[3]

Neither will the sale be delayed to enable several owners of the equity of redemption, or junior incumbrancers, to settle among themselves the proportion which each is to pay towards the discharge of the mortgage, unless, perhaps, a sufficient sum is paid into court to secure the mortgagee from loss; in which case, it seems that a reasonable time will be allowed.[4] Where the amount due on a mortgage has been judicially determined, an injunction to stay the sale will not be granted to enable an appeal to be taken, if the rights of the parties can be otherwise fully protected.[5]

§ 802. Damages for wrongful injunction.—Where a mortgagee has been wrongfully enjoined from proceeding to sell the mortgaged premises, and is entitled to damages in consequence, such damages will consist of his necessary counsel fees for services rendered in dissolving the mortgagor's injunction, and also on the reference,[6] besides the expenses incurred,[7] and his taxable costs.[8]

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[1] Gooch v. Vaughan, 92 N. C. 610 (1885); Purnell v. Vaughan, 77 N. C. 268 (1871); Capehart v. Biggs, 77 N. C. 261 (1877); Kornegay v. Spicer, 76 N. C. 95 (1877).

[2] Jones v. Matthie, 11 Jur. 504 (1848); Whitworth v. Rhodes, 20 L. J. N. S. (Ch.) 105 (1850).

[3] Bedell v. McClellan, 11 How. (N. Y.) Pr. 172 (1855).

[4] Brinkerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65 (1819); s. c. 8 Am. Dec. 538.

[5] Outtrin v. Graves, 1 Barb. Ch. (N. Y.) 49 (1845).

[6] Lee v. Homer, 37 Hun (N. Y.) 634 (1885). See Rose v. Post, 56 N. Y. 603 (1874); Disbrow v. Gracia, 52 N. Y. 654 (1873); Hovey v. Rubber Tip Pencil Co., 50 N. Y. 335 (1872); Andrews v. Glenville Woolen Co., 50 N. Y. 282 (1872); Aldrich v. Reynolds, 1 Barb. Ch. (N. Y.) 613 (1846); Edwards v. Bodine, 11 Paige Ch. (N. Y.) 223 (1844).

[7] Lawton v. Green, 64 N. Y. 326,

§ 803. **Lands situated in another state.**—The statutes of New York, regulating the foreclosure of mortgages by advertisement, do not apply to mortgages on real estate situated out of the state;[1] consequently, the courts of New York have no authority to enjoin a mortgagee of lands which are in another state, from selling such lands at public sale within the state, according to the terms of the mortgage security, upon the mere allegation that such power is void, particularly where no contrary statute of the state or territory where the lands are situated is alleged, and the invalidity of the power is not made apparent.[2]

Thus, where a mortgage, executed by a mining corporation upon lands in Colorado, authorized a sale, after a certain specified notice, in the city of New York, the court held, in an action to restrain a sale thus authorized, that, in the absence of any statutory regulation, the parties had the power to agree upon the manner of sale; that the statute of New York, in reference to the sale of mortgaged premises, had reference only to real estate in that state; and that there was no ground for equitable relief, as there was no proof that the sale, as provided for in the mortgage, was in conflict with the laws of Colorado.[3]

§ 804. **Sale under loan commissioners' mortgage.**—As the power of loan officers to foreclose a loan commissioners' mortgage is purely statutory, they must pursue the directions of the statute strictly in foreclosing such mortgage. If, therefore, the advertisement of sale is defective in describing the quantity and the situation of the premises, the sale will be irregular and void, and the purchaser under such sale will be decreed to surrender his title to the owner of the equity of redemption;[4] because, where

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331 (1876); Aldrich v. Reynolds, 1 Barb. Ch. (N. Y.) 613 (1846).

[8] Aldrich v. Reynolds, 1 Barb. Ch. (N. Y.) 613 (1846). See Rose v. Post, 56 N. Y. 603 (1874); Hovey v. Rubber Tip Pencil Co., 50 N. Y. 335 (1872); Andrews v. Glenville Woolen Co., 50 N. Y. 282 (1872); Edwards v. Bodine, 11 Paige Ch. (N. Y.) 223 (1844).

[1] Elliott v. Wood, 45 N. Y. 71 (1871).

[2] Central Gold Mining Co. v. Platt, 3 Daly (N. Y.) 263 (1870).

[3] Carpenter v. Blackhawk Gold Mining Co., 65 N. Y. 43 (1875).

[4] Sherwood v. Reade, 7 Hill (N.

premises are to be taken under statutory authority, in derogation of the common law, every requisite of the statute having the semblance of a benefit to the owner, must be strictly complied with.[1] And every requirement of the statute, affecting the substantial rights of a party, must be complied with in order to divest the title to the property and to transfer it from one party to another under the statutory authority.[2]

It is a well settled rule that where particular forms of procedure are required for the execution of a power, however immaterial they may appear in themselves, they are considered as conditions, the observance of which, is indispensable.[3] But the validity of a sale to a *bona fide* purchaser will not be affected by the neglect of the commissioners to enter in their minute book the order for and a copy of the notice of sale, and a statement of the places where, and the persons by whom, advertisements were posted.[4]

Y.) 431 (1844); Sherman v. Dodge, 6 Johns. Ch. (N. Y.) 107 (1822); Denning v. Smith, 3 Johns. Ch. (N. Y.) 332 (1818); Rogers v. Murray, 3 Paige Ch. (N. Y.) 390 (1832). See Washington Cemetery v. Prospect Park & C. I. R. Co., 68 N. Y. 591 (1877); Rathbun v. Acker, 18 Barb. (N. Y.) 393 (1854); Doughty v. Hope, 3 Den. (N. Y.) 249 (1847); Gilbert v. Columbia Turnpike Co., 3 Johns. Cas. (N. Y.) 107 (1802).

[1] Denning v. Smith, 3 Johns. Ch. (N. Y.) 332 (1818). See Powell v. Tuttle, 3 N. Y. 396, 402 (1850); Corwin v. Merritt, 3 Barb. (N. Y.) 341 (1848); Jackson v. Shepard, 7 Cow (N. Y.) 88 (1827); s. c. 17 Am. Dec. 502; Sherwood v. Reade, 7 Hill (N. Y.) 431, 434 (1844); Sharp v. Johnson, 4 Hill (N. Y.) 92, 99 (1843); s. c. 40 Am. Dec. 259; Sharp v. Speir, 4 Hill (N. Y.) 76 (1843); Atkins v. Kinnan, 20 Wend. (N. Y.) 241 (1838); s. c. 32 Am. Dec. 534; Jackson v. Esty, 7 Wend. (N. Y.) 148 (1831); Hubley v. Keyser, 2 Pen. & W. (Pa.) 501 (1831); Williams v. Peyton, 17 U. S. (4 Wheat.) 77 (1819); bk. 4 L. ed. 518.

[2] Hill v. Draper, 10 Barb. (N. Y.) 460 (1851); Denning v. Smith, 3 Johns. Ch. (N. Y.) 332 (1818); Stead v. Course, 8 U. S. (4 Cr.) 403 (1808); bk. 2 L. ed. 660.

[3] Denning v. Smith, 3 Johns. Ch. (N. Y.) 332 (1818). See Nixon v. Hyserott, 5 Johns. (N. Y.) 58 (1809); Wyman v. Campbell, 6 Port. (Ala.) 219 (1838); s. c. 31 Am. Dec. 677 692; Hunt v. Chamberlin, 8 N. J. L. (3 Halst.) 336 (1826); Combe v. Brazier, 2 Desaus. (S. C.) Eq. 431 (1806).

[4] White v. Lester, 1 Keyes (N. Y.) 316 (1864). See Powell v. Tuttle, 3 N. Y. 396 (1850).

§ 805. **Notice of sale by loan commissioners—Contents.** —Pursuant to the statute regulating sales under mortgages executed to loan commissioners,[1] the notice or advertisement of sale is required to contain a sufficient statement to indicate who executed the mortgage and to whom it was given.[2]

Hence, a notice of sale, upon default of payment, which does not name any of the mortgagors, and wherein the mortgage is stated to have been given to the "Commissioners of the United States Deposit Fund," it having been executed in fact, to the "Commissioners for loaning certain moneys of the United States," that being the designation of the officers named by the statute, will be insufficient, and a sale thereunder will be invalid.[3] Likewise, the omission from the notice of the number of the lot or of the name of the mortgagor will be fatal.[4]

§ 806. **Publishing notice of loan commissioners' sale.** —In New York it will be sufficient if the notice of sale is published for six successive weeks, although the first publication may be less than forty-two days prior to the sale.[5] Yet it has been said that where the statute requires the notice to be published "for," that is, "during" sixty days, one insertion made sixty days before the sale will not satisfy the language of the statute.[6]

Where a county has been divided, and lands mortgaged to the loaning officers of the original county, fall within the new county, such loaning officers, upon a foreclosure and sale of the mortgaged premises, are bound to publish a copy of their advertisement of the sale in a newspaper in the new county.[7]

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[1] N. Y. Laws of 1837, chap. 150, §§ 30, 31.

[2] Thompson v. Commissioners, 79 N. Y. 54 (1879); s. c. 21 Alb. L. J. 15.

[3] Thompson v. Commissioners, 79 N. Y. 54 (1879); s. c. 21 Alb. L. J. 15 (1879). But a general description of the land in the notice was sufficient under the statute of 1808. Jackson v. Harris, 3 Cow. (N. Y.) 241 (1824).

[4] Denning v. Smith, 3 Johns. Ch. (N. Y.) 332 (1818). See Jackson v. Harris, 3 Cow. (N. Y.) 249 (1824); King v. Stow, 6 Johns. Ch. (N. Y.) 323 (1822).

[5] Wood v. Terry, 4 Lans. (N. Y.) 80 (1871).

[6] Denning v. Smith, 3 Johns. Ch. (N. Y.) 332 (1818).

[7] People v. Supervisors of Delaware County, 5 Cow. (N. Y.) 436

§ 807. **Posting notice of loan commissioners' sale—Terms.**—The notice of such sale should be posted in three public places for the same length of time that it is advertised in a newspaper of the county. It has been held that posting the notice in unfrequented places, or on the inside of the court house door, will render the sale invalid.[1]

The commissioners have no right to sell the premises on credit, or to prescribe any terms of sale except such as are authorized by the statute; consequently, they can not make it one of the terms of the sale that the purchaser shall pay down only a part instead of the whole of the purchase price, and that in default of the payment of the balance there shall be a resale.[2]

If the mortgagor purchases the premises and gives a new mortgage, it will be a purchase money mortgage. On a subsequent default and foreclosure, the commissioners will hold as against a party who has acquired title under a judgment docketed prior to the new mortgage.[3]

§ 808. **Validity of loan commissioners' sale.**—A sale of mortgaged lands made by only one of the commissioners, will be void;[4] both commissioners must be present at, and take part in, the sale; the execution of the deed by both commissioners will not aid such a sale. Neither can one commissioner give a valid notice of the sale.[5] But when both commissioners are present and unite in making a sale, the fact that the entry in their minute book, purporting to be the entry of both, was made and signed by only one, will

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(1826); Rogers v. Murray, 3 Paige Ch (N. Y.) 390 (1832).

[1] Denning v. Smith, 3 Johns. Ch. (N. Y.) 332 (1818). See also King v. Stow, 6 Johns. Ch. (N. Y.) 323 (1822).

[2] Sherwood v. Reade, 7 Hill (N. Y.) 431 (1844).

[3] Commissioners v. Chase, 6 Barb. (N. Y.) 37 (1849).

[4] Denning v. Smith, 3 Johns. Ch. (N. Y.) 332 (1818); followed in Powell v. Tuttle, 3 N. Y. 404 (1850). Sales by one commissioner, prior to 1867, were confirmed by chap. 704, Laws of 1867.

[5] Olmsted v. Elder, 5 N. Y. 144 (1851); Powell v. Tuttle, 3 N. Y. 396 (1850); New York Life Ins. & T. Co. v. Staats, 21 Barb. (N. Y.) 570 (1851).

not be a fatal irregularity.[1] The statute as to the entry of proceedings in the mortgage book, is directory only.[2]

A court of equity can not set aside a public sale made by an officer who is not acting under its direction because of the inadequacy of the sum paid by the purchaser, however gross it may be.[3]

§ 809. **Purchaser presumed to know authority of loan commissioners.**—The purchaser at a loan commissioners' sale is presumed to know the authority of such officers, their authority being a matter of law and of public record;[4] if he purchases at a sale, in which the special authority conferred by statute is not pursued, he will purchase at his peril.[5] This rule is founded on the well known principle, that if the agency is known and limited, it is the duty of every party who deals with the agent to inquire into the nature and extent of the authority conferred by the principal, and to deal with the agent accordingly.[6]

Where a sale by loan commissioners is illegal and void, the mortgagor may bring an action against the purchaser for redemption, and for the value of the rents and profits of the premises. In such a case, an omission to make a tender will not be fatal to the action, but at most will only affect the question of costs.[7]

§ 810. **Conduct of sale—Deed of loan commissioners.**—The conduct of the sale, and the method of conveyancing by loan commissioners in New York, are defined in the case of

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[1] White v. Lester, 1 Keyes (N. Y.) 316 (1864).

[2] Wood v. Terry, 4 Lans. (N. Y.) 80 (1871).

[3] March v. Ludlum, 3 Sandf. Ch. (N. Y.) 35 (1845).

[4] Dart v. Hercules, 57 Ill. 449 (1870). See Denning v. Smith, 3 Johns. Ch. (N. Y.) 332 (1818); Marshall County v. Cook, 38 Ill. 44 (1865).

[5] Sherman v. Dodge, 6 Johns. Ch. (N. Y.) 107 (1822); Denning v. Smith, 3 Johns. Ch. (N. Y.) 332 (1818); Delafield v. Illinois, 26 Wend. (N. Y.) 222 (1841).

[6] See Snow v. Perry, 26 Mass. (9 Pick.) 542 (1830); Niles v. Ransford, 1 Mich. 341 (1849); s. c. 51 Am. Dec. 97; State v. Bank of Missouri, 45 Mo. 538 (1870); Towle v. Leavitt, 23 N. H. 360 (1851); s. c. 55 Am. Dec. 195, 201; Hatch v. Taylor, 10 N. H. 547 (1840); Schimmelpennich v. Bayard, 26 U. S. (1 Pet.) 264, 290 (1828); bk. 7 L. ed. 138.

[7] Thompson v. Commissioners, 79

York v. Allen.[1] Loan commissioners have no right to enter into possession of the premises, until after a failure to obtain a bid for the amount due on the mortgage, or the refusal of the purchaser to pay the amount of such bid.

Prior to the revised statutes, a deed from loan officers, in pursuance of a sale under a loan commissioners' mortgage, was conclusive on showing a default in payment by the mortgagor, although the mortgaged premises might never have been duly advertised for sale; but since the adoption of the revised statutes, it seems that the purchaser is bound to show the regularity of the sale.[2] The requirement of two witnesses to a deed is only directory.[3]

§ 811. Effect of sale by advertisement.—The Code[4] provides, that "a sale, made and conducted as prescribed by the statute, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose the mortgage, so far only as to be an entire bar of all claim or equity of redemption, upon, or with respect to, the property sold, of each of the following persons: (1) the mortgagor, his heir, devisee, executor or administrator; (2) each person, claiming under any of them, by virtue of a title or of a lien by judgment or decree, subsequent to the mortgage, upon whom the notice of sale was served, as prescribed by the statute;[5] (3) each person so claiming, whose assignment, mortgage, or other conveyance was not duly recorded in the

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N. Y. 54 (1879), reversing 16 Hun (N. Y.) 86; s. c. 21 Alb. L. J. 15.

[1] 30 N. Y. 104 (1864).

[2] Brown v. Wilbur, 8 Wend. (N. Y.) 657 (1832). See Rogers v. Murray, 3 Paige Ch. (N. Y.) 390 (1832).

[3] Commissioners v. Chase, 6 Barb. (N. Y.) 37 (1849).

[4] N. Y. Code Civ. Proc. § 2395.

[5] A judgment which is docketed after the first publication of the notice, and before the sale, will not be barred by the foreclosure, if the creditor is not served with the notice, and the holder thereof may redeem from the mortgage. Groff v. Morehouse, 51 N. Y. 503 (1873). In an early case, it appeared that a party, having a judgment subsequent to a mortgage, sold the premises under it, and acquired a right to a deed prior to the sale under the mortgage, though he did not receive his deed until after the sale; it was held that the deed took effect from the time when it might have been demanded, and that the judgment creditor's title was cut off by the statutory foreclosure. Klock v. Cronkhite, 1 Hill (N. Y.) 107 (1841), and see Post v. Arnot, 2 Den. (N. Y.) 344 (1845).

proper book for recording the same in the county, or whose judgment or decree was not duly docketed in the county clerk's office, at the time of the first publication of the notice of sale; and the executor, administrator, or assignee of such a person; (4) every other person, claiming under a statutory lien or incumbrance, created subsequent to the mortgage, attaching to the title or interest of any person, designated in either of the foregoing subdivisions; (5) the wife or widow of the mortgagor, or of a subsequent grantee, upon whom notice of the sale was served as prescribed by statute, where the lien of the mortgage was superior to her contingent or vested right of dower, or her estate in dower."[1]

§ 812. Sale firm and binding on all parties.—The title of a purchaser in good faith at such a sale, is the same as the title acquired by a purchaser at a sale made under a decree of foreclosure in an equitable action.[2] Where such a sale is made strictly as prescribed by statute, all questions which would have been determinable in an equitable action to foreclose a mortgage, will be settled by such sale.[3]

As the statute has no saving clause for such persons as may be under a disability at the time, it is believed that the courts can make no exceptions in their favor on the ground of any inherent equity applicable to the case. Thus, infants not being excepted from the operation of the statute, the courts can make no exception in their favor, and their equity of redemption will be effectually and absolutely barred by a regular sale under the power.[4]

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[1] N. Y. Code Civ. Proc. § 2395. Foreclosure by advertisement under a power of sale contained in a purchase money mortgage, not executed by the mortgagor's wife, will bar her right of dower. Brackett v. Baum, 50 N. Y. 8 (1872). *Compare* N. Y. Code Civ. Proc. §§ 2388, 2395.

[2] N. Y. Code Civ. Proc. § 2395. See Decker v. Boice, 19 Hun (N. Y.) 152 (1879); aff'd 83 N. Y. 215; Jackson v. Henry, 10 Johns. (N. Y.) 185 (1813); Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45, 50 (1823); s. c. 11 Am. Dec. 389; Slee v. Manhattan Ins. Co., 1 Paige Ch. (N. Y.) 48, 69 (1828); Otis v. McMillan, 70 Ala. 46 (1881).

[3] Warner v. Blakeman, 36 Barb. (N. Y.) 501 (1862); aff'd 4 Keyes (N. Y.) 487; s. c. 4 Abb. App. Dec. 530.

[4] Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 142 (1817); s. c. 8 Am. Dec. 467, 473.

The theory of the statute is that all foreclosures should be final, where they are free from fraud and gross irregularity.[1] But the requirements of the statute must be strictly complied with, in order to cut off the rights of the mortgagor and of subsequent grantees or incumbrancers; the object of the statute being to relieve interested parties from the expenses of an action, and to enable persons, not learned in the law, to conduct foreclosure proceedings, it follows that the construction placed upon the statute should be liberal and not technical.[2]

§ 813. Effect of sale on omitted parties—Rights of tenants.—The claim of a party who was not duly served with notice in the proceedings, will not be barred, even though he had actual knowledge of the sale. Where, however, the value of the mortgaged premises is less than the amount of the mortgage debt, with the other liens prior to the lien which was not barred, such lien will be of no value, and a purchaser in good faith may maintain an action to enjoin the lienor from enforcing his claim.[3]

The rights of a tenant holding under the mortgagor, where the demise was made subsequent to the mortgage, will be extinguished by the sale;[4] and the mortgagee, on acquiring possession of the premises, will be entitled to the crops sown by the lessee and growing on the land at the time of the sale.[5] The same rule is true as to fixtures.[6]

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[1] Wilson v. Troup, 2 Cow. (N. Y.) 195 (1823); s. c. 14 Am. Dec. 458; Jackson v. Henry, 10 Johns. (N. Y.) 195 (1813); Doolittle v. Lewis, 7 Johns Ch. (N. Y.) 50 (1823); s. c. 11 Am. Dec. 389; Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 531 (1834); Slee v. Manhattan Ins. Co., 1 Paige Ch. (N. Y.) 70 (1828). The validity of a foreclosure by advertisement can not be passed upon in an action to which the purchaser is not a party. Candee v. Burke, 1 Hun (N. Y.) 546 (1874); s. c. 4 T. & C. (N. Y.) 143.

[2] Jackson v. Henry, 10 Johns. (N. Y.) 195 (1813); Hubbell v. Sibley, 5 Lans. (N. Y.) 51 (1871); Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 526 (1834).

[3] Root v. Wheeler, 12 Abb (N. Y.) Pr. 294 (1861).

[4] Simers v. Saltus, 3 Den. (N. Y.) 214 (1846).

[5] Gillett v. Balcom, 6 Barb. (N. Y.) 370 (1849); Aldrich v. Reynolds, 1 Barb. Ch. (N. Y.) 613 (1846); Shephard v. Philbrick, 2 Den. (N. Y.) 176 (1846); Lane v. King, 8 Wend. (N. Y.) 581 (1832). See Gardner v. Finley, 19 Barb. (N. Y.) 317 (1855). See *ante* § 157.

[6] See *ante* §§ 426–428, 584–587.

§ 814. **Purchaser's title—What passes by sale.**—The effect of every statutory foreclosure is to transfer to the purchaser the rights of the mortgagee and of the mortgagor.[1] The regularity of the sale, however, constitutes the very foundation of the purchaser's title; if it is irregular, he will acquire no rights by his purchase.[2] If there are judgments subsequent to the mortgage, which continue a lien on the premises at the time of the sale, the purchaser will take the legal and equitable interest in the property as against the mortgagor and all persons claiming through and under him, subject to the equitable right of such lienors to redeem.[3]

Where the mortgagee becomes the purchaser, the whole mortgage debt will be extinguished; but, if a third person purchases, the mortgagor, if compelled to pay the residue of the mortgage, will be entitled to an assignment thereof, so as to re-imburse himself from the land.[4]

§ 815. **Defective foreclosure.**—Where a foreclosure is regularly conducted in all respects, except an omission to serve some one party with a notice of the sale, it will be valid as to all persons who were served. The persons who were properly served will be barred of their right of redemption, but the right of redemption will still remain in the party who, being entitled to notice, was not served with it.[5]

Thus, an omission to make the wife of the mortgagor a party, she having joined in the mortgage, merely leaves her the right of redemption, but it does not render the foreclosure invalid as to the other parties properly served.[6] It

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[1] Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 526 (1834). Where the only deed to the purchaser produced, was one executed nineteen years after the sale, it was held that as there were no intervening rights, it might be treated as good by relation back, especially in a court of equity. Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129 (1817); s. c. 8 Am. Dec. 467.

[2] See Jackson v. Clark, 7 Johns. (N. Y.) 217 (1810).

[3] Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833). See Robinson v Ryan, 25 N. Y. 320 (1862).

[4] Cox v. Wheeler, 7 Paige Ch. (N. Y.) 248 (1838).

[5] Groff v. Morehouse, 51 N. Y. 503 (1873); Wetmore v. Roberts, 10 How. (N. Y.) Pr. 51 (1853); Vanderkemp v. Shelton, 11 Paige Ch. (N. Y.) 28 (1844).

[6] Candee v. Burke, 1 Hun (N. Y.) 546 (1874).

seems, however, that the purchaser at such a sale, on obtaining possession of the premises, is entitled to retain it until the amount due on the mortgage is paid to him.[1]

Where subsequent incumbrancers were not properly cut off by the proceedings under the statute, a strict foreclosure was formerly held to be the proper remedy to extinguish such rights.[2]

If a statutory foreclosure is set aside for any reason, proceedings for the foreclosure of the mortgage may be commenced *de novo*. This is also true if an attempted foreclosure fails for any cause whatever; the mortgage does not become null and void by such failure, but stands restored and as though no proceedings had ever been taken upon it.[3]

§ 816. **Affidavits of the proceedings.**—The New York Code of Civil Procedure[4] provides, that "an affidavit of the sale, stating the time when, and the place where, the sale was made; the sum bid for each distinct parcel, separately sold; and the name of the purchaser of each distinct parcel, may be made by the person who officiated as auctioneer upon the sale. An affidavit of the publication of the notice of the sale, and of the notice or notices of postponement, if any, may be made by the publisher[5] or printer of the newspaper in which they were published, or by his foreman, or principal clerk. An affidavit of the affixing of a copy of the notice, at or near the entrance of the proper court house, may be made by the person who so affixed it, or by any person who saw it so affixed, at least eighty-four days before the day of sale.[6] An affidavit of the affixing of a copy of the notice in the book, kept by the county clerk, may be made by the county clerk, or by any person who saw it so affixed, at least eighty-four days before the day of

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[1] Brown v. Smith, 116 Mass. 108 (1874).

[2] Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58, 63 (1833).

[3] Stackpole v. Robbins, 48 N. Y. 665 (1871).

[4] N. Y. Code Civ. Proc. § 2396.

[5] The publisher of the newspaper may make the affidavit of publication, required by law to be made by the printer, or his foreman, or principal clerk. Bunce v. Reed, 16 Barb. (N. Y.) 347 (1853).

[6] Hornby v. Cramer, 12 How. (N. Y.) Pr. 490 (1855).

sale. An affidavit of the service of a copy of the notice upon the mortgagor, or upon any other person, upon whom the notice must or may be served, may be made by the person who made the service. Where two or more distinct parcels are sold to different purchasers, separate affidavits may be made with respect to each parcel, or one set of affidavits may be made for all the parcels."[1]

The Code also provides,[2] that " the matters required to be contained in any or all of the affidavits above specified, may be contained in one affidavit, where the same person deposes with respect to them. A printed copy of the notice of sale must be annexed to each affidavit ; and a printed copy of each notice of postponement must be annexed to the affidavit of publication, and to the affidavit of sale. But one copy of the notice suffices for two or more affidavits, where they all refer to it, and are annexed to each other, and filed and recorded together."[3]

§ 817. **Sufficiency of the affidavits.**—It has been held, that a sale made under a foreclosure by advertisement, pursuant to the statute, will bar the equity of redemption, although the usual affidavits may not be made.[4] The earlier cases held, that every requirement of the statute must be strictly complied with; and that if the premises are purchased by the mortgagee, the foreclosure will not be complete without the affidavits which stand in the place of the deed.[5] But it is said in the case of Mowry v. Sanborn,[6] that the

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[1] N. Y. Code Civ. Proc. § 2396. See Mowry v. Sanborn, 72 N. Y. 534 (1878) ; s. c. 68 N. Y. 153 ; 65 N. Y. 581 ; Hubbell v. Sibley, 50 N. Y. 468 (1872) ; Bryan v. Butts, 27 Barb. (N. Y.) 503 (1857) ; Hornby v. Cramer, 12 How. (N. Y.) Pr. 490 (1855).

[2] N. Y. Code Civ. Proc. § 2397.

[3] Mowry v. Sanborn, 72 N. Y. 534 (1878).

[4] See Mowry v. Sanborn, 68 N. Y. 153 (1877); Tuthill v. Tracy, 31 N. Y. 157 (1865); Howard v. Hatch, 29 Barb. (N. Y.) 297 (1859); Osborn v. Merwin, 12 Hun (N. Y.) 332 (1877), revs'g 50 How. (N. Y.) Pr. 183 (1875). See N. Y. Code Civ. Proc. § 2400.

[5] Bryan v. Butts, 27 Barb. (N. Y.) 503 (1859) ; Layman v. Whiting, 20 Barb. (N. Y.) 559 (1855) ; Cohoes Co. v. Gross, 13 Barb. (N. Y.) 138 (1852) ; Arnot v. McClure, 4 Den. (N. Y.) 41 (1847).

[6] 72 N. Y. 534 (1878), revs'g 11 Hun (N. Y.) 545.

statutory proofs of foreclosure and sale are to be liberally construed, and are only required to be certain to a common intent; and that if they are so, though technically defective, they will be sufficient.

If no affidavits are made, and a person other than the mortgagee becomes the purchaser, common-law proof may be made of the publication of the notice.[1] Where the affidavits of publication and sale operate as a conveyance, they can not be controverted by the purchaser and those claiming under him;[2] but such affidavits are not conclusive as to the facts therein stated, when the premises are purchased by the owner of the mortgage. Where the terms of the sale are not stated in the affidavits, oral evidence will be admissible to prove them.[3]

§ 818. **Contents of affidavits.**—The affidavits should show that the proceedings were conducted according to the statute in force when the default occurred;[4] they must be full enough in details to show that the statute was complied with, because a foreclosure by advertisement is technical and not a proceeding in which a court of equity can remedy defects.[5] An affidavit which simply states, that publication of the notice of sale was had "in each week," instead of "in each and every week,"[6] or that the notice of sale was affixed to the door of the court house in said county, "the place where the courts are directed to be held,"[7] or that the notice was affixed twelve weeks before the sale, without showing that the party making the affidavit afterwards saw it there, is sufficient.[8]

But it is not enough to state, that the notice was posted "in a proper manner," or served on "certain persons named

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[1] Brewster v. Power, 10 Paige Ch. (N. Y.) 562 (1844). See also Chalmers v. Wright, 5 Robt. (N. Y.) 713 (1866).

[2] Layman v. Whiting, 20 Barb (N. Y.) 559 (1855); Arnot v. McClure, 4 Den. (N. Y.) 41 (1847).

[3] Story v. Hamilton, 86 N. Y. 428 (1881); Mowry v. Sanborn, 72 N. Y. 534 (1878); s. c. 68 N. Y. 153.

[4] James v. Stull, 9 Barb. (N. Y.) 482 (1850).

[5] Dwight v. Phillips, 48 Barb. (N. Y.) 116 (1865).

[6] Howard v. Hatch, 29 Barb. (N. Y.) 297 (1859).

[7] Bunce v. Reed, 16 Barb. (N. Y.) 347 (1853).

[8] Hornby v. Cramer, 12 How. (N Y.) Pr. 490 (1855).

therein," or that it "was properly folded and directed," and that a "proper postage-stamp was placed on each of said letters," without stating the mode of folding and directing, and the place of residence of the persons for whom the notice was intended.[1] The affidavits must show that the places to which the notices were mailed to the parties, were the residences of such parties,[2] because the fact of residence is important, and should be stated positively and with accuracy;[3] but it seems that a foreclosure by advertisement and sale will not be void, because the affidavit of service of the notice on the mortgagors by mail, was on information and belief only, as to their place of residence, where it is not shown that the mortgagors failed to receive such notices, or that they did not reside at the place mentioned in the affidavit, at the time the notices were mailed to them.[4]

In New York, since the amendment of 1844, requiring service of the notice, as well as the publication and posting thereof, the affidavit must state that such service was made.[5] A statement in the affidavit that service was made upon a person, naming him as "administrator," has been held sufficient, and it has been held further, that the object of the statute was thereby fully complied with.[6]

§ 819. **Amending affidavits.**—If the affidavits are defective, it seems that amended affidavits may be filed according to the facts; as against the mortgagor, at least, they may be filed at any time.[7] But in an action for ejectment, brought against the purchaser at a sale, it was held that the court had no power to allow the purchaser to amend the affidavits so as to state the facts omitted. Statutory proceedings

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[1] Chalmers v. Wright, 5 Robt. (N. Y.) 713 (1866).

[2] Dwight v. Phillips, 48 Barb. (N. Y.) 116 (1865).

[3] Mowry v. Sanborn, 7 Hun (N. Y.) 380 (1876); s. c. 62 Barb. (N. Y.) 223.

[4] Mowry v. Sanborn, 62 Barb. (N. Y.) 223 (1872).

[5] Layman v. Whiting, 20 Barb. (N. Y.) 559 (1855).

[6] George v. Arthur, 2 Hun (N. Y.) 406 (1874); s. c. 4 T. & C. (N. Y.) 635.

[7] Bunce v. Reed, 16 Barb. (N. Y.) 347 (1853). See Story v. Hamilton, 86 N. Y. 428 (1881); Mowry v. Sanborn, 72 N. Y. 534 (1878). But a different rule seems to be held in Dwight v. Phillips, 48 Barb. (N. Y.) 116 (1865).

to foreclose a mortgage are not proceedings in a court, such as to authorize the court to supply omissions, or to remedy defects in the affidavits.[1]

§ 820. **Recording affidavits.**—The Code provides,[2] that the affidavits required to be made "may be filed in the office for recording deeds and mortgages, in the county where the sale took place. They must be recorded at length by the officer with whom they are filed, in the proper book for recording mortgages. The original affidavits, so filed, the record thereof, and a certified copy of the record, are presumptive evidence of the matters of fact therein stated, with respect to any property sold, which is situated in that county. Where the property sold is situated in two or more counties, a copy of the affidavits, certified by the officer with whom the originals are filed, may be filed and recorded in each other county, wherein any of the property is situated. Thereupon the copy and the record thereof have the like effect, with respect to the property in that county, as if the originals were duly filed and recorded therein."

The Code also provides,[3] that "a clerk or a register, who records any affidavits, or a certified copy thereof, filed with him, must make a note upon the margin of the record of the mortgage, in his office, referring to the book and page, or the copy thereof, where the affidavits are recorded."

§ 821. **Necessity of recording affidavits.**—An affidavit of the service of the notice of sale upon the parties entitled thereto, is a necessary part of the record; without it, the record will be fatally defective.[4] In a foreclosure by advertisement the legal title to the premises is transferred by recording

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[1] Dwight v. Phillips, 48 Barb. (N. Y.) 116 (1865).

[2] N. Y. Code Civ. Proc. § 2398.

[3] N. Y. Code Civ. Proc. § 2399.

[4] Mowry v. Sanborn, 65 N. Y. 581 (1875), reversing 62 Barb. (N. Y.) 223. For further decisions, see 68 N. Y. 153 (1877), reversing 7 Hun (N. Y.) 380, and 72 N. Y. 534 (1878), reversing 11 Hun (N. Y.) 545. It is held in some cases, however, that the recording of the affidavits of publication and posting is not necessary to perfect the title. See Mowry v. Sanborn, 68 N. Y. 153, 161 (1877); Howard v. Hatch, 29 Barb. (N. Y.) 297 (1859); Osborn v. Merwin, 12 Hun (N. Y.) 332 (1877); Frink v. Thompson, 4 Lans. (N. Y.) 489 (1869).

the affidavits; a plaintiff in ejectment, claiming under a statutory foreclosure, can not support his action by procuring the necessary affidavits in the foreclosure, to be made subsequently to the commencement of the action in ejectment.[1]

The filing and recording of the affidavits is not necessary, however, as against the mortgagor's equity of redemption, which is effectually barred and foreclosed by the sale, notwithstanding the fact that the affidavit of the publication of the notice of sale, and of the posting thereof, may not have been made and recorded as required by statute, until fifteen years thereafter, and after an action to redeem was brought. Neither will the equitable title of the purchaser be defeated by a claim to redeem.[2]

§ 822. **Contradicting affidavits.**—The affidavits required to be filed in a foreclosure by advertisement, may be controverted by the mortgagor, or by any person claiming under him; and any of the facts stated therein may be disproved by any person except the mortgagee and those claiming under him.[3]

Such affidavits, being made *ex parte*, are only *prima facie* evidence of the facts stated therein;[4] they are merely evidence of the exercise of the power of sale as prescribed by statute for the benefit of the purchaser, and he may show facts necessary to correct any errors therein.[5] But the mortgagee and those claiming under him in an action to recover possession of the premises, must stand on the affidavits, as they existed at the time of the action.[6]

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[1] Tuthill v. Tracy, 31 N. Y. 157 (1865); Bryan v. Butts, 27 Barb. (N. Y.) 503 (1857); Layman v. Whiting, 20 Barb. (N. Y.) 559 (1855); Cohoes Co. v. Goss, 13 Barb. (N. Y.) 137 (1852); Arnot v. McClure, 4 Den. (N. Y.) 41 (1847).

[2] Tuthill v. Tracy, 31 N. Y. 157 (1865).

[3] Sherman v. Willett, 42 N. Y. 146 (1870); Mowry v. Sanborn, 62 Barb. (N. Y.) 223 (1872); s. c. 7 Hun (N. Y.) 380. See Arnot v. McClure, 4 Den. (N. Y.) 41 (1847).

[4] Story v. Hamilton, 86 N. Y. 428 (1881), aff'g 20 Hun (N. Y.) 133.

[5] Story v. Hamilton, 86 N. Y. 428 (1881).

[6] Dwight v. Phillips, 48 Barb. (N. Y.) 116 (1865); Mowry v. Sanborn, 7 Hun (N. Y.) 380 (1876). But see Bryan v. Butts, 27 Barb. (N. Y.) 503 (1857). It is thought by some that, inasmuch as the affidavits may be made at any

§ 823. **Effect of affidavits.**—The affidavits required in a foreclosure by advertisement are simply evidence of the completion of the proceedings, and are for the benefit of the purchaser at the sale, and may be made at any time after the sale has been completed.[1] The mortgagor has a right to retain possession of the mortgaged premises under foreclosure by advertisement, however, until the foreclosure is perfected by the making and filing of the affidavits,[2] just as under a judgment of foreclosure in an equitable action he is entitled to retain possession until the execution and delivery of the deed by the officer making the sale.[3]

The affidavits required by the statute are instruments of conveyance as well as evidence authorizing a conveyance, and the title does not pass until they are completed and filed.[4] But the more recent cases hold, that the recording of such affidavits is not necessary to pass the title to the purchaser, because the statute does not make recording essential, and it seems that the affidavits themselves are made by the statute as good evidence of the facts as the record itself.[5]

§ 824. **A deed not necessary.**—Under the New York Code of Civil Procedure,[6] "the purchaser of the mortgaged

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time after the sale, there is no reason why they may not be corrected at any time, if such corrections, when made prior to the commencement of an action to redeem, are material to their maintenance, or that such affidavits may be made even after the commencement of such an action. Bunce v. Reed, 16 Barb. (N. Y.) 347 (1853). See Story v. Hamilton, 86 N. Y. 428 (1881); Mowry v. Sanborn, 68 N. Y. 153 (1877).

[1] Tuthill v. Tracy, 31 N. Y. 157 (1865). See Osborn v. Merwin, 12 Hun (N. Y.) 332 (1877); Hawley v. Bennett, 5 Paige Ch. (N. Y.) 104 (1835).

[2] Bryan v. Butts, 27 Barb. (N. Y.) 503 (1857); Layman v. Whiting, 20 Barb. (N. Y.) 559 (1855); Arnot v. McClure, 4 Den. (N. Y.) 41 (1847). See Tuthill v. Tracy, 31 N. Y. 157 (1865); Howard v. Hatch, 29 Barb. (N. Y.) 297 (1859).

[3] Mitchell v. Bartlett, 51 N. Y. 447 (1873). See *ante* § 588.

[4] Bryan v. Butts, 27 Barb. (N. Y.) 503 (1857); Layman v. Whiting, 20 Barb. (N. Y.) 559 (1855); Arnot v. McClure, 4 Den. (N. Y.) 41 (1847).

[5] Mowry v. Sanborn, 68 N. Y. 153, 164 (1877); Howard v. Hatch, 29 Barb. (N. Y.) 297 (1859); Osborn v. Merwin, 12 Hun (N. Y.) 332 (1877); Frink v. Thompson, 4 Lans. (N. Y.) 489 (1869).

[6] N. Y. Code Civ. Proc. § 240).

premises, upon a sale conducted as prescribed by this statute, obtains title thereto, against all persons bound by the sale, without the execution of a conveyance. Except where he is the person authorized to execute the power of sale, such a purchaser also obtains title, in like manner, upon payment of the purchase money, and compliance with the other terms of sale, if any, without the filing and recording of the affidavits, as prescribed by this statute. But he is not bound to pay the purchase money, until the affidavits of foreclosure, with respect to the property purchased by him, are filed, or delivered, or tendered to him for filing."

§ 825. **Obtaining possession by purchaser—Summary proceedings.**—The Code provides,[1] that where property has been duly sold upon the foreclosure, by the proceedings above prescribed, of a mortgage executed by the party in possession, or by a person under whom he claims, and the title has been duly perfected, that notice to quit the same may be given, and he may be removed therefrom in the manner prescribed by statute for summary ejectment. In such a proceeding, it is thought to be sufficient to produce before the court the record of the proceedings on foreclosure.[2]

If the proceedings in the foreclosure were regular, the validity of the mortgage, or the motives of the applicant, can not be inquired into in summary proceedings; but it is the duty of the court to examine the evidence of the foreclosure and to ascertain whether the papers upon their face confer a right to the possession of the property.[3]

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[1] New York Code Civ. Procedure, § 2232.

[2] People *ex rel.* Bridenbecker v. Prescott, 3 Hun (N. Y.) 419, 424 (1875); Brown v. Betts, 13 Wend. (N. Y.) 32 (1834).

[3] Getting v. Mohr, 31 Hun (N. Y.) 340 (1884).

CHAPTER XXXV.

STRICT FORECLOSURE.

§ 826. Nature of the remedy.
827. Effect of a strict foreclosure.
828. A severe remedy.
829. In what states allowed.
830. In what states not allowed.
831. Illinois doctrine and practice.
832. New York doctrine and practice.
833. Has strict foreclosure been abolished by the Code in New York?
834. Jurisdiction of court to decree a strict foreclosure in another state.
§ 835. Parties to a strict foreclosure.
836. Who may maintain a strict foreclosure.
837. Strict foreclosure against infants.
838. Pleadings in a strict foreclosure.
839. Judgment in a strict foreclosure.
840. Time for redemption.
841. Setting aside and opening strict foreclosure.

§ 826. **Nature of the remedy.**—The remedy of strict foreclosure, which operates to transfer to the mortgagee the entire mortgaged estate, is regarded with disfavor by the courts of this country. This method of foreclosure had its origin at a time when a mortgage was regarded as a conditional sale of the land, rather than as a security for the payment of a debt. Chancellor Jones has said, in Lansing v. Goelet:[1] "In early times when a mortgage was still regarded as a conditional sale of the land, rather than as a mere security for the payment of a debt, an adherence to the form of the condition in the application of the remedy of the mortgagee, was natural; and it would necessarily lead to the decree of strict foreclosure, requiring the mortgagor to perform the condition by paying the debt within a given time, to be limited by the court, or be forever barred from his right to redeem."

With the establishment of the doctrine now prevailing in this country, that a mortgage is a mere security for the payment of a debt, a breach of the condition for payment

[1] 9 Cow. (N. Y.) 346, 352 (1827).

merely giving to the mortgagee a right to proceed against the security, the natural remedy for such breach was to sell the property and apply the proceeds thereof to the payment of the mortgage debt. The advantages to the debtor of a sale of the property, instead of a strict foreclosure, were much discussed before the practice of ordering a sale was adopted, and became the almost universal remedy as it now is.[1]

§ 827. **Effect of a strict foreclosure.**—The effect of a strict foreclosure, is to transfer to the mortgagee the land for the debt.[2] A strict foreclosure merely extinguishes the right of redemption.[3] It does not become operative as a satisfaction of the debt,[4] until the time fixed by the decree for the redemption of the premises has expired.[5]

It has been said, that the debt will not be extinguished by such a foreclosure,[6] unless the property is of sufficient

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[1] See Bolles v. Duff, 43 N. Y. 469 (1871); s. c. 10 Abb. (N. Y.) Pr. N. S. 399; 41 How. (N. Y.) Pr. 355; 55 Barb. (N. Y.) 313, 580; 7 Abb. (N. Y.) Pr. N. S. 385; 38 How. (N. Y.) Pr. 492, 505; Lansing v. Goelet, 9 Cow. (N. Y.) 346 (1827); Ross v. Boardman, 22 Hun (N. Y.) 527, 531 (1880); Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367 (1818); Mussina v. Bartlett, 8 Port. (Ala.) 277 (1839); Williams' Case, 3 Bland. Ch. (Md.) 186, 193 (1841); Wilder v. Haughey, 21 Minn. 101 (1874).

[2] Lansing v. Goelet, 9 Cow. (N. Y.) 346, 352 (1827). In this case the court say: "In a country where the laws do not permit the sale of real estate by execution at law, for the satisfaction of debts, there might be some apology for preferring the foreclosure to the sale. But in modern times, when the more liberal principle has gained the ascendency, which deals with the mortgage as being, in its substance and legal effect, a mere security for the payment of the debt; and in this state, where the lands of the debtor are subjected to sale for the satisfaction of his debts, it would be strange, indeed, that a court of equity should be without the power to decree a sale of the mortgaged premises for the satisfaction of the debt, and the mortgagee confined to a decree for a strict foreclosure."

[3] Brainard v. Cooper, 10 N. Y. 359 (1852); Bradley v. Chester Valley R. Co., 36 Pa. St. 150 (1860).

[4] Spencer v. Harford, 4 Wend. (N. Y.) 381, 384 (1830).

[5] Peck's Appeal, 31 Conn. 215 (1862); Edgerton v. Young, 43 Ill. 464 (1867).

[6] Vansant v. Allmon, 23 Ill. 30 (1859); Nunemacher v. Ingle, 20 Ind. 135 (1863); Brown v. Wernwag, 4 Blackf. (Ind.) 1 (1835); Germania Building Assoc. v. Neill, 93 Pa. St. 322 (1880); Devereaux v. Fairbanks, 52 Vt. 587 (1880); Smith v. Lamb, 1 Vt. 395 (1829); Strong v. Strong, 2 Aik. (Vt.) 373 (1827).

value to satisfy it,[1] but that the foreclosure simply operates as a payment *pro tanto*.[2] In this form of foreclosure there can be no judgment for deficiency;[3] to recover a deficiency, the mortgagee will be relegated to an action at law upon the debt.

§ 828. **A severe remedy.**—Strict foreclosure is generally regarded in courts of equity as a severe remedy. It is now rarely pursued or allowed, except in cases where a foreclosure by an equitable action has been defectively conducted and some judgment creditor, or other subsequent lienor or incumbrancer, not having been made a party to the action, has a right to redeem. As to him, a strict foreclosure is proper and effective, and, furthermore, the quickest and least expensive procedure that can be pursued.[4]

§ 829. **In what states allowed.**—Strict foreclosure is the usual procedure for enforcing mortgages in Connecticut[5] and in Vermont;[6] where the interests of the parties seem to require it, it is also allowed in Alabama,[7] Illinois,[8]

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[1] DeGrant v. DeGraham, 1 N. Y. Leg. Obs. 75 (1842); Morgan v. Plumb, 9 Wend. (N. Y.) 287 (1832). See Lansing v. Goelet, 9 Cow. (N. Y.) 346, 352 (1827); Globe Ins. Co. v. Lansing, 5 Cow. (N. Y.) 380 (1826); s. c. 15 Am. Dec. 274; Charter v. Stevens, 3 Den. (N. Y.) 35 (1846); Craig v. Tappen, 2 Sandf. Ch. (N. Y.) 78 (1844); Case v. Boughton, 11 Wend. (N. Y.) 106 (1833); Spencer v. Harford, 4 Wend. (N. Y.) 381, 384 (1830); Hatch v. White, 2 Gall. C. C. 152 (1814). It seems that formerly in Connecticut a strict foreclosure operated to extinguish the debt without regard to the value of the property. Swift v. Edson, 5 Conn. 531 (1825); Derby Bank v. Landon, 3 Conn. 62 (1819); Fitch v. Coit, 1 Root (Conn.) 266 (1791); McEven v. Welles, 1 Root (Conn.) 202 (1790).

[2] Paris v. Hulett, 26 Vt. 308 (1854).

[3] Bean v. Whitcomb, 13 Wis. 431 (1861).

[4] Bolles v. Duff, 43 N. Y. 469, 474 (1871).

[5] Palmer v. Mead, 7 Conn. 149, 152 (1828); Conn. Gen. Stats. 358 (1855).

[6] Paris v. Hulett, 26 Vt. 308 (1854). See Sprague v. Rockwell, 51 Vt. 401 (1878).

[7] Where the parties to the mortgage have provided for it, and it is for their interests. Hunt v. Lewin, 4 Stew. & P. (Ala.) 138 (1833). It is said to be the proper remedy, for the purpose of cutting off intermediate incumbrances and liens, where the mortgagee has acquired title to the equity of redemption and it is worth no more than the debt. Hitchcock v. Bank of Pennsylvania, 7 Ala. 386 (1844).

[8] Where the premises are not worth the face of the mortgage,

Iowa,[1] Maine,[2] Massachusetts,[3] Minnesota,[4] North Carolina[5] and Wisconsin.[6] This method of foreclosure has sometimes been allowed in Kentucky,[7] Nebraska,[8] New York[9] and Ohio.[10]

§ 830. **In what states not allowed.**—In California, it is said that the foreclosure of a mortgage in the English sense,

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and the mortgagor is insolvent. Stephens v. Bicknell, 27 Ill. 444 (1862); s. c. 81 Am. Dec. 242; also where the interests of both parties require it. See Johnson v. Donnell, 15 Ill. 97 (1853); Boyer v. Boyer, 89 Ill. 447 (1878); s. c. 8 Cent. L. J. 213.

[1] Where a junior lienholder has not been made a party to a suit to foreclose a prior mortgage, the purchaser at the foreclosure sale may require such lienholder to exercise his right of redemption, or, in default thereof, to be foreclosed and barred of all his rights. Shaw v. Heisey, 48 Iowa, 468 (1878).

[2] Williams v. Hilton, 35 Me. 547 (1853); s. c. 58 Am. Dec. 729.

[3] Norton v. Palmer, 142 Mass. 433 (1886); Thompson v. Tappan, 139 Mass. 506 (1885); Thompson v. Kenyon, 100 Mass. 108 (1868); Green v. Kemp, 13 Mass. 515 (1816); s. c. 7 Am. Dec. 169; Pomeroy v. Winship, 12 Mass. 514 (1885); s. c. 7 Am. Dec. 91.

[4] Heyward v. Judd, 4 Minn. 483 (1860); but the courts of this state are adverse to this method of foreclosure, and will in most cases confine the mortgagee to a sale of the property. See Wilder v. Haughey, 21 Minn. 101 (1874).

[5] In this state foreclosure was formerly made without a sale. See Fleming v. Sitton, 1 Dev. & B. (N. C.) Eq. 621 (1837); subsequently it became the practice in all instances to direct a sale on application, but if no application was made, to decree a strict foreclosure. See Green v. Crockett, 2 Dev. & B. (N. C.) Eq. 390 (1839).

[6] Sage v. McLaughlin, 34 Wis. 550 (1874); Bean v. Whitcomb, 13 Wis. 431 (1861). For the parties consent, see also Bresnahan v. Bresnahan, 46 Wis. 385 (1879).

[7] But the Kentucky Code of Procedure now provides, that there shall be a sale in all cases; Ky. Code of 1867, § 404; Code of 1876, § 375. See Caufman v. Sayre, 2 B. Mon. (Ky.) 202 (1841).

[8] Under the territorial statutes providing for a sale, it was held that a strict foreclosure might be decreed. Woods v. Shields, 1 Neb. 453 (1871); but at present, it seems that the remedy is confined to a sale of the premises. See Kyger v. Ryley, 2 Neb. 20 (1873).

[9] Bolles v. Duff, 43 N. Y. 469 (1871); s. c. 10 Abb. (N. Y.) Pr. N. S. 399, 414; 41 How. (N. Y.) Pr. 355; Kendall v. Treadwell, 5 Abb. (N. Y.) Pr. 16 (1857); s. c. 14 How. (N. Y.) Pr. 165; Blanco v. Foote, 32 Barb. (N. Y.) 535 (1860); Franklyn v. Hayward, 61 How. (N. Y.) Pr. 46 (1881); Ross v. Boardman, 22 Hun (N. Y.) 531 (1880); Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833). But it is thought that strict foreclosure has been abolished in New York. See N. Y. Code Civ. Proc. § 1626.

[10] Where two-thirds of the value of the mortgaged premises did not exceed the debt. See Higgins v.

by which the mortgagor, after default, is called upon to pay the debt by a specified day, or to be forever barred of the equity of redemption, is unknown to our laws.[1] In Gamut v. Gregg,[2] it is said that a strict foreclosure has no place in the Iowa system of procedure. Strict foreclosure in the English sense of the phrase is not allowed in Florida,[3]

West, 5 Ohio, 554 (1832); Anon. 1 Ohio, 235 (1823).

[1] McMillan v. Richards, 9 Cal. 365, 411 (1858); s. c. 70 Am. Dec. 655. See Goodenow v. Ewer, 16 Cal. 461, 467 (1860); s. c. 76 Am. Dec. 540. In this case the court say: "In McMillan v. Richards, *supra*, we had occasion to consider the subject at great length, and to observe upon the diversity existing in the adjudged cases. We there asserted what had previously been held in repeated instances, the equitable doctrine as the true doctrine respecting mortgages, and have ever since applied it under all circumstances. Johnson v. Sherman, 15 Cal. 287 (1860); s. c. 76 Am. Dec. 481; Clark v. Baker, 14 Cal. 612 (1860); s. c. 76 Am. Dec. 449; Koch v. Briggs, 14 Cal. 256 (1859); s. c. 73 Am. Dec. 651; Haffley v. Maier, 13 Cal. 13 (1859); Nagle v. Macy, 9 Cal. 426 (1838). When, therefore, a mortgage is here executed, the estate remains in the mortgagor, and a mere lien or incumbrance upon the premises is created. The proceedings for a foreclosure of the equity of redemption, as those terms are understood where the common law view of mortgages is maintained, is unknown to our system, so far, at least, as the owner of the estate is concerned. The mortgagee can here, in no case, become the owner of the mortgaged premises, except by purchase upon a sale under a judicial decree consummated by conveyance. Proceedings in the nature of a suit to foreclose an equity of redemption, held by a subsequent incumbrancer, may undoubtedly be maintained by a purchaser under the decree, where such incumbrancer was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right by virtue of his lien, and his equity of redemption, extending to the period provided by the statute of limitations, be thus reduced to the statutory period of six months. But the owner of the mortgaged premises, where a power of sale is not embraced in the mortgage, can not, under any circumstances, be cut off from his estate, except by sale in pursuance of the decree of the court. See Montgomery v. Tutt, 11 Cal. 190 (1858); Whitney v. Higgins, 10 Cal. 547 (1858); s. c. 70 Am. Dec. 748; Cal. Practice Act, § 260. To give validity to such decree, the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose."

[2] 37 Iowa, 573 (1873). It seems, however, that strict foreclosure will be allowed where a junior lienholder has not been made a party to the foreclosure of a prior mortgage. See Shaw v. Heisey, 48 Iowa, 468 (1878).

[3] Browne v. Browne, 17 Fla. 607, 623 (1880).

Indiana,[1] Missouri,[2] Pennsylvania,[3] or Tennessee.[4] In Indiana, however, a proceeding in the nature of a strict foreclosure may be maintained by one who holds the legal title to the premises, as against persons who have a mere lien upon or a right of redemption in such premises;[5] but such a remedy is not allowable by a mortgagee as against the person who holds the legal title to the land.[6]

§ 831. **Illinois doctrine and practice.**—In Illinois a strict foreclosure may be decreed, and generally will be, where the premises are not worth the face of the mortgage and the mortgagor is insolvent,[7] or where the interests of both parties seem to require it.[8]

But where the amount which the owner of the equity of redemption is required to pay to redeem from a foreclosure sale, is less than the value of the property, a strict foreclosure can not be maintained; and under the practice in Illinois,[9] a strict foreclosure of a mortgage should not be decreed, as a general rule, when there are junior incumbrances upon the property, or junior creditors or claimants of the equity of redemption.[10] And where the estate of a deceased mortgagor is insolvent, that fact, as well as the descent of the equity of redemption to infant heirs, would seem to require the usual procedure of an equitable action.[11]

But a court of equity will not sacrifice or endanger the rights of a mortgagee holding the oldest and preferred lien and the best equity, for the bare possibility of a wholly improbable benefit to one having a second lien and a subordinate

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[1] Smith v. Brand, 64 Ind. 427 (1878).

[2] O'Fallon v. Clopton, 89 Mo. 284 (1886); Davis v. Holmes, 55 Mo. 349, 351 (1874).

[3] Winton's Appeal, 87 Pa. St. 77 (1878).

[4] Hord v. James, 1 Overt. (Tenn.) 201 (1805).

[5] Jefferson v. Coleman, 110 Ind. 515 (1886).

[6] Jefferson v. Coleman, 110 Ind. 515 (1886).

[7] Stephens v. Bichnell, 27 Ill. 444 (1862); s. c. 81 Am. Dec. 242.

[8] Johnson v. Donnell, 15 Ill. 97 (1853).

[9] Gorham v. Farson, 119 Ill. 425 (1887).

[10] Illinois Starch Co. v. Ottawa Hydraulic Co., 15 West Rep. 56 (1888); Boyer v. Boyer, 89 Ill. 447 (1878).

[11] Boyer v. Boyer, 89 Ill. 447 (1878).

equity. In a recent case[1] the court say: "We do not understand the rule in this state to be that a strict foreclosure will in no case and under no circumstances be allowed where there are other creditors, or other incumbrances upon the mortgaged property, or purchasers of the equity of redemption. It is undoubtedly true that the general rule is, that a strict foreclosure will not be permitted where there is such a creditor, purchaser, or incumbrancer; but in our view there are exceptions to the general rule."

§ 832. **New York doctrine and practice.**—In New York, the usual practice is to order a sale of the premises, as this is the most beneficial course for all parties. Actions for strict foreclosure are of rare occurrence, and are looked upon with disfavor by the courts, except in unusual cases where such an action is the only method by which complete justice can be rendered to all the parties in interest.[2]

Thus, a purchaser under a statutory foreclosure is entitled to maintain an action for strict foreclosure as against the wife of a mortgagor,[3] or against a judgment creditor or a subsequent mortgagee or lienor who was not made a party to the statutory foreclosure, and whose rights were therefore not barred by the sale.[4] As to such a person, a strict foreclosure is not only the proper, but it is thought to be the only remedy.[5]

§ 833. **Has strict foreclosure been abolished by the Code in New York?**—It is suggested that strict foreclosure has been abolished by the New York Code of Civil

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[1] Illinois Starch Co. v. Ottawa Hydraulic Co., 15 West. Rep. 56 (1888).

[2] Franklyn v. Haywood, 61 How. (N. Y.) Pr. 43, 46 (1881); Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833).

[3] Ross v. Boardman, 22 Hun (N. Y.) 527 (1880).

[4] Bolles v. Duff, 43 N. Y. 469, 474 (1871); s. c. 10 Abb. (N. Y.) Pr. N. S. 399; 41 How. (N. Y.) Pr. 355.

[5] Bolles v. Duff, 43 N. Y. 469, 474 (1871); s. c. 10 Abb. (N. Y.) Pr. N. S. 399; 41 How. (N. Y.) Pr. 355; Blanco v. Foote, 32 Barb (N. Y.) 535 (1860); Franklyn v. Haywood, 61 How. (N. Y.) Pr. 46 (1881); Ross v. Boardman, 22 Hun (N. Y.) 527 (1880); Kendall v. Tredwell, 14 How. (N. Y.) Pr. 165 (1857); Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833); Goodenow v. Ewer, 16 Cal. 461 (1860); s. c. 76 Am. Dec. 540; Shaw v. Heisey, 48 Iowa, 468 (1878).

Procedure,[1] which requires that "in an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, *it must direct the sale of the property mortgaged*, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action."

§ 834. **Jurisdiction of court to decree a strict foreclosure in another state.**—Where the parties are within the jurisdiction of the courts of a state, and process is personally served upon the defendants within the state, an action may be maintained for strict foreclosure against lands in another state.[2] Thus, in House v. Lockwood,[3] an action was brought to procure a strict foreclosure of a mortgage given by the defendant upon lands in Cook county, Illinois, to secure the payment of a sum of money due to the plaintiff. The referee dismissed the complaint upon the ground that the court had no jurisdiction of the action, because the land was situated in another state. But the court held this to be error, because the parties were within the jurisdiction of the court when its process was served upon them, and had appeared and put in answers contesting the right of the plaintiff to maintain the action, and the court thereby acquired jurisdiction to entertain the suit and to grant the relief sought.[4]

§ 835. **Parties to a strict foreclosure.**—The rules as to parties to a strict foreclosure are the same as those which govern equitable actions for a sale.[5] It has been said, however, that the plaintiff need not make those persons

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[1] N. Y. Code Civil Proc. § 1626.

[2] See 2 Story's Eq. Jur. (13th ed.) §§ 191, 192, 193.

[3] 40 Hun (N. Y.) 532 (1886); s. c. 1 N. Y. St. Rep. 196.

[4] In this case the court cited and applied Cragin v. Lovell, 88 N. Y. 258 (1882); Bolles v. Duff, 43 N. Y. 469 (1871); s. c. 10 Abb. (N. Y.) Pr. N. S. 399; 41 How. (N. Y.) Pr. 355; Gardner v. Ogden, 22 N. Y. 327 (1860); Bailey v. Ryder, 10 N. Y. 363 (1852); Lansing v. Goelet, 9 Cow. (N. Y.) 346, 356 (1827); Roblin v. Long, 60 How. (N. Y.) Pr. 200 (1880); Sutphen v. Fowler, 9 Paige Ch. (N. Y.) 280 (1841); Mitchell v. Bunch, 2 Paige Ch. (N. Y.) 606, 616, 617 (1831); Watts v. Waddle, 31 U. S. (6 Pet.) 389, 400 (1832); bk. 8 L. ed. 437, 442.

[5] Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833).

parties to the action whose rights have already been barred by a previous foreclosure;[1] but all persons interested in the mortgage, or in the mortgaged property, must be made parties to the suit.[2] Thus, the owner of the equity of redemption is a necessary defendant,[3] and so are subsequent mortgagees.[4]

§ 836. **Who may maintain a strict foreclosure.**—In some states a mortgagee may maintain an ejectment on the mortgage against the mortgagor for a condition broken; so may a grantee in a deed absolute in form given as security for a debt.[5] And a second mortgagee may maintain an action against the first mortgagee and against the owner of the equity of redemption.[6]

Where a bill in equity is brought for a strict foreclosure after the death of the mortgagee, his heirs at law are necessary parties plaintiff, because in such a case the decree vests the legal title to the premises in the heirs, and not in the personal representatives.[7]

§ 837. **Strict foreclosure against infants.**—In a strict foreclosure against an infant, he is entitled to have his day in court after he becomes of age, to show any error in the decree; but if there is no error, he will be bound by the decree.[8] This rule is based on the ancient and well settled principle, that no decree should be rendered against an infant without giving him an opportunity, on coming of age, to show cause against it. The time usually allowed is six months, and the infant is entitled to the process of the court for that purpose on coming of age.[9]

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[1] Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833).

[2] Lyon v. Sanford, 5 Conn. 544 (1825).

[3] Goodenow v. Ewer, 16 Cal. 461 (1860).

[4] Weed v. Beebe, 21 Vt. 495 (1849). See Brooks v. Vermont Cent. R. Co., 14 Blatchf. C. C. 463, 472 (1878); also Goodman v. White, 26 Conn. 317, 320 (1857).

[5] Finlon v. Clark, 118 Ill. 32 (1886); Williams v. Hilton, 35 Me. 547 (1853); s. c. 58 Am. Dec. 729.

[6] Cochran v. Godell, 131 Mass. 464 (1881).

[7] Osborne v. Tunis, 25 N. J. L. (1 Dutch.) 633 (1856).

[8] Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367 (1818); Houston v. Aycock, (5 Sneed.) Tenn. 406 (1858); s. c. 3 Am. Dec. 131.

[9] Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367 (1818); McClellan v.

For this reason, it is thought that instead of ever seeking a strict foreclosure of a mortgage against an infant heir of the mortgagor, it is safer to obtain a decree for the sale of the mortgaged premises, because a decree of sale will be binding upon the infant from the time it is granted.[1]

§ 838. **Pleadings in a strict foreclosure.**—In an action for strict foreclosure, the pleadings and practice are substantially the same as they are in an equitable action for foreclosure and sale.[2] The specific remedy desired should be demanded in the prayer of the complaint; but this is not indispensable, because in an action for foreclosure, if the complaint is drawn in the ordinary form, and it appears in the progress of the cause, that it is desirable, a sale may be ordered, although a strict foreclosure may be prayed for, and *vice versa*.[3]

§ 839. **Judgment in a strict foreclosure** —The judgment in a strict foreclosure should require the persons entitled to redeem to do so within a specified time; in default of such redemption, the title should be decreed to vest absolutely in the plaintiff.[4] Until the expiration of the time limited in the judgment of strict foreclosure for the payment of the mortgage debt, the mortgage will not be foreclosed and the title will not pass to the plaintiff.[5]

§ 840. **Time for redemption.**—The period allowed for redemption should be fixed by the court in the exercise of its sound discretion;[6] it may be enlarged from time to

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McClellan, 65 Me. 508 (1872); Whitney v. Stearnes, 52 Mass. (11 Metc.) 319 (1846); Coffin v. Heath, 47 Mass. (6 Metc.) 76 (1843); Chandler v. McKinney, 6 Mich. 217 (1859); s. c. 74 Am. Dec. 286; Dow v. Jewell, 21 N. H. 470, 487 (1850); Long v. Munford, 17 Ohio St. 506 (1867).

[1] Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367 (1881).

[2] Kendall v. Treadwell, 5 Abb. (N. Y.) Pr. 16 (1857); s. c. 14 How. (N. Y.) Pr. 165

[3] Sage v. McLaughlin, 34 Wis. 550 (1874).

[4] Kendall v. Treadwell, 5 Abb. (N. Y.) Pr. 16 (1857); s. c. 14 How. (N. Y.) Pr. 165; Waters v. Hubbard, 44 Conn. 340 (1877); Farrell v. Parlier, 50 Ill. 274 (1869). See Sage v. Iowa Cent. R. Co., 99 U. S. (9 Otto), 334 (1878); bk. 25 L. ed. 394.

[5] Bolles v. Duff, 43 N. Y. 469 (1871).

[6] Bolles v. Duff, 43 N. Y. 469 (1871); Blanco v. Foote, 32 Barb.

time, on application, and on satisfactory reasons being shown therefor.[1] The time usually allowed for redemption is six months.[2]

Courts are very liberal in strict foreclosures in extending and enlarging, from time to time, the period allowed for redemption; but in actions to redeem, such leniency is not indulged, and the party seeking redemption is required to redeem within the time appointed.[3]

§ 841. **Setting aside and opening strict foreclosure.**— A decree of strict foreclosure may be opened and set aside the same as a decree of foreclosure and sale in an equitable action, and for many of the same causes.[4] After a decree of foreclosure has been entered, the conduct of the parties may be such as to waive, or open the decree; as by treating the debt as still due,[5] or by paying a part of it,[6] or by agreeing that the foreclosure shall be null and void.[7]

Usually, the opening of a decree of strict foreclosure depends upon equitable considerations affecting the rights of the parties, and not upon the regularity of the proceedings.[8] Where a mortgagee supposed that he had made

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(N. Y.) 535 (1860); Perine v. Dunn, 4 Johns. Ch. (N. Y.) 140 (1819); McKinstry v. Mervin, 3 Johns. Ch. (N. Y.) 466 n (1818); Johnson v. Donnell, 15 Ill. 97 (1853); Clark v. Reyburn, 75 U. S. (8 Wall.) 318 (1868); bk. 19 L. ed. 354.

[1] Perine v. Dunn, 4 Johns. Ch. (N. Y.) 140 (1819); Downing v. Palmateer, 1 T. B. Mon. (Ky.) 64, 66 (1824); Quarles v. Knight, 8 Price, 630 (1820); Monkhouse v. Corporation of Bedford, 17 Ves. 380 (1810).

[2] Perine v. Dunn, 4 Johns. Ch. (N. Y.) 140 (1819); McKinstry v. Mervin, 3 Johns. Ch. (N. Y.) 466 n (1818); Barnes v. Lee, 1 Bibb (Ky.) 526 (1809); Harkins v. Forsyth, 11 Leigh (Va.) 294 (1840); Edwards v. Cunliffe, 1 Madd. Ch. 287 (1816); Monkhouse v. Corporation of Bedford, 17 Ves. 380, 407 (1810).

[3] Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65 (1819); Perine v. Dunn, 4 Johns. Ch. (N. Y.) 140 (1819); Harkins v. Forsyth, 11 Leigh (Va.) 294 (1840); Chicago & V. R. Co. v. Fosdick, 106 U. S. (16 Otto), 70 (1882); bk. 27 L. ed. 55.

[4] See *ante* chap. xxvi.

[5] Bissell v. Bosman, 2 Dev. (N. C.) Eq. 154 (1831).

[6] Gilson v. Whitney, 51 Vt. 552 (1879); Smalley v. Hickok, 12 Vt. 153 (1840); Converse v. Cook, 8 Vt. 164 (1836).

[7] Griswold v. Mather, 5 Conn. 435 (1825).

[8] Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556 (1859).

a valid tender within the time limited, which was not good by reason of some informality, the decree of strict foreclosure will be opened ;[1] and if the failure to pay the amount directed to be paid, within the time allowed, is due to overtures for a settlement made by the plaintiff, the decree of foreclosure will be opened.[2] Where a mortgagor who had paid part of the mortgage debt, was prevented by an unavoidable calamity, from paying the balance, until a short time after the day designated for such payment, when he tendered the amount due, the foreclosure was opened.[3]

Where proper service has not been made on the defendants, a strict foreclosure may be set aside on application.[4] In making an application, the party must tender the mortgage debt, or show his readiness to pay it, in order to secure the relief desired.[5]

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[1] Crane v. Hanks, 1 Root (Conn.) 468 (1792).

[2] Pierson v. Clayes, 15 Vt. 93 (1843).

[3] Crane v. Hanks, 1 Root (Conn.) 468 (1792).

[4] Fall v. Evans, 20 Ind. 210 (1863); Mitchell v. Gray, 18 Ind. 223 (1862).

[5] Hatch v. Garza, 7 Tex. 60 (1851).

CHAPTER XXXVI.

FEES, COSTS AND DISBURSEMENTS.

FEES OF REFEREE SELLING—COSTS IN GENERAL—WHEN DISCRETIONARY—WHO MAY HAVE—PRIOR AND JUNIOR LIENORS—GUARDIAN *AD LITEM*—STIPULATION FOR COUNSEL FEE—STATUTORY FORECLOSURE—COSTS IN DISTRIBUTING SURPLUS.

§ 842. Fees of officer conducting sale.
843. Fees of such officer statutory.
844. Appeal from order fixing fees of referee to sell.
845. Costs in general.
846. Costs in equitable actions to foreclose.
847. Costs where guarantor of mortgage deceased.
848. Costs of foreclosure in discretion of court.
849. Costs under New York Code of Civil Procedure.
850. Exceptions to discretion of court in allowing costs.
851. Who may recover costs.
852. Prior mortgagee entitled to costs.
853. Costs to subsequent incumbrancers.
854. Costs on two foreclosures against same property.
855. When costs not allowed to mortgagee.
856. When costs not allowed to defendants.
857. Notice of no personal claim.
858. Effect of excessive demand in the complaint.
859. Effect of tender after action brought.
860. Costs on default.
861. Costs allowed guardian *ad litem*.
862. Costs on appointment of receiver.
§ 863. Costs on resale.
864. Who personally liable for costs.
865. Out of what fund costs payable.
866. Counsel fee in foreclosing a mortgage.
867. Counsel fee in Kentucky and Michigan.
868. Stipulation for attorney's fee —When usurious.
869. Allowance of attorney's fee —Discretion of court.
870. Allowance of attorney's fee a matter of contract or statute.
871. Enforcement of counsel fee against purchaser.
872. Allegation as to counsel fee.
873. When attorney's fee not allowed.
874. Costs on redeeming.
875. Foreclosure under power—Mortgagee's compensation.
876. Expenses and disbursements of trustee.
877. Taxing costs and disbursements on foreclosure by advertisement.
878. What disbursements allowed.
879. Who may require taxation of costs and disbursements.
880. Costs in surplus proceedings.
881. Who entitled to costs in surplus proceedings.
882. Who chargeable with costs in surplus proceedings.
883. Disbursements in surplus proceedings.

§ 842. **Fees of officer conducting sale.**—The New York Code of Civil Procedure provides,[1] that "the fees of a referee appointed to sell real property pursuant to a judgment in an action, are the same as those allowed to the sheriff; and he is also allowed the same disbursements as the sheriff.[2] Where a referee is required to take security upon a sale, or to distribute, or apply, or ascertain and report upon the distribution or application of, any of the proceeds of the sale, he is also entitled to one-half of the commissions upon the amount so secured, distributed, or applied, allowed by law to an executor or administrator for receiving and paying out money. But commissions shall not be allowed to him upon a sum bidden by a party, and applied upon that party's demand, as fixed by the judgment, without being paid to the referee. And a referee's compensation, including commissions, can not, where the sale is under a judgment, in an action to foreclose a mortgage, exceed fifty dollars, or in any other case five hundred dollars."[3]

§ 843. **Fees of such officer statutory.**—It has always been the policy of the law to prescribe and fix the compensation which may be demanded for the performance of legal duties by public officers. And where no provision is made, either directly or indirectly, no fees can be lawfully demanded. Costs and fees are recoverable by virtue of statutory authority only, and where no such authority exists, no claim for their recovery can be maintained.[4]

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[1] N. Y. Code Civ. Proc. § 3297.

[2] As to the fees allowed to a sheriff, see N. Y. Code Civ. Proc. § 3307.

[3] N. Y. Code Civ. Proc. § 3297. Race v. Gilbert, 102 N. Y. 298 (1886); Schermerhorn v. Prouty, 80 N. Y. 317 (1880); s. c. 21 Alb. L. J. 275; Maher v. O'Conner, 61 How. (N. Y.) Pr. 103 (1881); Walbridge v. James, 16 Hun (N. Y.) 8 (1878). See Daby v. Jacot, 2 Abb. (N. Y.) N. C. 97 (1877); Richards v. Richards, 2 Abb. (N. Y.) N. C. 93 (1875); Innes v. Purcell, 2 T. & C. (N. Y.) 538 (1874); s. c. 1 Hun (N. Y.) 318. The act (chap. 569, Laws 1869, as amended by chap. 192, Laws 1874) in relation to the fees of sheriffs and referees, on foreclosure sales in the city and county of New York, was not repealed by the amendment of 1876 to § 309 of the Code of Procedure, which limits the sum to be allowed as fees on such a sale. The amendment simply modifies the act by fixing the maximum of fees, leaving the scale of charges up to that limit as fixed by said act. Schermerhorn v.

A referee is entitled to receive only the same fees for selling real estate, as are allowed by law to a sheriff;[1] he can recover for such services no more than the fees prescribed by statute, although there may be an express agreement between the parties to pay a larger sum.[2] No fees can be allowed to an auctioneer for services upon the adjournment of a sale by a referee.[3]

It has been held, in the case of Lockwood v. Fox,[4] that chapter 569, of the laws of 1869, as amended by chapter 192, of the laws of 1874, not having been repealed, is by virtue of section 3308 of the Code of Civil Procedure, still in force, and that the fees of a referee to sell, on a foreclosure in the city and county of New York, must be taxed thereunder.

§ 844. **Appeal from order fixing fees of referee to sell.**—Under section 1296 of the Code, a referee appointed to sell real estate in pursuance of a judgment, may appeal from an order fixing his fees and compensation.[5] An order making an allowance to a referee appointed to conduct the sale under a decree of foreclosure, which charges the owner of the equity of redemption with the payment of a definite sum of money, which is greater than he or his property can lawfully be charged with, affects a substantial right, and is appealable when made in a summary application for judgment.[6]

§ 845. **Costs in general.**—In actions at law, the rule seems to be well settled, both in England and in this country, that the prevailing party is entitled to costs,

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Prouty, 80 N. Y. 317 (1880); s. c. 21 Alb. L. J. 275.

[4] Innes v. Purcell, 2 T. & C. (N. Y.) 538, 539 (1874); s. c. 1 Hun (N. Y.) 318. See Downing v. Marshall, 37 N. Y. 380 (1867).

[1] Ward v. James, 8 Hun (N. Y.) 526 (1876); Innes v. Purcell, 2 T. & C. (N. Y.) 538 (1874); s. c. 1 Hun (N. Y.) 318; N. Y. Code Civ. Proc. § 2397.

[2] Brady v. Kingsland, 5 N. Y. Civ. Proc. Rep. 413 (1884).

[3] Ward v. James, 8 Hun (N. Y.) 526 (1876).

[4] 1 N. Y. Civ. Proc. Rep. 407 (1881).

[5] Hobart v. Hobart, 23 Hun (N. Y.) 484 (1881).

[6] Innes v. Purcell, 2 T. & C. (N. Y.) 538 (1874); s. c. 1 Hun (N. Y.) 318. See People v. New York Cent. R. Co., 29 N. Y. 418, 422 (1864).

although he may recover only a part of his demand; this rule has been established by statute in many states.[1] A debtor may, however, by offering to confess judgment for a certain amount, become entitled to costs accruing subsequently to his offer, provided his creditor fails to recover more than the amount offered.[2]

In suits in equity, however, the allowance, or disallowance, of costs depends largely on the circumstances of each particular case, and rests entirely within the discretion of the court, to be exercised upon equitable principles and with reference to the general rules of practice. *Prima facie*, the successful party is entitled to costs, and it is incumbent upon the defeated party, if there are just reasons why he should not pay a bill of costs, to show such circumstances as would overcome the presumptive right of the successful party; if it is shown that it would be unjust to compel the defeated party to pay costs, the court may, in the exercise of its sound discretion, refuse costs to either party, or it may even impose them upon the successful party.[3]

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[1] Wood v. Brown, 6 Daly (N. Y.) 428 (1876); St. Charles v. O'Mailey, 18 Ill. 407 (1857); Brandies v. Stewart, 1 Met. (Ky.) 395 (1858); Underwood v. Lacapere, 14 La. An. 274 (1859); Wall v. Covington, 76 N. C. 150 (1877); Little v. Lockman, 5 Jones (N. C.) L. 433 (1858); McReynolds v. Cates, 7 Humph. (Tenn.) 29 (1846).

[2] Bathgate v. Haskin, 63 N. Y. 261 (1875); O'Conner v. Arnold, 53 Ind. 203 (1876); Rucker v. Howard, 2 Bibb (Ky.) 166, 169 (1810); Building Assoc. v. Crump, 42 Md. 192 (1874); Holden v. Kynaston, 2 Beav. 204, 206 (1840).

[3] Eldridge v. Strenz, 39 N. Y. Supr. Ct. (7 J. & S.) 295 (1875); Belmont v. Ponvert, 38 N. Y. Supr. Ct. (6 J. & S.) 425 (1874); Robinson v. Cropsey, 2 Edw. Ch. (N. Y.) 138 (1833); Travis v. Waters, 12 Johns. (N. Y.) 500 (1815); Glen v. Fisher, 6 Johns. Ch. (N. Y.) 33 (1822); s. c. 10 Am. Dec. 310; Methodist Church v. Jaques, 1 Johns. Ch. (N. Y.) 65 (1814); Gray v. Gray, 15 Ala. 779 (1849); Temple v. Lawson, 19 Ark. 148 (1857); Cowles v. Whitman, 10 Conn. 121 (1834); s. c. 25 Am. Dec. 60; Pearce v. Chastain, 3 Ga. 226 (1847); s. c. 46 Am. Dec. 423; McArtee v. Engart, 13 Ill. 242 (1851); Frisby v. Ballance, 5 Ill. (4 Scam.) 287 (1843); s. c. 39 Am. Dec. 409; Stone v. Locke, 48 Me. 425 (1861); Lee v. Pindle, 12 Gill. & J. (Md.) 288 (1842); Clark v. Reed, 28 Mass. (11 Pick.) 449 (1831); Carpenter v. Easton & A. R. R. Co., 28 N. J. Eq. (1 Stew.) 390 (1877); Decker v. Caskey, 3 N. J. Eq. (2 H. W. Gr.) 446 (1836); Hess v. Beates, 78 Pa. St. 429 (1875); Massing v. Ames, 38 Wis. 285 (1875); Pennsylvania

In Clark v. Reed,[1] Putman, J., in delivering the opinion of the court, stated the general practice in equity, with his usual accuracy, as follows: "We adopt the general rule, that the prevailing party is to have costs, as applicable to suits in equity as well as at law. It will be applied, unless the losing party can show that equity requires a different judgment. If it should appear that the plaintiff had good reason to think the respondent was liable upon equitable principles to pay money, to perform specific contracts, or to make discovery, and it should, upon hearing of the answer, appear that no such cause existed, as the plaintiff had reason to suppose did exist, the court would not award costs against him, if it appeared that the respondent was in such a situation as to render it probable that he was amenable to the call of the plaintiff upon equitable principles. On the other hand, if it should appear that the plaintiff knew the whole ground and made a claim in equity, which was successfully resisted by the respondent, it would seem that costs should be allowed as well in equity as at law. The mere change of the forum should not in reason make any difference in the question of costs."

§ 846. Costs in equitable actions to foreclose.—The mortgagee in a foreclosure, like the plaintiff in other actions, is generally entitled to a bill of costs, if he prevails and obtains a decree of sale.[2] But all costs and fees are, as a rule, statutory;[3] and where no statutory right to charge or allow them exists, no legal or equitable right to do so can be presumed.[4]

Where the facts alleged and proved entitle the plaintiff to costs, a judgment rendered for costs will not be reversed

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v. Wheeling & Belmont Bridge Company, 59 U. S. (18 How.) 421 (1855); bk. 15 L. ed. 435; Brooks v. Byam, 2 Story C. C. 553 (1843); Hunter v. Marlboro, 2 Woodb. & Min. C. C. 168 (1846); Vancouver v. Bliss, 11 Ves. 462 (1805).

[1] 28 Mass. (11 Pick.) 449 (1831).

[2] Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833); Conclin v. Coddington, 12 N.J. Eq.(1 Beas.) 250 (1859); s. c. 72 Am. Dec. 393; Wetherell v. Collins, 3 Madd. 255 (1818); Bartle v. Wilkin, 8 Sim. 238 (1836); Loftus v. Swift, 2 Sch. & Lef. 642 (1806).

[3] Ward v. James, 8 Hun (N. Y.) 526 (1876).

[4] Ward v. James, 8 Hun (N. Y.) 526 (1876). See Downing v. Marshall, 37 N. Y. 380 (1867); s. c. 80 Am. Dec. 290; Innes v. Purcell, 2

or set aside merely because the plaintiff did not ask for costs in his complaint;[1] the established practice, however, requires the successful party to apply by motion for his costs, or to demand them in some manner.[2] And where the court of appeals reverses a judgment, "with costs to abide the event," the party who finally succeeds can recover costs for all the different steps in the action.[3]

In the case of Bockes v. Hathorn,[4] it was held that where an action on a bond and to foreclose a mortgage collateral thereto, is difficult and unusual, on account of a defence and trial, an additional allowance, not exceeding five per centum of the recovery, nor $2,000 in the aggregate, may be granted to any party.

§ 847. **Costs where guarantor of mortgage deceased.** —In proceedings to sell the real estate of a deceased guarantor of a mortgage, the costs of foreclosure can not be considered as a part of the debt, yet as they are incidental to the endeavor to collect the same out of the premises, the amount to be credited on the debt is the proceeds realized from the foreclosure, after deducting the costs.[5] A surety has no equity to demand that so much money as is necessary to pay the costs of collection, shall be withheld from that object and applied exclusively to satisfy the principal of the debt, for as the creditor is entitled to the whole amount, the expenses of collection are properly deductible from the sum realized from the principal debtor.

§ 848. **Costs of foreclosure in discretion of court.**— The allowance of costs in actions in equity is always in the

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T. & C. (N. Y.) 538 (1874); s. c. 1 Hun (N. Y.) 318.

[1] Hees v. Nellis, 1 T. & C. (N. Y.) 118, 121 (1873).

[2] Chase v. Miser, 67 Barb. (N. Y.) 441, 443 (1875); Lanz v. Trout, 46 How. (N. Y.) Pr. 94 (1873). See Gray v. Hannah, 3 Abb. (N. Y.) Pr. N. S. 183 (1867).

[3] Newcomb v. Hale, 4 N. Y. Civ. Proc. Rep. 25, 27 (1882). See First Nat. Bank of Meadville v. Fourth Nat. Bank of New York, 84 N. Y. 169 (1881); Donovan v. Vandermark, 22 Hun (N. Y.) 307 (1880); Saunders v. Townshend, 63 How. (N. Y.) Pr. 343 (1882).

[4] 17 Hun (N. Y.) 87 (1879), distinguishing Hunt v. Chapman, 62 N. Y. 333 (1875); N. Y. Code Civ. Proc. §§ 3252, 3253.

[5] Hurd v. Callahan, 9 Abb. (N. Y.) N. C. 374 (1881).

discretion of the trial court,[1] but the discretion to be exercised must be a reasonable and sound one.[2] Their allowance, or disallowance, will always depend largely on the facts and circumstances of each particular case, and the discretion of the court is to be exercised without reference to the general rules of practice, but as equity may require.[3] Such discretion will not be interfered with by an appellate court, except in cases of open abuse or gross error, or where it is exercised in disregard of recognized equitable principles.[4]

The matter of costs, in the several states, depends very much upon their statutes and practice, which are quite dissimilar. But as foreclosures are equitable actions in most

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[1] Garr v. Bright, 1 Barb. Ch. (N. Y.) 157 (1845); Methodist Episcopal Church v. Jaques, 1 Johns. Ch. (N. Y.) 65 (1814); Lyman v. Lyman, 2 Paine C. C. 53 (1829). See Mackey v. Cairns, 5 Cow. (N. Y.) 575, 586 (1825); s. c. 15 Am. Dec. 477; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129 (1817); s. c. 8 Am. Dec. 467; Pendelton v. Eaton, 3 Johns. Ch. (N. Y.) 69 (1817); Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566 (1815); Travis v. Waters, 1 Johns. Ch. (N. Y.) 89 (1814); Nicoll v. Trustees of Huntington, 1 Johns. Ch. (N. Y.) 166 (1814); Cunningham v. Freeborn, 11 Wend. (N. Y.) 258 (1833); Pearce v. Chastain, 3 Ga. 226 (1847); s. c. 46 Am. Dec. 423; The Martha, Blatchf. & How. D. C. 169 (1830).

[2] Eastburn v. Kirk, 2 Johns. Ch. (N. Y.) 317 (1817). See Law v. McDonald, 9 Hun (N. Y.) 23 (1876).

[3] *Prima facie*, the prevailing party is entitled to costs, and it devolves upon the defeated party to overcome such presumptive right. See Atkinson v. Manks, 1 Cow. (N. Y.) 691 (1823); Canfield v. Morgan, 1 Hopk. Ch. (N. Y.) 224 (1824); Aymer v. Gault, 2 Paige Ch. (N. Y.) 284 (1830); Badeau v. Rogers, 2 Paige Ch. (N. Y.) 209 (1830); Gray v. Gray, 15 Ala. 779 (1849); Temple v. Lawson, 19 Ark. 148 (1857); Cowles v. Whitman, 10 Conn. 121 (1834); s. c. 25 Am. Dec. 60; McArtee v. Engart, 13 Ill. 243 (1851); Frisby v. Ballance, 5 Ill. (4 Scam.) 287 (1843); s. c. 34 Am. Dec. 409; Clark v. Reed, 28 Mass. (11 Pick.) 449 (1831); Saunders v. Frost, 22 Mass. (5 Pick.) 259 (1827); s. c. 16 Am. Dec. 395; Farley v. Blood, 30 N. H. 354 (1854); Carpenter v. Easton & A. R. Co., 28 N. J. Eq. (1 Stew.) 392 (1877); Decker v. Caskey, 3 N. J. Eq. (2 H. W. Gr.) 446 (1836); Hess v. Beates, 78 Pa. St. 429 (1875); Manchester P. W. v. Stimpson, 2 R. I. 415 (1853); Pennsylvania v. Wheeling & B. B. Co., 59 U. S. (18 How.) 421 (1855); bk. 15 L. ed. 435; Spring v. South Carolina Ins. Co., 21 U. S. (8 Wheat.) 268 (1823); bk. 5 L. ed. 614; Hunter v. Marlboro, 2 Woodb. & Min. C. C. 168 (1846); Aldrich v. Thompson, 2 Bro. Ch. 149 (1787).

[4] Morris v. Wheeler, 45 N. Y. 708 (1871); Barker v. White, 1 Abb.

states, the costs are generally within the discretion of the court.[1] And, although there is no fixed rule for granting costs, as in courts of law, courts of equity rarely, if ever, refuse to allow them.[2]

§ 849. **Costs under New York Code of Civil Procedure.**—In New York, the allowance of costs in equity cases stands on the same footing now that it did before the enactment of the Code of Civil Procedure.[3] The rules governing costs apply to actions for strict foreclosure, as well as to equitable actions for a decree of foreclosure and sale.[4]

Where the action is tried before a referee, the referee takes the place of the court, and the question of costs is a matter resting in his sound discretion.[5] If his discretion is honestly exercised,[6] it can be interfered with only by an appeal from the judgment.[7]

§ 850. **Exceptions to discretion of court in allowing costs.**—Where a party to a foreclosure is dissatisfied with the costs allowed by a trial court, his only method for

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App. Dec. (N. Y.) 95 (1867); House v. Eisenlord, 30 Hun (N. Y.) 90, 92 (1883).

[1] Garr v. Bright, 1 Barb. Ch. (N. Y.) 157 (1845); O'Hara v. Brophy, 24 How. (N. Y.) Pr. 379 (1863); Bartow v. Cleveland, 16 How. (N. Y.) Pr. 364 (1858); s. c. 7 Abb. (N. Y.) Pr. 339; Pratt v. Ramsdell, 16 How. (N. Y.) Pr. 59 (1858); s. c. 7 Abb. (N. Y.) Pr. 340 n; Lossee v. Ellis, 13 Hun (N. Y.) 655 (1878); Gallagher v. Egan, 2 Sandf. (N. Y.) 742 (1850).

[2] Garr v. Bright, 1 Barb. Ch. (N. Y.) 157 (1845); Eastburn v. Kirk, 2 Johns. Ch. (N. Y.) 317 (1817); Stevens v. Veriane, 2 Lans. (N. Y.) 90 (1870).

[3] Law v. McDonald, 9 Hun (N. Y.) 23 (1876). See Phelps v. Woods, 46 How. (N. Y.) Pr. 1 (1873); Pratt v. Stiles, 17 How. (N. Y.) Pr. 211 (1859); Church v. Kidd, 3 Hun (N. Y.) 254 (1874). See N. Y. Code Civ. Proc. §§ 3228, 3229, 3230.

[4] O'Hara v. Brophy, 42 How. (N. Y.) Pr. 379 (1863). See Bartow v. Cleveland, 7 Abb. (N. Y.) Pr. 339 (1858); s. c. 16 How. (N. Y.) Pr. 364.

[5] Graves v. Blanchard, 3 N. Y. Code Rep. 25 (1850); s. c. 4 How. (N. Y.) Pr. 300; Pratt v. Styles, 9 Abb. (N. Y.) Pr. 150 (1859); s. c. 17 How. (N. Y.) Pr. 211; Ludington v. Taft, 10 Barb. (N. Y.) 447 (1857); Couch v. Millard, 3 How. (N. Y.) Pr. N. S. 22 (1885); Lossee v. Ellis, 13 Hun (N. Y.) 655 (1878); Law v. McDonald, 9 Hun (N. Y.) 23 (1876).

[6] Taylor v. Root, 48 N. Y. 687 (1872).

[7] Lossee v. Ellis, 13 Hun (N. Y.) 655 (1878).

obtaining relief is to challenge the finding as to costs by an exception and an appeal from the judgment.[1] Where a trial court allows costs under a mistaken idea of the law, it is the duty of the appellate court to correct the error.[2]

In New York, the discretion of the trial judge in an action to foreclose a mortgage will not be interfered with on appeal to the general term, except in cases of abuse or gross error, in which recognized equities and rights were disregarded.[3]

§ 851. **Who may recover costs.**—A judgment for costs may be entered in favor of any party to the action.[4] As a general rule, the mortgagee is entitled to his costs of the suit, whether he is plaintiff or defendant.[5] If, however, he has been guilty of improper conduct, the court may not only refuse him costs, but may compel him to pay the costs of the action.[6] Thus, if the action was occasioned by the unreasonable or fraudulent conduct of the mortgagee, he will be liable for its costs.[7]

All defendants, who properly appear and answer, are entitled to their costs, as a rule. But where several defendants have the same solicitor, they will not be allowed to swell the costs by filing separate answers.[8] This rule is different in New York, where the plaintiff alone can tax a bill of costs against the mortgaged premises.

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[1] Rosa v. Jenkins, 31 Hun (N. Y.) 384 (1884); Woodford v. Bucklin, 14 Hun (N. Y.) 444 (1878).

[2] Morris v. Wheeler, 45 N. Y. 708 (1871).

[3] House v. Eisenlord, 30 Hun (N. Y.) 90 (1883). See *ante* § 848.

[4] Garr v. Bright, 1 Barb. Ch. (N. Y.) 257 (1845).

[5] Concklin v. Coddington, 12 N. J. Eq. (1 Beas.) 250 (1857); s. c. 72 Am. Dec. 393. See Hurd v. Callahan, 9 Abb. (N. Y.) N. C. 374 (1881); Berlin Building & L. Assoc. v. Clifford, 30 N. J. Eq. (3 Stew.) 482 (1879); Young v. Young, 17 N. J. Eq. (2 C. E. Gr.) 161 (1864).

[6] Pratt v. Stiles, 9 Abb. (N Y.) Pr. 150 (1858); s. c. 17 How. (N. Y.) Pr. 211; Large v. Van Doren, 14 N. J. Eq. (1 McCart.) 208 (1862); Concklin v. Coddington, 12 N. J. Eq. (1 Beas.) 250 (1857); s. c. 72 Am. Dec. 393; Detillin v. Gale, 7 Ves. 583 (1802). *Compare*, Bathgate v. Haskin, 63 N. Y. 261 (1875).

[7] Saunders v. Frost, 22 Mass. (5 Pick.) 259 (1827); s. c. 16 Am. Dec. 394.

[8] Danbury v. Robinson, 14 N. J. Eq. (1 McCart.) 324 (1862).

§ 852. **Prior mortgagee entitled to costs.**—A prior mortgagee, who has been properly made a defendant for the purpose of having the amount of his claim ascertained, is entitled to a bill of costs,[1] and the same is true where such mortgagee has been improperly joined as a party to the action. In the first case, he is entitled to have his costs paid out of the property, and in the latter, to have them taxed against the plaintiff personally.[2]

Where a prior mortgagee is made a party to an action for foreclosure, brought by a second mortgagee, he is entitled to have his taxable costs first paid out of the proceeds of the sale, and if the second mortgagee wishes to save such costs, he must tender the prior mortgagee the amount due on his mortgage.[3] Such a prior mortgagee will not forfeit his right to costs by setting up in his answer, in addition to his mortgage, an interest in the premises acquired under a tax sale, even if such claim is decided against him.[4]

But it is thought, that if such prior mortgagee puts in an answer and compels the plaintiff to prove his case, and thereby unnecessarily increases the costs, where the right of such mortgagee might have been properly protected by an appearance on the reference to compute the amount due, he will not only be denied his costs, but may properly be called upon to pay the costs consequent upon such conduct.[5]

§ 853. **Costs to subsequent incumbrancers.**—A subsequent incumbrancer was formerly entitled to a bill of costs in a mortgage foreclosure.[6] But, if subsequent incumbrancers

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[1] Boyd v. Dodge, 10 Paige Ch. (N. Y.) 42 (1843); Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 526 (1834); Slee v. Manhattan Ins. Co., 1 Paige Ch. (N. Y.) 48 (1828); Berlin Building & Loan Assoc. v. Clifford, 30 N. J. Eq. (3 Stew.) 482 (1879); Lithauer v. Royle, 17 N. J. Eq. (2 C. E. Gr.) 40 (1864).

[2] Millandon v. Brugiere, 11 Paige Ch. (N. Y.) 163 (1844); Boyd v. Dodge, 10 Paige Ch. (N. Y.) 42 (1843).

[3] Concklin v. Coddington, 12 N. J. Eq. (1 Beas.) 250 (1859); s. c. 72 Am. Dec. 393.

[4] Concklin v. Coddington, 12 N. J. Eq. (1 Beas.) 250 (1859); s. c. 72 Am. Dec. 393.

[5] Barnard v. Bruce, 21 How. (N. Y.) Pr. 360 (1860).

[6] Young v. Young, 17 N. J. Eq. (2 C. E. Gr.) 161 (1864).

unnecessarily appeared and answered, they were not entitled to costs until the plaintiff's debt and costs had been paid.[1] Now, however, a junior lienor is rarely allowed a bill of costs.

If the claims of subsequent incumbrancers are correctly set forth in the complaint for the foreclosure of a prior mortgage, it will not be necessary for them to appear, because their rights will be fully protected under the decree; and it has been said, that where the appearance of such an incumbrancer, though proper, is not necessary, the plaintiff, upon receiving the amount due him, may discontinue as against subsequent incumbrancers who have appeared, without costs to them.[2]

By the rules and the course of practice of the court of chancery of New York, a subsequent incumbrancer was not entitled to costs until the debts and costs of all prior incumbrancers had been satisfied.[3]

§ 854. **Costs on two foreclosures against same property.**—In Wendell v. Wendell,[4] where there were two separate mortgages on the same property, belonging to different mortgagees, and the holder of the first mortgage filed a bill of foreclosure against the second mortgagee and the owners of the mortgaged premises, and the same solicitor filed another bill in behalf of the second mortgagee, against the first mortgagee and the owners of the premises, to foreclose the second mortgage, the court held, that only one bill of foreclosure was necessary, and that the owners of the equity of redemption could be charged with the costs of one suit only. This decision is based upon the principle, that where an action is unnecessarily brought, or where the relief asked for, might have been obtained by an application to the court on a motion in a case already pending, the party commencing such action can not recover costs.[5]

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[1] Barnard v. Bruce, 21 How. (N. Y.) Pr. 360 (1860); Merchants' Ins. Co. v. Marvin, 1 Paige Ch. (N. Y.) 557 (1829).

[2] Gallagher v. Egan, 2 Sandf. (N. Y.) 742 (1850).

[3] Boyd v. Dodge, 10 Paige Ch. (N. Y.) 42 (1843); Lithauer v. Royle, 17 N. J. Eq. (2 C. E. Gr.) 40, 44 (1864). See Smack v. Duncan, 4 Sandf. Ch. (N. Y.) 621 (1847).

[4] 3 Paige Ch. (N. Y.) 509 (1832).

[5] Roosevelt v. Ellithorp, 10 Paige Ch. (N. Y.) 415 (1843); De

But, where a subsequent incumbrancer can not secure the relief desired, by an application in a suit already pending, the above rule does not apply. Thus, where a second mortgagee is unable to secure the relief prayed for,—that is to obtain a satisfaction of his mortgage,—in a suit already pending for the foreclosure of a prior mortgage, because of an injunction staying the sale in such suit, he will be entitled to his costs in an independent action to foreclose.[1]

§ 855. **When costs not allowed to mortgagee.**—While a mortgagee plaintiff is generally entitled to costs, yet he will not be allowed costs if the foreclosure is defective, on account of his errors in the conduct of the proceedings, whereby a new foreclosure is rendered necessary.[2]

Where a mortgagee, by his refusal to accept the mortgage debt when tendered, or by interposing groundless objections to a redemption, compels the mortgagor or his assignee to resort to an action, he will not be allowed, but on the contrary, may sometimes be compelled to pay costs.[3] Where the plaintiff in a mortgage foreclosure, unnecessarily sets out the rights of the several defendants at length, the extra costs occasioned thereby will not be allowed on taxation.[4]

§ 856. **When costs not allowed to defendants.**—Costs will not be allowed to a defendant who unnecessarily answers;[5] and where an action has been unreasonably, unjustifiably or improperly defended, so that unnecessary expenses have been incurred, it is thought that the court may, in its discretion, order the costs, or such part of them as may be proper, to be paid personally by the contesting party; otherwise the costs of the prevailing party should be paid from the fund.[6]

LaVergne v. Evertson, 1 Paige Ch. (N. Y.) 181 (1828); s. c. 19 Am. Dec. 411.

[1] Bache v. Purcell, 6 Hun (N. Y.) 518 (1876); aff'd 51 How. (N. Y.) Pr. 270.

[2] Clark v. Stilson, 36 Mich. 482 (1877)

[3] Slee v. Manhattan Co., 1 Paige Ch. (N. Y.) 48 (1828). See Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 535 (1834).

[4] Union Ins. Co. v. VanRensselaer, 4 Paige Ch. (N. Y.) 85 (1833).

[5] Rood v. Winslow, 2 Doug. (Mich.) 68 (1845).

[6] Millandon v. Brugiere, 11 Paige

§ 857. **Notice of no personal claim.**—It has been seen,[1] that the plaintiff in a mortgage foreclosure may relieve himself of the expense of unnecessary disclaimers, by defendants who are made parties to the action solely for the purpose of extinguishing their claims and of perfecting the title, by serving upon them a notice that no personal claim is made against them; if any defendant, served with such a notice, unnecessarily defends, he will be personally liable for costs to the plaintiff.[2] A notice of no personal claim is required, although a copy of the complaint may have been served.[3]

But it is thought that the neglect of the plaintiff to serve a notice of no personal claim, will not deprive the court of power to award costs against a defendant who unnecessarily or unreasonably defends.[4]

§ 858. **Effect of excessive demand in the complaint.**—The fact, that a mortgagee demands a larger sum in his complaint than the court finally decides he is entitled to receive, is no ground for refusing him a bill of costs.[5] The court held, in Loftus v. Swift,[6] that "a mortgagee is always considered as entitled to costs, unless there be something of positive misconduct. Merely extending his claim beyond what the court finally decides he is entitled to, is no ground for refusing him his costs." If, however, he has acted oppressively in demanding a larger sum than was due on his mortgage, and the mortgagor has been diligent in endeavoring to ascertain from him the amount of the

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Ch. (N. Y.) 163 (1844); Boyd v. Dodge, 10 Paige Ch. (N. Y.) 42 (1843); Bank of Plattsburg v. Platt, 1 Paige Ch. (N. Y.) 464 (1829); *In re* Wright, 16 Fed. Rep. 482, 485 (1883).

[1] See *ante* § 241; N. Y. Code Civ. Proc. § 423.

[2] Barker v. Burton, 67 Barb. (N. Y.) 458 (1877); O'Hara v. Brophy, 24 How. (N. Y.) Pr. 379 (1863); Benedict v. Warriner, 14 How. (N. Y.) Pr. 570 (1857); Gallagher v. Egan, 2 Sandf. (N. Y.) 742 (1850); Adams v. Myers, 61 Wis. 385 (1884).

[3] O'Hara v. Brophy, 24 How. (N. Y.) Pr. 379 (1863).

[4] Gallagher v. Egan, 2 Sandf. (N. Y.) 742 (1850).

[5] Concklin v. Coddington, 12 N. J. Eq. (1 Beas.) 250 (1859); s. c. 72 Am. Dec. 393; Loftus v. Swift, 2 Sch. & L. 642 (1806).

[6] 2 Sch. & L. 657 (1806), and this language is approved in the case of Concklin v. Coddington, 12 N. J. Eq. (1 Beas.) 250 (1859); s. c. 72 Am. Dec. 393.

incumbrance, in order to pay it, costs will be denied to him, and possibly, in some cases, awarded against him.[1]

§ 859. **Effect of tender after action brought.**—Usually a tender of the payment of a debt, at its maturity, releases the party making such tender from liability for interest and costs thereafter; but it seems that in New York,[2] a mortgagor can not make and plead a tender in a mortgage foreclosure, for the reason that a tender to be good, must be complete, and include not only the money due on the demand, but also all costs, and the costs in a mortgage foreclosure, resting in the discretion of the court, are uncertain.[3]

The New York Code of Civil Procedure provides,[4] that where a complaint demands judgment for a sum of money only, which sum is certain or may be reduced to certainty by calculation, the defendant or his attorney may, at any time before the trial, tender to the plaintiff, or his attorney, such a sum of money as he conceives will be sufficient to pay the plaintiff's demand, together with the costs of the action to that time. But it is said that this rule is confined to actions at law, and for that reason does not affect actions brought for the foreclosure of mortgages.[5]

Yet, it is thought that a mortgagor, or the owner of the equity of redemption, may relieve himself from all liability for the payment of interest and costs, by tendering to the

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[1] Van Buren v. Olmstead, 5 Paige Ch. (N. Y.) 9 (1834); Vroom v. Ditmas, 4 Paige Ch. (N. Y.) 526 (1834); Large v. VanDoren, 14 N. J. Eq. (1 McCart.) 208 (1862); Detillin v. Gale, 7 Ves. 583 (1802).

[2] In New York it was formerly held, that a tender made no difference in the amount of the costs. Bartow v. Cleveland, 16 How. (N. Y.) Pr. 364 (1858); s. c. 7 Abb. (N. Y.) Pr. 339; Pratt v. Ramsdell, 16 How. (N. Y.) Pr. 59, 62 (1858); s. c. 7 Abb. (N. Y.) Pr. 340 n; Stevens v. Veriane, 2 Lans. (N. Y.) 90 (1870). But these cases were overruled in Bathgate v. Haskin, 63 N. Y. 261 (1875).

[3] Bartow v. Cleveland, 7 Abb. (N. Y.) Pr. 339 (1858); s. c. 16 How. (N. Y.) Pr. 364; Thurston v. Marsh, 5 Abb. (N. Y.) Pr. 389 (1857); s. c. 14 How. (N. Y.) Pr. 572; Pratt v. Ramsdell, 16 How. (N. Y.) Pr. 59 (1858).

[4] N. Y. Code Civ. Proc. § 721. See also §§ 1634, 1635.

[5] New York Fire Ins. Co. v. Burrell, 9 How. (N. Y.) Pr. 398 (1854).

plaintiff the amount due upon the mortgage, together with such costs as he thinks sufficient; upon refusal of the plaintiff to accept the amount, the mortgagor may apply to the court for leave to pay the amount due, and such costs as the court in its discretion may allow, into court, and upon such payment the court will either order the action discontinued or stay all proceedings therein.[1] Where a tender is made before judgment, and the parties themselves do not mutually arrange the costs, either party may apply to the court for the taxation thereof.[2]

§ 860. **Costs on default.**—Where judgment is taken by default in a mortgage foreclosure, costs will be allowed as provided in section 3251, of the Code of Civil Procedure; and it has been held, that the fact, that a tender of the amount due was made, will not make any difference as to the amount to be allowed.[3]

§ 861. **Costs allowed guardian ad litem.**—In New York the compensation allowed to a guardian *ad litem* in an equitable action, is not dependent upon any provision of the Code. It was the practice of the court of chancery to compensate such guardian, for the services actually performed by him in the protection of the infant's interests, by allowing him to recover costs out of the proceeds of the sale, not exceeding the taxable items prescribed for such services.[4]

It is a general rule, that the guardian *ad litem* of an infant defendant can be allowed only taxable costs as

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[1] Bartow v. Cleveland, 7 Abb. (N. Y.) Pr. 339 (1858); s. c. 16 How. (N. Y.) Pr. 364. See N. Y. Code Civ. Proc. §§ 1634, 1635.

[2] Bartow v. Cleveland, 7 Abb. (N. Y.) Pr. 339 (1858); s. c. 16 How. (N. Y.) Pr. 364; Stevens v. Veriane, 2 Lans. (N. Y.) 90 (1870); Pratt v. Ramsdell, 16 How. (N. Y.) Pr. 59 (1858). See Morris v. Wheeler, 45 N. Y. 708 (1871).

[3] Bartow v. Cleveland, 16 How. (N. Y.) Pr. 364 (1858); s. c. 7 Abb. (N. Y.) Pr. 339; Pratt v. Ramsdell, 16 How. (N. Y.) Pr. 59 (1858); s. c. 7 Abb. (N. Y.) Pr. 340 n; Stevens v. Veriane, 2 Lans. (N. Y.) 90 (1870). But see Adams v. Myers, 61 Wis. 385 (1884).

[4] Weed v. Paine, 31 Hun (N. Y.) 10 (1883); s. c. 13 Abb. (N. Y.) N. C. 200; Gott v. Cook, 7 Paige Ch. (N. Y.) 521, 544 (1839); Union Ins. Co. v. Rensselaer, 4 Paige Ch. (N. Y.) 85 (1833).

against a fund belonging to the other parties to the action.[1] Where an extra allowance is made to the guardian *ad litem* of infant defendants, in a mortgage foreclosure, it must be paid out of their share, since only the taxable costs can be charged upon that portion of the fund which belongs to other parties.[2] But only very special circumstances will authorize a court to allow anything beyond the taxable costs of the guardian *ad litem*, to be charged upon a fund belonging to an infant.[3]

§ 862. **Costs on appointment of receiver.**—Where it is found necessary to appoint a receiver to take charge of the mortgaged premises or to collect the rents and profits thereof during the pendency of the action, the costs of the motion for the appointment of such receiver are sometimes reserved until the hearing,[4] even where the application therefor is refused;[5] but the court may, in its discretion, deal with the costs of a motion for a receiver at the time of the application;[6] or the costs of the application may be ordered to be taxed with the costs of the action.[7]

§ 863. **Costs on resale.**—Where a sale is reported by the officer conducting it, and the purchaser refuses to comply with its terms, the court may, upon representations by the plaintiff, or other parties in interest, order that cause be shown why the terms of the sale should not be complied with; if sufficient cause is not shown, it may, considering all the circumstances of the case, either ratify the sale or set it aside, as will best subserve the interests of the parties concerned.[8] And in such a case, if the sale is set aside, the court

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[1] Union Ins. Co. v. Rensselaer, 4 Paige Ch. (N. Y) 85 (1833).

[2] Downing v. Marshall, 37 N. Y. 391 (1867); Union Ins. Co. v. Rensselaer, 4 Paige Ch. (N. Y.) 85 (1833).

[3] Union Ins. Co. v. Rensselaer, 4 Paige Ch. (N. Y.) 85 (1833).

[4] Chaplin v. Young, 6 L. T., N. S. 97 (1862).

[5] Baxter v. West, 28 L. J. Ch. 169 (1859); Coope v. Creswell, 12 W. R. 299 (1864).

[6] Goodman v. Whitcome, 1 Jac. & W. 593 (1820); Wilson v. Wilson, 18 Jur. 581 (1854); Skinner's Company v. Irish Society, 1 M. & C. 169 (1835); Fall v. Elkins, 9 W. R. 861 (1861).

[7] Bowker v. Henry, 6 L. T., N. S. 43 (1862); Topping v. Searson, 6 L. T., N. S. 449 (1862); Fall v. Elkins, 9 W. R. 861 (1861).

[8] Schaefer v. O'Brien, 49 Md. 253 (1878).

may properly impose upon the party reported as purchaser, all the costs and expenses attending the sale, as the condition of releasing him from his bid and the consequences of his default.[1]

§ 864. **Who personally liable for costs.**—It was said by Lord Eldon, in the case of Detillen v. Gale,[2] that "it is admitted that there is no instance in which a mortgagee has been called upon to pay costs;"[3] but it is thought that the mortgagee may be required to pay costs, if he has rejected a tender of the full amount due him, together with his costs, or if the litigation has in any way been occasioned by his fraud or mistake.[4] Where the plaintiff in a mortgage foreclosure so misstates the rights of a defendant as to render it necessary for him to put in an answer to protect his rights, the plaintiff may be personally charged with the extra costs occasioned thereby.[5]

The mortgagor, or any other party to the action, who unnecessarily defends it, may be charged personally with the costs, for the benefit of those entitled to the surplus.[6] Thus, costs are properly imposed against a subsequent incumbrancer who defends against a bill of review filed by a principal defendant, and maintains the supplemental litigation in opposition to the terms of a mortgage binding his lands.[7]

It has been held, that a purchaser of a portion of the mortgaged premises from the mortgagor, should pay his portion of all legitimate costs incurred in the foreclosure of a mortgage upon such lands;[8] and it is certain that a subsequent purchaser of mortgaged premises may make himself personally liable for costs, although he may not be liable for

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[1] Schaefer v. O'Brien, 49 Md. 253 (1878).

[2] 7 Ves. 584 (1802).

[3] House v. Eisenlord, 30 Hun (N. Y.) 90 (1883).

[4] Pratt v. Stiles, 9 Abb. (N. Y.) Pr. 150 (1859); s. c. 17 How. (N. Y.) Pr. 211.

[5] Union Ins. Co. v. Rensselaer, 4 Paige Ch. (N. Y.) 85 (1833).

[6] Jones v. Phelps, 2 Barb. Ch. (N. Y.) 440 (1847); Barnard v. Bruce, 21 How. (N. Y.) Pr. 360 (1860); O'Hara v. Brophy, 24 How. (N. Y.) Pr. 379 (1863). See *ante* § 241.

[7] Mickle v. Maxfield, 42 Mich. 304 (1879).

[8] Bates v. Ruddick, 2 Iowa, 425 (1856); s. c. 65 Am. Dec. 774.

the payment of the mortgage debt, if he makes an unreasonable and unfounded defence to the suit, and the property is not of sufficient value to pay the incumbrance.[1]

§ 865. **Out of what fund costs payable.**—The costs of a mortgage foreclosure are usually payable from the proceeds of the sale of the mortgaged premises.[2] It is thought that where the circumstances of the case require it, the court may direct the costs to be paid out of any moneys in its custody, belonging to any of the parties litigant, and subject to the lien of the mortgage.[3] Thus, where a prior mortgagee is properly made a party to a foreclosure, for the purpose of ascertaining the amount of his claim, such mortgagee is entitled to his costs, to be paid out of the property, or by the plaintiff personally, in the discretion of the court.[4]

But where a party is improperly made a defendant, his costs must be paid by the plaintiff personally,[5] and not out of the general fund.[6] Where a complaint is dismissed as to some of the defendants, the costs are to be paid by the plaintiff, and not out of the funds raised by the sale of the mortgaged premises.[7]

§ 866. **Counsel fees in foreclosing mortgages.**—It is the general rule, that a reasonable attorney's fee for foreclosing a mortgage, beyond the costs allowed by law, may be contracted for in a mortgage, and the court will consider the amount stipulated for by the parties to be reasonable, unless it is extravagantly large and extortionate, so as to show that it was intended as a penalty to be held *in terrorem* over the mortgagor.[8] A percentage may be allowed instead

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[1] Danbury v. Robinson, 14 N. J. Eq. (1 McCart.) 324 (1862).

[2] Botsford v. Botsford, 49 Mich. 29 (1882).

[3] Falkner v. Printing Co., 74 Ala. 359 (1883).

[4] Chamberlain v. Dempsey, 36 N. Y. 144, 147 (1867); Jones v. Phelps, 2 Barb. Ch. (N. Y.) 440 (1847); Mayer v. Salisbury, 1 Barb. Ch. (N. Y.) 546 (1846); Boyd v. Dodge, 10 Paige Ch. (N. Y.) 42 (1843).

[5] Millandon v. Brugiere, 11 Paige Ch. (N. Y.) 163 (1844).

[6] Nelson v. Montgomery, 1 Edw. Ch. (N. Y.) 657 (1833).

[7] Rosa v. Jenkins, 31 Hun (N. Y.) 384 (1884).

[8] Munter v. Linn, 61 Ala. 492 (1878); Alden v. Pryal, 60 Cal. 415 (1882); Clawson v. Munson, 55 Ill.

of a fixed sum as a fee, or the fee may be stipulated for in blank.[1]

A provision in a mortgage, that the mortgagor shall, in case of foreclosure, pay the costs and "fifty dollars as liquidated damages for the foreclosure of the mortgage," has been held to be void, because so indefinite that the court could not tell whether the amount was for something legal or illegal, and a judgment rendered on such a stipulation for fifty dollars as an attorney's fee, was declared erroneous.[2] But a stipulation that the mortgagee shall be entitled on foreclosure, "to a judgment for the possession of said premises, and costs, expenses and an attorney's fee of ten per centum of the amount due for foreclosing said mortgage," is valid; and on a mortgage debt of $4,000, or less, such a percentage has been held not to be so excessive that a court of equity would refuse to enforce it.[3]

A stipulation in a mortgage, for the payment of an attorney's fee, is regarded as a compensation to the mortgagee for expenses incurred by the default of the mortgagor, and will not be relieved against in equity, if fairly entered into, unless it is evidently a penalty, or made the cloak for an usurious contract.[4]

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394 (1870); McLane v. Abrams, 2 Nev. 207, 208 (1866); Cox v. Smith, 1 Nev. 161 (1865); s. c. 90 Am. Dec. 476; Daly v. Maitland, 88 Pa. St. 384 (1878); Hitchcock v. Merrick, 15 Wis. 522 (1862); Rice v. Cribb, 12 Wis. 179 (1860). *Compare*, Ogborn v. Eliason, 77 Ind. 393 (1881); Alexandrie v. Saloy, 14 La. An. 327 (1859). In McLane v. Abrams, 2 Nev. 199 (1866), a stipulation for ten per centum on the amount of the mortgage, $6,000, was not regarded as unreasonable. In Daly v. Maitland, 88 Pa. St. 384 (1878); s. c. 13 West. Jur. 204, a stipulation for a commission of five per centum on a mortgage of $15,000 was considered to be unreasonable.

[1] Thus, where the mortgage foreclosed provided for "counsel fees and charges of attorneys and counsel employed in such foreclosure suit, not exceeding ....," it was held that counsel fees were properly allowed. Alden v. Pryal, 60 Cal. 215 (1882).

[2] Foote v. Sprague, 13 Kan. 155 (1874); Stover v. Johnnycake, 9 Kan. 367 (1872); Tholen v. Duffy, 7 Kan. 405 (1871); Kurtz v. Sponable, 6 Kan. 395 (1878).

[3] Sharp v. Barker, 11 Kan. 381 (1873).

[4] Daly v. Maitland, 88 Pa. St. 384 (1878). *Compare*, Myer v. Hart, 40 Mich. 517 (1879); s. c. 25 Am. Rep. 558. See Alden v. Pryal, 60 Cal. 215 (1882).

§ 867. Counsel fees in Kentucky and Michigan.—It seems that a different doctrine prevails in Kentucky[1] and Michigan.[2] It was held by the supreme court of Michigan, in the case of Vosburgh v. Lay,[3] that a stipulation in a mortgage fixing in advance a gross allowance, is against public policy and can not be enforced; and that this is specially true, where the allowance for an attorney's fee differs from that authorized by statute.[4]

§ 868. Stipulation for attorney's fee—When usurious. —A stipulation in a mortgage, that the mortgagor, in addition to legal interest, shall pay to the mortgagee an attorney's fee for collecting the debt, such fee to be taxed in the judgment, will not render the agreement usurious, and may be enforced,[5] because the debtor, by neglecting or refusing to pay the debt, imposes upon the mortgagee the expense of resorting to law to enforce his rights, and it is only just that all the expenses of foreclosure should be borne by the party whose wrong has made it necessary to incur them.[6] But such a stipulation will not embrace the unnecessary and useless services of a solicitor, however extensive or laborious.[7] Where such a stipulation is intended as

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[1] Rilling v. Thompson, 12 Bush (Ky.) 310 (1876); Thomasson v. Townsend, 10 Bush (Ky.) 114 (1873).

[2] Millard v. Truax, 50 Mich. 343 (1883); Botsford v. Botsford, 49 Mich. 29 (1882); Vosburgh v. Lay, 45 Mich. 455 (1881); Parks v. Allen, 42 Mich. 482 (1880); Myer v. Hart, 40 Mich. 517 (1879); s. c. 29 Am. Rep. 553.

[3] 45 Mich. 455 (1881).

[4] The court held in this case, that "in respect to all proceedings of this nature, and which are exceptional and peculiar, all allowances which partake of the character of fees are dependent on legislation," citing Booth v. McQueen, 1 Doug. (Mich.) 41 (1843).

[5] Munter v. Linn, 61 Ala. 492 (1878); McGill v. Griffin, 32 Iowa, 445 (1871); Weatherby v. Smith, 30 Iowa, 131 (1870); s. c. 6 Am. Rep. 663; Nelson v. Everett, 29 Iowa, 184 (1870); Conrad v. Gibbon, 29 Iowa, 120 (1870); Gilmore v. Ferguson, 28 Iowa, 220 (1869); Gower v. Carter, 3 Clarke (Iowa), 244 (1856). In Williams v. Meeker, 29 Iowa, 292 (1870), an attorney's fee of $75 was allowed. *Contra*, Rilling v. Thompson, 12 Bush (Ky.) 310 (1876); Thomasson v. Townsend, 10 Bush (Ky.) 114 (1873).

[6] Hitchcock v. Merrick, 15 Wis. 522 (1862); Rice v. Cribb, 12 Wis. 179 (1860); Boyd v. Summer, 10 Wis. 41 (1859); Tallman v. Truesdell, 3 Wis. 443, 454 (1854).

[7] Soles v. Sheppard, 99 Ill. 620 (1881).

a gratuity, or is without consideration, or is inserted as a cover for usury, which is prohibited by statute, it will be void.[1]

§ 869. Allowance of attorney's fee—Discretion of court.—It has been said, that the allowance of an attorney's fee for the collection of a mortgage, is in the nature of a penalty, rather than of liquidated damages;[2] and that it is within the sound discretion of the court in which the mortgage is being foreclosed, to determine whether the whole, or any part of the sum stipulated for in the mortgage as a counsel fee, shall be included in the judgment.[3] The allowance of the stipulated fee, being a matter of discretion with the court, can not be reviewed on appeal, unless it appears that such discretion has been abused.[4]

The supreme court of Alabama held, in Munter v. Linn,[5] that in case of such a stipulation, a reasonable sum only can be collected as an attorney's fee, although a larger sum or per centum may have been agreed upon by the parties. And the supreme court of Mississippi held, in the case of Voechting v. Grau,[6] that where a mortgage contains a stipulation, that in case of foreclosure, the mortgagor will pay "in addition to the taxable costs a reasonable and customary sum for an attorney's or solicitor's fee," the amount to be paid for such fee must be ascertained by evidence,

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[1] Soles v. Sheppard, 99 Ill. 616 (1881).

[2] Daly v. Maitland, 88 Pa. St. 384 (1878).

[3] Daly v. Maitland, 88 Pa. St. 384 (1878); Reed v. Catlin, 49 Wis. 686 (1880). See Carriere v. Minturn, 5 Cal. 435 (1855); Insurance Co. v. Shields, 12 Phila. (Pa.) 407 (1882).

[4] Reed v. Catlin, 49 Wis. 686 (1880). Where a mortgage contains a provision, that in case of foreclosure, two per centum on the amount found due on the mortgage indebtedness, shall be allowed and included in the decree as a solicitor's fee, there will be no error in including such a fee in the decree. McIntire v. Yates, 104 Ill. 491 (1882).

A mortgage provided for the allowance of a counsel fee, "at the rate of — per centum, upon the amount which may be found to be due on principal and interest." The court allowed one hundred and fourteen dollars, being 25 per centum of the amount found due; it was held that such an allowance was authorized by the terms of the mortgage. Rickards v. Hutchinson, 18 Nev. 215 (1883).

[5] 61 Ala. 497 (1878).

[6] 55 Wis. 312 (1882).

as the judge has no authority to fix the amount thereof on a mere inspection of the record, or from his personal knowledge of the services rendered.[1]

Where a mortgage contains a stipulation for the payment of a specified sum as an attorney's fee, in case the mortgage is foreclosed, it seems that the allowance of a greater sum will be erroneous.[2] In the early case of Remington v. Willard,[3] however, where the mortgage contained a stipulation for the payment of a fee of seventy-five dollars, the court allowed, under the Code, five per centum on the amount due.

§ 870. **Allowance of attorney's fee a matter of contract or statute.**—A judgment of foreclosure can not include a sum as an attorney's fee in addition to statutory costs, unless such sum is stipulated for in the mortgage,[4] or expressly authorized by statute, as in some of the states.[5] It is thought, however, that courts of equity may allow the counsel fees incurred by the mortgagee in defending his title, without an express contract in the mortgage, or a statutory enactment providing therefor.[6]

In an action for the foreclosure of a mortgage executed by a corporation, the plaintiff is not entitled to recover a counsel fee for such foreclosure, where the resolutions of the corporation, authorizing the loan and the execution of the mortgage, did not provide for the payment of a counsel fee, or that such fee should be secured by the mortgage.[7]

§ 871. **Enforcement of counsel fee against purchaser.**—A covenant in a mortgage, that in case of foreclosure the

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[1] As to the necessity for proof of the value of an attorney's services, see Wyant v. Pottorff, 37 Ind. 512 (1871); Samstag v. Conley, 64 Mo. 476 (1877); First Nat. Bank of Trenton v. Gay, 63 Mo. 33 (1876); Woods v. North, 84 Pa. St. 407 (1877).

[2] Palmeter v. Carey, 63 Wis. 426 (1885).

[3] 15 Wis. 583 (1862).

[4] Sichel v. Carrillo, 42 Cal. 493 (1871); Stover v. Johnnycake, 9 Kan. 367 (1872); Wylie v. Karner, 54 Wis. 591 (1882); Hitchcock v. Merrick, 15 Wis. 522 (1862).

[5] Hunt v. Chapman, 62 N. Y. 333 (1875); Bocks v. Hathorn, 17 Hun (N. Y.) 87 (1879). See Stover v. Johnnycake, 9 Kan. 367 (1872); *In re* Carroll's Will, 53 Wis. 228 (1881); s. c. 10 N. W. Rep. 375.

[6] Lomax v. Hide, 2 Vern, 185 (1690); Hunt v. Fownes, 9 Ves. 70 (1803).

[7] Schallard v. Eel River Steam Nav. Co., 70 Col. 144 (1886).

mortgagor shall pay to the mortgagee a solicitor's fee, in addition to taxable costs in the suit, is enforceable not only against the mortgagor but also against a subsequent purchaser of the mortgaged premises.[1]

In the case of Pierce v. Kneeland,[2] the court say: "It is objected that the covenant could not be enforced against subsequent purchasers. But we fail to see any good reason why it could not. In case of foreclosure, the property was bound for the payment of the one hundred dollars solicitor's fee as much as it was for the taxable costs. The defendants purchased the property subject to the incumbrances, and it is certainly strange that they can relieve themselves from conditions in the mortgage which were binding upon their immediate grantors."

§ 872. **Allegation as to counsel fee.**—The fee stipulated to be paid in a foreclosure, is additional to the costs recoverable by statute.[3] It is not essential that there should be an averment that the amount of the fee stipulated for in the mortgage is reasonable, as it is a mere incident to the cause of action and may be fixed by the court in its discretion.[4]

It has been said, that where a mortgage contains a stipulation that the mortgagee shall be entitled to an attorney's fee in any action that he may be compelled to bring on the mortgage, he may claim such fee when, as a defendant in the foreclosure of a prior mortgage, he sets up his cause of action, because this is, in effect, bringing an action on the mortgage.[5] But the supreme court of Illinois held, in the case of Soles v. Sheppard,[6] that such a stipulation does not apply to the filing of an answer or a cross bill by a mortgagee to a complaint to foreclose a prior mortgage.

A stipulation in a mortgage allowing a counsel fee in a foreclosure does not entitle the plaintiff to such counsel

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[1] Pierce v. Kneeland, 16 Wis. 672 (1863); s. c. 84 Am. Dec. 720.

[2] 16 Wis. 672 (1863); s. c. 84 Am. Dec. 726. See Weatherby v. Smith, 30 Iowa, 131 (1870); s. c. 6 Am. Rep. 663.

[3] Gronfier v. Minturn, 5 Cal. 492 (1855); Carriere v. Minturn, 5 Cal. 435 (1855).

[4] Carriere v. Minturn, 5 Cal. 435 (1855).

[5] Lanoue v. McKinnon, 19 Kan. 408 (1877).

[6] 99 Ill. 616 (1881).

fee until he has paid it or become liable therefor.[1] The mortgagee can not recover such fee for personally prosecuting his own foreclosure;[2] consequently, an attorney who is the mortgagee, can not recover such a fee in his own foreclosure.[3]

§ 873. When attorney's fee not allowed.—A counsel fee for foreclosing a mortgage will be allowed in no case, unless stipulated in the mortgage,[4] or expressly authorized by statute;[5] and even where it is so stipulated or authorized, such fee will not be allowed in the decree unless it is demanded in the bill or complaint.[6]

A provision in a mortgage for an attorney's fee is not enforceable unless a sale is actually made.[7] Thus, it was held in Jennings v. McKay,[8] that a stipulation in a mortgage providing that "an attorney's fee of fifty dollars for foreclosure, with costs of suit and accruing costs," shall be taxed against the mortgagor, does not authorize such a fee unless a decree for foreclosure is entered; if the mortgagor pays the debt after the action is commenced, but before a decree of sale is entered, the fee can not be collected. It has been held, that under a provision in a power of sale for an attorney's fee in case of foreclosure, no allowance can be made if the mortgage is foreclosed in chancery instead.[9]

The supreme court of Maryland held, in the case of Maus v. McKellip,[10] that fees paid to counsel for resisting an

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[1] Bank of Woodland v. Treadland, 55 Cal. 379 (1880); Patterson v. Donner, 48 Cal. 369 (1874); Soles v. Sheppard, 99 Ill. 616 (1881); Reed v. Catlin, 49 Wis. 686 (1880).

[2] Patterson v. Donner, 48 Cal. 369 (1874); Reed v. Catlin, 49 Wis. 686 (1880).

[3] Patterson v. Donner, 48 Cal. 369 (1874); Sclater v. Cottam, 3 Jur. N. S. 630 (1857).

[4] Sichel v. Carrillo, 42 Cal. 493 (1871); Wylie v. Karner, 54 Wis. 591 (1882).

[5] Bockes v. Hathorn, 17 Hun (N. Y.) 87 (1879); Stover v. Johnnycake, 9 Kan. 367 (1872).

[6] Augustine v. Doud, 1 Ill. App. 588 (1878).

[7] Myer v. Hart, 40 Mich. 517 (1879); s. c. 25 Am. Rep. 553.

[8] 19 Kan. 120 (1876), distinguishing Life Association v. Dale, 17 Kan. 185 (1877). See Schmidt v. Potter, 35 Iowa, 426 (1872); Collar v. Harrison, 30 Mich. 66 (1874).

[9] Van Marter v. McMillan, 39 Mich. 304 (1878); Hardwick v. Bassett, 29 Mich. 17 (1874); Sage v. Riggs, 12 Mich. 313 (1864).

[10] 38 Md. 231 (1873).

application by the assignee in bankruptcy of the mortgagor to enjoin a sale under a power contained in the mortgage, do not constitute a payment in defence of the mortgage title. A defendant in a foreclosure who does not seek to redeem, but who claims the land by a superior title, is not in a position to object to the amount of an attorney's fee allowed by the court.[1]

§ 874. **Costs on redeeming.**—It is said in the case of Benedict v. Gilman,[2] that upon the redemption of mortgaged premises by a judgment creditor, after a statutory foreclosure, he is not bound to pay the costs of such foreclosure; but the general rule is that a party who is permitted to redeem mortgaged premises, whether he is a plaintiff or a defendant in the suit, must pay the costs of the suit in addition to the amount due on the mortgage.

Where the purchaser under a statutory foreclosure makes valuable and permanent improvements upon the premises, under the belief that he has a good title, and without notice of the existence of a judgment which is a lien upon the equity of redemption, the judgment creditor applying to redeem, must, in addition to the amount due upon the mortgage, pay the enhanced value of the premises arising from such improvements.[3]

§ 875. **Foreclosure under power—Mortgagee's compensation.**—Under a power of sale contained in a mortgage, reasonable and proper expenses incurred in advertising a sale under such power will always be allowed, whether or not an express provision therefor is made in the mortgage;[4] and this, it is thought, will always include a reasonable sum for legal advice regarding the sale and an attorney's fee for preparing the notice of sale.[5]

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[1] Winnebago County v. Brones, 68 Iowa, 682 (1886).

[2] 4 Paige Ch. (N. Y.) 58 (1833).

[3] Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 (1833). See Bradley v. Snyder, 14 Ill. 265 (1853); s. c. 58 Am. Dec. 564.

[4] Collins v. Standish, 6 How. (N. Y.) Pr. 493 (1852); Allen v. Robbins, 7 R. I. 33 (1861); Fearns v. Young, 10 Ves. 184 (1804); Worrall v. Harford, 8 Ves. 4 (1802).

[5] Marsh v. Morton, 75 Ill. 621 (1874); Varnum v. Meserve, 90 Mass. (8 Allen), 158 (1864).

Where, however, the sale is not completed, and the advertisement, being imperfect, is withdrawn after a single publication, no costs or attorney's fees can be collected.[1] Where a sale is enjoined, after it is advertised, and the mortgagee or trustee, in anticipation of the action of the court, incurs expenses in advertising an adjournment of the sale, he will not be entitled to have such expenses allowed, on the dissolution of the injunction.[2]

§ 876. **Expenses and disbursements of trustee.** — The holder of a mortgage, containing a power of sale, on foreclosing under such power, is regarded as a trustee, and under the general rule applicable to trustees, that they shall not be permitted to profit by their trust, he will not be entitled to recover compensation for his services, in the absence of a special agreement providing therefor.[3]

Provision may be made in the mortgage or trust deed for compensation to the mortgagee or trustee, and in such a case the agreement of the parties will govern. Where a provision is inserted, securing to the mortgagee or trustee a commission for his services in selling the property, such compensation will be allowed, in addition to his ordinary expenses and counsel fees.[4] The mere fact, however, that a party is named as trustee in a deed of trust raises no implied promise on the part of the beneficiary to pay him for his services.[5]

§ 877. **Taxing costs and disbursements on foreclosure by advertisement.**—The New York Code of Civil Procedure provides,[6] that costs, in addition to necessary expenses provided for, shall be allowed as follows, in a statutory

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[1] See Collar v. Harrison, 30 Mich. 66 (1874).

[2] Marsh v. Morton, 75 Ill. 621 (1874). See Collins v. Standish, 6 How. (N. Y.) Pr. 493 (1852).

[3] Allen v. Robbins, 7 R. I. 33 (1861). See Lime Rock Bank v. Phetteplace, 8 R. I. 56 (1864); Catlin v. Glover, 4 Tex. 151 (1843); Sugden on Vendors, 55; also Parshall's Appeal, 65 Pa. St. 233 (1870); Sloc v. Law, 3 Blatchf. C. C. 459 (1856).

[4] Lime Rock Bank v. Phetteplace, 8 R. I. 56 (1864). See Varnum v. Meserve, 90 Mass. (8 Allen), 158 (1864).

[5] Catlin v. Glover, 4 Tex. 151 (1843).

[6] N. Y. Code Civ. Proc. § 2401.

foreclosure; "(1) For drawing a notice of sale, a notice of the postponement of a sale, or an affidavit, made as prescribed in this title, for each folio, twenty-five cents; for making each necessary copy thereof, for each folio, thirteen cents. (2) For serving each copy of the notice of sale, required or expressly permitted to be served by this title, and for affixing each copy thereof, required to be affixed upon the court house, as prescribed in this title, one dollar. (3) For superintending the sale, and attending to the execution of the necessary papers, ten dollars."[1]

A charge for drawing the notice, for making an office copy to keep, and for a copy for the printer, is proper;[2] and it is proper to charge for thirteen weeks' publication.[3] But a charge can not be made for a copy of the notice served on the auctioneer, when he is also the counsel of the mortgagee.[4]

Where the mortgagee neglected to serve the notice of sale on the necessary parties, and the sale had to be postponed for that reason, the court held that such mortgagee could not tax the costs of the sale first attempted.[5] In taxing costs in such a foreclosure, matter inserted in the notice which is not required by statute, should be excluded in determining the number of folios to be allowed; and no charge should be allowed for serving the notice on parties not required by statute to be served.[6]

§ 878. **What disbursements allowed.**—The Code provides,[7] that there shall be an allowance for disbursements, not exceeding the fees allowed by law for those services, as follows: "(1) For publishing the notice of sale, and the notice or notices of postponement, if any, for a period not exceeding twenty-four weeks. (2) For the services specified in section 2390 of this act. (3) For recording the affidavits; and also,

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[1] Collins v. Standish, 6 How. (N. Y.) Pr. 493, 495 (1835).

[2] Ferguson v. Wooley, 9 N. Y. Civ. Proc. Rep. 236 (1886).

[3] Ferguson v. Wooley, 9 N. Y. Civ. Proc. Rep. 236 (1886).

[4] Ferguson v. Wooley, 9 N. Y. Civ. Proc. Rep. 236 (1886).

[5] Hornby v. Cramer, 12 How. (N. Y.) Pr. 490 (1855); Ferguson v. Wooley, 9 N. Y. Civ. Proc. Rep. 236 (1886).

[6] Ferguson v. Wooley, 9 N. Y. Civ. Proc. Rep. 236 (1886).

[7] N. Y. Code Civ. Proc. § 2402

where the property sold is situated in two or more counties, for making and recording the necessary certified copies thereof. (4) For necessary postage and searches."[1]

§ 879. **Who may require taxation of costs and disbursements.**—Any party, who is liable for the costs of the foreclosure, may require such costs to be taxed. Thus, it has been held, that a party who claims the surplus, as an heir at law of the mortgagor, and who has been recognized as a claimant, by being made defendant in an action of interpleader to determine the ownership of the surplus, is a party liable to pay the costs, and, as such, entitled to require their taxation.[2]

The Code provides,[3] that "the costs and expenses must be taxed, upon notice, by the clerk of the county where the sale took place, upon the request and at the expense of any person interested in the payment thereof. Each provision of this act relating to the taxation of costs in the supreme court, and the review thereof, applies to such a taxation."[4]

It is said in Ferguson v. Wooley,[5] that devisees, under the recorded will of a deceased mortgagor, and a lessee, under a recorded lease, may be deemed grantees who should be served with the notice of sale; where such devisees are minors under fourteen years of age, a notice should also be served on their guardian, and such service may be charged for.

§ 880. **Costs in surplus proceedings.**—In proceedings for the distribution of surplus moneys, motion fees, fees of the referee, and disbursements, are all the costs that can be granted to the successful party.[6] The hearing before the

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[1] Collins v. Standish, 6 How. (N. Y.) Pr. 493 (1852).

[2] *In re* Moss, 6 How. (N. Y.) Pr. 263 (1851).

[3] N. Y. Code Civ. Proc. § 2403.

[4] The statute clearly contemplates a taxation in such manner that the parties can be heard, and not an *ex parte* taxation. *In re* Moss, 6 How. (N. Y.) Pr. 263 (1851).

[5] 9 N. Y. Civ. Proc. Rep. 236 (1886).

[6] Borland v. Alleond, 8 Daly (N. Y.) 126 (1878); New York Life Ins. & Trust Co. v. Vanderbilt, 12 Abb. (N. Y.) Pr. 458 (1861); *In re* Gibbs, 58 How. (N. Y.) Pr. 502 (1880); Elwell v. Robbins, 43 How. (N. Y.) Pr. 108 (1872); German Sav. Bank v. Sharer, 25 Hun (N. Y.) 409 (1881);

referee is not a trial, and no extra allowance can be made therefor.[1] The reason for this, is thought to be, that proceedings for the distribution of surplus moneys arising in a foreclosure by action, are not special proceedings, but are proceedings in the action and a part of it.[2]

In Elwell v. Robbins,[3] Balcom, J., said: "It was held in New York Life Insurance & Trust Company v. Vanderbilt,[4] that in disposing of surplus funds arising on the foreclosure of a mortgage, the court has authority to allow to the parties a suitable compensation for costs and disbursements, to be paid out of the funds, in addition to the taxable costs. This is a special proceeding. It is provided by statute that in special proceedings, costs may be allowed in the discretion of the court, and when allowed, shall be at the rate allowed for similar services in civil actions.[5] The claimants to the surplus moneys are entitled to the fees of the referee and the fees of the clerk in the proceeding. The only costs, aside from disbursements, that can be allowed the claimants, at the rate allowed for similar services in civil actions, are such as are prescribed by the Code. The attorney of the claimants has made two motions in this proceeding, one for the appointment of the referee, and the other for the confirmation of his report. And by section 315 of the Code, not exceeding $10 for each motion can be allowed the claimants, or their attorney, in the discretion of the court. I will not say but there may

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McDermott v. Hennesy, 9 Hun (N. Y.) 59 (1876); Hebrank v. Colell, 2 N. Y. Month. L. Bul. 39 (1880); Dudgeon v. Smith, 23 N. Y. Week. Dig. 400 (1886); Wellington v. Ulster County Ice Co., 5 N. Y. Week. Dig. 104 (1877). In Elwell v. Robbins, 43 How. (N. Y.) Pr. 108 (1872), it was held, that two motion fees might be allowed in such proceedings, one on the appointment of a referee and the other on the confirmation of his report.

[1] See Borland v. Allcond, 8 Daly (N. Y.) 126 (1878); *In re* Gibbs, 58 How. (N. Y.) Pr. 502 (1880); Elwell v. Robbins, 43 How. (N. Y.) Pr. 108 (1872); German Sav. Bank v. Sharer, 25 Hun (N. Y.) 409 (1881); McDermott v. Hennesy, 9 Hun (N. Y.) 59 (1876); Dudgeon v. Smith, 23 N. Y. Week. Dig. 400 (1886); Wellington v. Ulster County Ice Co., 5 N. Y. Week. Dig. 104 (1877).

[2] Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618 (1866), *In re* Gibbs, 58 How. (N. Y.) Pr. 502, 504 (1880).

[3] 43 How. (N. Y.) Pr. 108 (1872).

[4] 12 Abb. (N. Y.) Pr. 458 (1861).

[5] Laws of 1854, chap. 270, § 3

be made cases where the proceedings before the referee should be regarded in the nature of a trial, and a trial fee allowed to the claimant of the surplus money in the discretion of the court."

§ 881. **Who entitled to costs in surplus proceedings.**—The successful applicant for surplus moneys is entitled to have his costs taxed to the extent set forth in the preceding section; and where on a complaint to foreclose a mortgage, the widow of the mortgagor is made a party and answers and submits to the decree of the court, she is entitled to one-third of the surplus proceeds of the sale of the mortgaged premises remaining in court, after satisfying the mortgage debt, as her equitable dower, and to have her costs paid out of the other two-thirds.[1]

§ 882. **Who chargeable with costs in surplus proceedings.**—Generally the costs and expenses of the proceedings for the distribution of surplus moneys are properly chargeable against the proceeds of the mortgage sale;[2] but where the facts are such as to make another rule more equitable, they may be charged against a party individually.[3]

Where the surplus is small, and unsuccessful claimants have caused unnecessary expenses, they may be charged personally with the costs;[4] parties litigating in good faith, however, will not usually be so charged.[5] Thus, it has been

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[1] Tabele v. Tabele, 1 Johns. Ch. (N. Y.) 45 (1814). See Hawley v. Bradford, 9 Paige Ch. 200 (1841).

[2] Oppenheimer v. Walker, 3 Hun (N. Y.) 31 (1874); s. c. 5 T. & C. (N. Y.) 325.

[3] Lawton v. Sager, 11 Barb. (N. Y.) 349 (1851); Bevier v. Schoonmaker, 29 How. (N. Y.) Pr. 411 (1864).

[4] Lawton v. Sager, 11 Barb. (N. Y.) 349 (1851); Bevier v. Schoonmaker, 29 How. (N. Y.) Pr. 411 (1864).

Chancery rule 136 also provided, in respect to costs on the reference, that any person making a claim to the surplus moneys upon a sale of mortgaged premises, who should fail to establish his claim on the reference before the master, might be charged with such costs as the other parties were subjected to by reason of such claim. And the parties succeeding in the reference might be allowed such costs as the court should deem reasonable; but no costs, unnecessarily incurred on such reference, or previous thereto, by any of the parties, could be allowed on taxation or paid out of such surplus.

[5] Farmers' Loan & Trust Co. v. Millard, 9 Paige Ch. (N. Y.) 620

held that a claimant who litigates a prior lien unsuccessfully and in good faith, is not chargeable with costs; but if he files exceptions which are overruled, he will be required to pay the costs of the appeal.[1] And if a creditor makes claim to a larger amount than is found upon the reference to be owing to him, or if he adopts an unusual and expensive method of procedure, he may be charged with the costs.

Where a junior incumbrancer, who has sufficient reason to believe that the prior lien will exhaust the surplus, files his claim and subjects the prior incumbrancer to unnecessary costs, he will be required to pay such costs. The rule is different, however, where he acts in good faith and has sufficient reason to believe that the prior lien will not exhaust the surplus.[2] It has been held that a creditor who was not made a party to the suit, and who files a claim to the surplus, will be required to pay the costs of proving his claim.[3]

§ 883. Disbursements in surplus proceedings.—Although disbursements, in an action to foreclose a mortgage, are not costs in the strict sense of the word, yet they may be regarded as discretionary, and the courts usually allow disbursements not legally chargeable as costs, if they are for services actually rendered and are reasonable in amount.[4]

Disbursements usually include advancements necessary to remove prior incumbrances and to protect the rights and interests of the mortgagee;[5] also taxes, assessments and

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(1841); Norton v. Whiting, 1 Paige Ch. (N. Y.) 578 (1829).

[1] De LaVergne v. Evertson, 1 Paige Ch. (N. Y.) 181 (1828).

[2] Farmers' Loan & Trust Co. v. Millard, 9 Paige Ch. (N. Y.) 620 (1842).

[3] Abell v. Screech, 10 Ves. 355 (1805). See Lawton v. Sager, 11 Barb. (N. Y.) 349 (1851); Bevier v. Schoonmaker, 29 How. (N. Y.) Pr. 411, 422 (1864).

[4] Benedict v. Warriner, 14 How. (N. Y.) Pr. 568 (1857); Gallagher v. Egan, 2 Sandf. (N. Y.) 742 (1850).

[5] Hill v. Eldred, 49 Cal. 398 (1874). See Marshall v. Davies, 78 N. Y. 414 (1879); Williams v. Townsend, 31 N. Y. 411 (1865); Robinson v. Ryan, 25 N. Y. 320 (1862); Eagle Fire Ins. Co. v. Pell, 2 Edw. Ch. (N. Y.) 631 (1836); Brevoort v. Randolf, 7 How. (N. Y.) Pr. 398 (1853); Burr v. Veeder, 3 Wend. (N. Y.) 412 (1829); Hughes v. Johnson, 38 Ark. 296 (1881).

insurance paid by the mortgagee.[1] This rule is applicable although the mortgage may not contain a tax clause;[2] and a mortgagee has a right to pay insurance premiums for the protection of the estate mortgaged, and to add the amount paid to the mortgage debt, independently of an express agreement authorizing such payment.[3]

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[1] Sidenberg v. Ely, 90 N. Y. 257 (1882); s. c. 43 Am. Rep. 163; Williams v. Townsend, 31 N. Y. 411 (1865); Kortright v. Cady, 5 Abb. (N. Y.) Pr. 358 (1857); s. c. 23 Barb. (N. Y.) 490; Mix v. Hotchkiss, 14 Conn. 32 (1840); Wright v. Langley, 36 Ill. 381 (1865).

[2] Sidenberg v. Ely, 90 N. Y. 257 (1882); s. c. 43 Am. Rep. 163. *In re* Bogart, 28 Hun (N. Y.) 466 (1882); Cook v. Kraft, 3 Lans. (N. Y.) 512 (1871). *Compare*, Faure v. Wynans, Hop. Ch. (N. Y.) 283 (1824); Barthell v. Syverson, 54 Iowa, 160 (1880); Savage v. Scott, 45 Iowa. 130 (1876); Manning v. Tuthill, 30 N. J. Eq. (3 Stew.) 29 (1878).

[3] *In re* Bogart, 28 Hun (N. Y.) 466, 469 (1882).

APPENDIX OF FORMS.

No. 1.

General Complaint in Foreclosure by Action.

[*Title of action containing names of all the parties*].

The complaint of the plaintiff in the above entitled action respectfully shows to this court (upon information and belief):

That the defendant, C. D., for the purpose of securing the payment to E. F., his certain attorney, executors, administrators or assigns, of the sum of dollars, with interest thereon, on or about the day of , 18 , executed and delivered to the said E. F. a bond bearing date on that day, sealed with his seal, whereby the said C. D. did bind himself, his heirs, executors and administrators, in the penal sum of dollars, upon condition that the same should be void, if the said C. D., his heirs, executors or administrators should pay to the said E. F., his certain attorney, executors, administrators or assigns, the sum of money first above mentioned, as follows: [*Insert conditions of the bond verbatim, if possible*].

That it was therein expressly agreed,[1] that should any default be made in the payment of the principal or interest, or of any part of the said principal or interest, when the same should become due and payable, according to the conditions of said bond, as above expressed, and should the same remain unpaid for the space of days after the same had become due and payable, then the said moneys, principal and interest, at the option of the said obligee, his executors, administrators or assigns, should become and be due and payable immediately thereupon, any other provision in said bond to the contrary notwithstanding.

That the said obligor,[2] in and by said bond, did covenant for himself, his heirs, executors and administrators, that the buildings erected and to be erected on the mortgaged premises, described in the mortgage given as collateral to said bond and bearing even date therewith, should be kept insured against loss or damage by fire, in a sum not less than dollars, and that the policy therefor should be assigned to said obligee, his executors, administrators or assigns, and that upon any default thereof, the said obligee, his executors, administrators or assigns, were

[1] Insert in case bond and mortgage contain an interest clause.

[2] Insert in case the action is to recover money paid for insurance premiums.

thereby authorized to insure the same, and to add the sums paid therefor to the moneys then due, or first to become due, upon said bond, and that they should be payable on demand, with interest from the time of such payment, and should also be a lien on said premises secured by said mortgage, and added to the sums otherwise secured thereby; and also that in case the taxes,[1] which might thereafter be assessed, taxed or levied against said mortgaged premises, were at any time allowed to remain unpaid for days after the said taxes had become due and payable, then the said obligee, his executors, administrators or assigns, might pay the same, and the sum so paid should also be a lien on said mortgaged premises and be added to the sums thereby secured and payable on demand, with interest.

That, as a collateral security for the payment of said indebtedness, the said defendants, C. D., and M. D., his wife, on the same day executed, duly acknowledged and delivered to the said E. F., a mortgage, whereby they granted, bargained and sold to the said E. F., his heirs and assigns, the following described premises, with the appurtenances, that is to say: [*Here insert description of premises from mortgage*], which mortgage was duly recorded in the office of the clerk of the county of , on the day of , in the year 18 , at o'clock M., in book No. of mortgages, at page .

That said mortgage contained the same conditions as said bond, and the further condition, that if the mortgagor, his heirs or assigns, should not pay the moneys thereby secured, according to the terms thereof, then the said E. F., his executors, administrators or assigns, were empowered to sell the said mortgaged premises in due form of law, and out of the moneys arising from such sale to retain the amount due for principal, interest, taxes, assessments and insurance, in and by said bond and mortgage secured to be paid, with the costs and expenses of the proceedings thereon, the surplus, if any there should be, to be returned to the said mortgagor, C. D., his heirs or assigns.

That thereafter, the said defendant, E. F., by an instrument in writing,[2] given under his hand and seal, dated the day of 18 , and recorded in the office of the clerk of the county of , on the day of 18 , for a valuable consideration therein expressed, duly assigned said bond and mortgage to this plaintiff, H. O., who now is and has since been the owner and holder thereof, and also guaranteed to the plaintiff that the sum secured thereby would be paid when due, with interest; [*or* which said assignment also contains a covenant in the following words, to wit: *Set forth the covenant verbatim*].

[*If the bond and mortgage were assigned as collateral security only, such fact and the actual interest and claim of the plaintiff should be fully alleged here*].

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[1] Insert in case money has been paid for taxes.
[2] Insert in case the mortgage has been assigned.

That thereafter,[1] the said C. D., and M. D., his wife, by their deed of conveyance, executed under their hands and seals, dated the day of , 18 , and recorded in the office of the clerk of the county of , in book No. of deeds, at page , duly conveyed the said mortgaged premises to the defendant, J. H., subject to said mortgage; that the said defendant, J. H., in and by said deed of conveyance, and by accepting the same, assumed said mortgage and covenanted and agreed to pay off and discharge the same as part of the consideration in said deed of conveyance expressed. [*Or set forth the covenant verbatim*].

And the plaintiff further shows, that the sum of dollars became due and payable by the terms of said bond and mortgage, on the day of 18 , that the same has remained unpaid for more than days thereafter, that the said plaintiff has elected and does elect that the whole sum owing upon said bond and mortgage be due and payable, and that thereby, by the provisions of said bond and mortgage, the same became due and payable before the commencement of this action.

And the plaintiff further shows, that the said defendants, C. D., and J. H., have failed to comply with the conditions of the said bond and mortgage, by omitting to pay the sum of dollars, which by the terms and conditions of said bond and mortgage became due and payable on the day of 18 ; and also, by omitting to pay the sum of dollars for insurance, as required by said bond and mortgage, which sum of dollars was advanced and paid for such insurance by this plaintiff on the day of 18 , for the payment whereof due demand was made before the commencement of this action, the same being also a lien added to the other claims by said mortgage secured to be paid; and also, by omitting to pay the sum of dollars, for taxes or assessments, taxed or assessed against the said mortgaged premises, and left unpaid for days after the same became due and payable, which said sum for taxes and assessments was thereafter advanced and paid by this plaintiff on the day of , 18 ; and that the same is justly due and unpaid with interest thereon from the day of 18 , and is also a lien added to the other claims by said mortgage secured to be paid; and that there is now justly due to the plaintiff upon said bond and mortgage the sum of dollars, with interest thereon from the day of , 18 , and the further sum of dollars paid for insurance as aforesaid, with interest thereon from the day of 18 , and the further sum of dollars paid for taxes and assessments as aforesaid, with interest thereon from the day of 18 , amounting in the aggregate to the sum of dollars; and that there is to become due thereon the further sum of dollars with interest thereon from the day of 18 .

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[1] Insert in case premises have been conveyed with assumption of payment of mortgage

And the plaintiff further shows, that the defendants, R. P. and D. O., are infants, under the age of fourteen years and reside with their parents (*or guardian*) at , ; that the defendant, D. P., is an infant above the age of fourteen years, residing with at ; and that the defendant, O. S., does not reside within the state of New York, but at in . [*State residence if known*].

And the plaintiff further shows, that no proceedings have been had at law or otherwise, and that no other action has been brought, to his knowledge or belief, for the recovery of said sum secured by said bond and mortgage, or for the recovery of the said mortgage debt or any part thereof. [*If this is not true, state what proceedings have been taken*].

And the plaintiff further shows, upon information and belief, that the defendants, C. D., M. D., J. H., R. P., X. Y. and D. P., have, or claim to have, some interest in, or lien upon, the said mortgaged premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said mortgage.

[*If parties with paramount liens are made defendants for the purpose of having them ascertained, such liens should be fully stated here*].

Wherefore, the plaintiff demands judgment, that the defendants and all persons claiming under them, or either or any of them, subsequently to the commencement of this action, and every person, whose conveyance is subsequent or subsequently recorded, may be barred and foreclosed of all right, title, claim, lien and equity of redemption in said mortgaged premises; that the said mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff for all sums paid for insurance, taxes, or assessments, and also for principal, interest and costs, and which may be sold in parcels without material injury to the parties, may be decreed to be sold according to law; that out of all the moneys arising from the sale thereof, the plaintiff may be paid the amount due on said bond and mortgage with interest to the time of such payment, and the costs and expenses of this action, so far as the amount of such moneys properly applicable thereto will pay the same; that the officer making such sale be directed to pay from the proceeds thereof, all taxes, assessments and water rates, which are liens on the property sold; that the defendants, C. D., E. F. and J. H., may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiff may have such other or further relief, or both in the premises, as shall be just and equitable.

T. R.,

Plaintiff's Attorney.

[*Add verification in the usual form*].

No. 2.

Complaint to Foreclose Mortgage Executed by Infants Pursuant to Order of Court.

[*Title of action containing names of all the parties*].

The complaint of the plaintiff in the above entitled action respectfully shows to this court (upon information and belief):

That a petition was heretofore presented to this court by the defendant, D. P., an infant over fourteen years of age, and by the defendants, O. P., R. P. and T. P., infants under the age of fourteen years, by the defendant, C. M. P., their mother and next friend, praying for the mortgaging of all the right, title and interest of said infants in and to the real estate hereinafter mentioned and described; and that such proceedings were afterwards had in said court upon the said petition, that an order of this court was made on the day of , 18 , whereby M. C. was appointed the special guardian of said infants for the purposes of such application, upon his giving the proper security therein required; and that such security, duly executed, justified and approved, was subsequently filed by said guardian in the proper office.

That by an order of said court in said proceedings, made on the day of , 18 , the said M. C. was authorized and empowered to contract for the mortgaging of all the right, title and interest of the said infants in the said real estate, for an amount not exceeding that specified in the referee's report, referred to in said order, and upon the terms and conditions therein mentioned, to wit: for dollars, payable in years at least, or in a longer time, at the rate of interest per annum.

That in pursuance of the last mentioned order, the said special guardian afterwards made his report to the said court, which report was dated the day of , 18 , whereby he reported that he had entered into an agreement with this plaintiff, subject to the approval of said court, for the mortgaging to said plaintiff of all the right, title and interest of said infants in and to the said real estate, upon the terms and conditions therein mentioned, to wit: providing for the execution by said guardian of a mortgage, in the name of said infants, to said plaintiff, for the amount and time and upon the terms and conditions upon which said mortgage was to be executed, as hereinafter set forth.

That by another order of said court, made in said proceedings on the day of , 18 , it was ordered, that the said report of said special guardian and the agreement therein mentioned, be, and the same were thereby, ratified and confirmed; and that the said special guardian, in the names of said infants, execute, acknowledge and deliver to the said plaintiff, a good and sufficient mortgage, upon the terms and conditions provided by said agreement, of all the estate, right, title and interest of said infants

in and to the said premises, being the fee simple thereof, subject to their mother's dower interest therein, as hereinafter mentioned, upon the said plaintiff's complying with the said terms and conditions of the said agreement by which such mortgage was to be delivered, to wit: the payment to said special guardian by him of the sum of dollars.

That the said plaintiff thereafter complied with the said terms and conditions of said agreement on his part to be performed, and paid the said special guardian the sum of dollars.

That the said infants, by their said special guardian, pursuant to the several orders aforesaid, and in pursuance of the statute in such case made and provided, and in consideration of the sum of dollars, paid to their said special guardian as aforesaid, and the said C. M. P., the mother of said infants, who had a vested dower right in said premises as the widow of L. P., deceased, the father of said infants, in consideration of the sum paid to said special guardian and of one dollar to her in hand paid, as a consideration for releasing her said dower interest in said premises to said plaintiff, (the said C. M. P. thereby agreeing, in consideration aforesaid, that she would not assert or set up her dower interest in said premises as against said mortgage and against the said plaintiff, the mortgagee therein named, his executors, administrators or assigns), on the day of , 18 , as security for the payment of said principal sum of dollars, with interest thereon, as hereinafter mentioned, did execute, duly acknowledge and deliver to the said plaintiff a mortgage, whereby they granted, bargained and sold to the said plaintiff the following described premises, with the appurtenances, that is to say: [*Here insert description of premises from mortgage*], upon the express condition, that if the said parties of the first part should well and truly pay unto the said party of the second part, his executors, administrators, or assigns, the sum of dollars in years from the date of said mortgage, with interest thereon at the rate of per centum per annum, payable semi-annually from the date thereof, and should keep the buildings erected, or thereafter to be erected upon said premises, insured in some solvent incorporated fire insurance company of this state, against loss or damage by fire, in the sum of at least dollars, and should assign and deliver the policy or policies of such insurance, and the receipts or certificates of renewal thereof, to the said party of the second part, his executors, administrators, or assigns, so and in such manner and form that they should at all time and times, until the full payment of the said money, have and hold said policies as a collateral and full security for the payment of all money due or to become due upon said mortgage, and should, during all the time, until the said moneys secured by said mortgage should be fully paid and satisfied, pay and discharge, immediately after they should become due or payable, all taxes, water rates, assessments, or other charges which might be levied, laid, or assessed upon the above described premises or any part thereof;

then the said mortgage and the estate thereby granted, should cease, determine and become null and void.

And the plaintiff further shows, that the said mortgage was duly recorded in the office of the clerk of the county of , on the day of , 18 , at o'clock M., in book No. of mortgages, at page .

[*Adapt the remainder of this form from Form No.* 1].

No. 3.

Complaint to Foreclose Savings and Loan Association Mortgage.

[*Title of action containing names of all the parties*].

The plaintiff in the above entitled action complains of the defendants therein, and states to the court (upon information and belief) :

That the plaintiff is a domestic corporation, located at , and duly constituted, organized and incorporated in pursuance of an act entitled, "An Act for the Incorporation of Building, Mutual Loan and Accumulating Fund Associations," passed April 10th, 1851, and of the act or acts supplementary thereto, and amendatory thereof ; that the defendant, C. D., on or about the day of , 18 , executed under his hand and seal, and delivered to this plaintiff, a bond, dated on that day, in the penal sum of dollars, with the conditions therein written in substance, that if the said obligor in said bond named, would pay or caused to be paid to the association or to its successor or assigns, the sum of dollars in manner following, that is to say: the sum of dollars and cents contribution or principal, and dollars and cents interest on shares of the capital stock of said association, each and every week from the date thereof, until the dues and dividends accrued on said shares should equal the said principal sum of dollars, including premiums paid for any loan, by the consent of such holder; and also all dues, fines and penalties that might be imposed upon the said obligor, as a member of said association, pursuant to the articles, rules and regulations thereof, to be paid into the treasury of said association on each and every (*day*) thereafter, until the said sum of dollars has been fully paid as aforesaid, then the said bond to be void, else to remain in full force and virtue ; and with the agreement also therein written, in substance, that in case any of said installments of principal or interest, or any part thereof, or any fines or penalties imposed as aforesaid, should remain unpaid for months after the same should become due, then the whole of said principal sum, together with the unpaid interest, dues, penalties, fines and assessments thereon, should become due and payable forthwith.

And to secure the payment of the principal, interest, dues, fines and premiums mentioned in the conditions of said bond, the said C. D. and M. D., his wife, did at the same time execute under their hands and seals, duly acknowledge and deliver to this plaintiff a mortgage, bearing even date with said bond, whereby they granted, bargained and sold to this plaintiff, its successors and assigns, the following described premises, with the appurtenances, that is to say: [*Here insert description of premises from mortgage*].

That said mortgage contained the same conditions, as the said bond, and the further condition, that if said mortgagors should not pay the moneys thereby secured, according to the terms thereof, then the said plaintiff, or its successors, or assigns, were empowered to sell the mortgaged premises in due form of law, and out of the moneys arising from such sale to retain the amount then due upon said bond and mortgage, secured to be paid, together with the costs and charges of the proceedings thereon, the surplus, if any there should be, to be returned to the said C. D., his heirs and assigns, which said mortgage was duly recorded in the office of the clerk of the county of , on the day of , 18 , at o'clock M., in book No. of mortgages, at page .

That at the time of the execution and delivery of said bond and mortgage, as aforesaid, the said C. D. was, and still is, a member of said association, and is the owner of shares of the capital stock thereof; that said bond and mortgage were given, as aforesaid, to secure the indebtedness of dollars upon of such shares loaned to the said C. D.

That the capital stock of said association consists of shares of dollars each; that by the rules and regulations of said association it was provided, among other things, that the said capital stock should be payable in weekly installments of cents per share, from and including the first day of membership; and that after being awarded a loan, every member should pay to the said association, weekly, the full sum of cents interest per share on each and every share of said loan; and that every member, neglecting to pay said installments regularly, should forfeit and pay to said association cents per week as a fine for each and every share of such stock held by him, and for neglecting to pay said weekly interest, should forfeit and pay as a fine the full sum of cents per share of the loan to him, for each and every week he should be in default of such weekly payments.

That the said C. D. failed to comply with the conditions of said bond and mortgage by omitting to pay the sum of dollars contribution or principal, and dollars interest, which became due on the day of , 18 ; that more than three months have elapsed since the same became due; that the same and all installments of principal and interest which have become due since that time, still remain unpaid; and that there

remains unpaid on said bond and mortgage the sum of dollars principal, together with dollars interest, and dollars dues and dollars fines, amounting in the aggregate to the sum of dollars, with interest thereon from the day of , 18 .

And the plaintiff further states (upon information and belief) that the defendants, C. D., M. D. and J. H., have, or claim to have, some interest in or lien upon said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said mortgage.

And the plaintiff further shows, that no proceedings have been had at law or otherwise, and no action has been brought to the knowledge or belief of said plaintiff, for the recovery of said sum secured by said bond and mortgage, or for the recovery of said mortgage debt, or any part thereof. [*If not true, state what proceedings have been taken*].

Wherefore, the plaintiff demands that the defendants, and all parties claiming under them, or either or any of them, subsequently to the commencement of this action, and every person whose conveyance is subsequent or subsequently recorded, may be barred and foreclosed of all right, title, claim, lien and equity of redemption in said mortgaged premises and every part thereof; that the said mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff for all sums paid for taxes, assessments, or insurance, and also for principal, interest, fines and costs, and which may be sold in parcels, without material injury to the parties, may be decreed to be sold according to law; that out of all the moneys arising from the sale thereof, the plaintiff may be paid the amount due on said bond and mortgage, and the said interest and fines, with the interest thereon to the time of such payment, together with the costs and expenses of this action, so far as the amount of such moneys properly applicable thereto will pay the same; that the officer making such sale be directed to pay from the proceeds thereof all taxes, assessments and water rates, which are liens upon the property sold; that the defendant, C. D., may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiff may have such other or further relief, or both in the premises, as shall be just and equitable.

T. R.,
Plaintiff's Attorney.

COUNTY OF , *ss.:*

H. F. being duly sworn, says that he is the of the plaintiff, in the above entitled action; that the foregoing complaint is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; that the reason why this affidavit is not made by the plaintiff is, that the plaintiff is a corporation; that deponent is an officer of said corporation, to

wit: the thereof; that deponent's knowledge of the facts stated in said complaint is derived from the books and papers of said association, which are kept under the immediate supervision of deponent, and from the records of the county clerk's office.

[*Jurat*]. H. F.

No. 4.

General Form of Answer.

[*Title of the action*].

The defendant, C. D., for his answer to the complaint of the plaintiff herein, denies each and every allegation therein contained, and further denies that the plaintiff is the lawful owner of the bond and mortgage mentioned in said complaint, or of either of them, or that he has any interest whatever in said bond and mortgage, or in the moneys thereby secured, or pretended to be thereby secured.

[And for a further answer and defence, this defendant alleges and states to the court, that she is, and at the time of the execution of the bond and mortgage mentioned in said complaint, was a married woman; that the said bond and mortgage were not executed for any debt or liability of this defendant, nor for any advance or loan to her, nor for any benefit or advantage to her or to her estate whatever, but were given solely as collateral security for an antecedent pretended indebtedness of her husband; that the said mortgage was given upon, and covers the sole and separate real estate of this defendant, in which her husband has no interest, and had none when said mortgage was given; that this mortgage was executed by this defendant under and by the direction, coercion, duress and threats of the plaintiff and her said husband, and was not her free and voluntary act; and this defendant, therefore, insists that the said bond and mortgage are void and of no effect, and no lien or charge upon her said real estate].

And this defendant further answering, shows, that the loan alleged in the complaint, was made to the defendant by the plaintiff on the corrupt and unlawful agreement between them, that the plaintiff should reserve and secure to himself, and the defendant would pay to him, for the use of said sum, a greater sum than the rate of per centum per annum; to wit: the rate of per centum per annum (besides a commission of per centum on the face of said bond and mortgage).

That said sum was deducted and reserved from the amount of said bond and mortgage by said plaintiff, and the balance only paid to said defendant; that is to say, that this defendant agreed to pay, and the plaintiff agreed to receive, dollars for said loan, the plaintiff reserving and securing to himself for the loan of money on said bond and mortgage, until the maturity

thereof, dollars.[1] [*Or, state any other interest or compensation agreed on; and the payment of it, if it has been paid*].

Wherefore, this defendant demands that the complaint in this action be dismissed with costs.

J. Z.,
Attorney for Defendant C. D.
[*Office and post-office address*].

[*Add verification in the usual form*].

No. 5.

Infant Defendant's Answer.

[*Title of the action*].

The defendants R. P. and D. P., by M. N., their guardian *ad litem*, answering the complaint of the plaintiff above named, say, that they are strangers to all and singular the matters and things in said complaint contained; that these defendants are infants under the age of twenty-one years, and claim such an interest in the premises described in said complaint as they are entitled to, and submit their rights to the court for protection.

Dated, the day of , 18 .

V. O.,
Attorney for Guardian ad litem.
[*Office and post-office address*].

No. 6.

Notice of Object of Action, with Notice of No Personal Claim.

[*Title of the action*].

To the above named defendant, [*name*]:

Take notice, that the summons herewith served upon you in this action, is issued upon a complaint praying for the foreclosure of a mortgage executed by C. D., and wife, to E. F., dated the day of , 18 , and recorded in the office of the clerk of the county of , in book No. of mortgages, at page , on the day of , 18 , at o'clock M., to secure the payment of the sum of dollars, with interest thereon from the day of , 18 , (and which mortgage has been duly assigned to this plaintiff).

That there is now due and owing to this plaintiff, on said bond and mortgage, the sum of dollars, with interest thereon from the day of 18 ; that the following is a description of the mortgaged premises: [*Insert description from mortgage*].

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[1] See Manning v. Tyler, 21 N. Y. 567 (1860).

That no personal claim is made against you, nor against any defendant, except against the defendants, C. D. and J. H.

Dated the day of , 18 .

T. R., *Plaintiff's Attorney.*
[*Office and post-office address*].

No. 7.

Notice of Pendency of Action.

[*Title of the action*].

Notice is hereby given, that an action has been commenced and is now pending in this court, upon the complaint of the above named plaintiff, against the above named defendants, for the foreclosure of a mortgage, bearing date the day of , 18 , executed by C. D., and M. D., his wife, to E. F., and recorded in the office of the clerk of the county of , at , on the day of , 18 , in book No. of mortgages, at page , at o'clock in the noon (which said mortgage has been duly assigned by said E. F., to the above named H. O., who is the plaintiff herein).

That the mortgaged premises affected by this foreclosure were, at the time of the commencement of this action, and at the time of filing this notice are, situated in the county of , and that they are described in the said mortgage as follows, to wit: [*Here insert description of premises from mortgage*].

The clerk of the county of will please index this notice against the names of the defendants, C. D., J. H. and R. P.

Dated the day of , 18 .

T. R., *Plaintiff's Attorney.*
[*Office and post-office address*].

No. 8.

County Clerk's Certificate of Filing Lis Pendens.

County of , *ss.*:

I, clerk of the county of , and of the court thereof, being a court of record and having a seal, do hereby certify, that I have compared the copy of the notice of pendency of action in the above entitled action hereto annexed, with the original thereof, now on file and record in my office, and that the same is a transcript thereof and of the whole of said original.

And I do hereby further certify that the said notice of pendency of action was filed and recorded in my said office, on the day of , 18 .

In witness whereof, I have hereunto set my hand and affixed the seal of my said office, this day of , 18 .

[*Seal*]. [*County Clerk*].

No. 9.

Affidavit of Filing Notice of Pendency of Action Preliminary to Judgment.

[*Title of the action*].

COUNTY OF , *ss.:*

O. J., being duly sworn, says that he resides in the of , in the county of , and that he is (managing clerk for T. R.), the attorney for the plaintiff in the above entitled action; that this action was brought to foreclose a mortgage upon real property situated in the county of .

That the whole sum secured by said mortgage is now due and payable, (*or*, that an installment of dollars of the principal of said mortgage, and interest thereon from the day of , 18 , is now due and payable, and that the residue thereof, being the sum of dollars, and interest thereon from the day of , 18 , will become due and payable on the day of , 18).

That the complaint herein was filed in the office of the clerk of the county of , on the day of , 18 , and that a notice of the pendency of this action, containing the names of all the parties thereto, the object of the action, the date of the said mortgage, the names of the parties thereto, the time and place of recording the same, and a description of the mortgaged premises, and containing correctly and truly all the particulars required by law to be stated in such notice, was more than twenty days since, *viz.:* on the day of , 18 , filed and recorded in the office of the clerk of the county of , that being the county in which the mortgaged premises are situated, which filing was at or immediately after the time of filing said complaint therein as required by law, and more than twenty days since; and that since the filing of said notice the complaint in this action has not been amended by making new parties to the action, nor so as to affect other property not described in the original complaint, nor so as to extend the claims of the plaintiff as against the mortgaged premises.

That all of the defendants have been duly served with the summons, or have duly appeared herein by their respective attorneys, as will more fully appear by the affidavits of service and notices of appearance which are hereto annexed.

That none of the defendants are infants or absentees (*or*, that none of the defendants are infants, except the defendant, R. P., who has appeared by his guardian *ad litem*, and that none of the defendants are absentees, except the defendant, O. S., who has been duly served with the summons by publication thereof, under an order of this court, proof of which service is hereto annexed).

That the time to answer has expired as to all of the defendants, and that no answer or demurrer has been received from any defendant (except the usual general answer of the infant

defendant, D. P., who answers by his guardian, and who does not controvert any of the allegations of the complaint; and except also, the answer of the defendant, C. D., the issues raised by which have been duly tried and decided in favor of this plaintiff by Hon. L. Q., a justice of this court, whose findings are hereunto annexed).

[*Jurat*]. [*Signature*].

No. 10.

Notice of Application for Order of Reference and Judgment.

[*Title of the action*].

Take notice, that on all of the papers and proceedings in this action and on the affidavits hereto annexed, copies of which are herewith served upon you, the plaintiff will apply to this court at a term thereof, to be held at the court house, in the city of , on the day of , 18 , at o'clock in the noon of that day, or as soon thereafter as counsel can be heard, for the relief demanded in the complaint; and also for an order referring this action to some suitable person to compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint, (and also to ascertain and compute the amount due to such of the defendants as are prior incumbrancers of the mortgaged premises), [*if the whole amount secured by the mortgage has not become due, or if any of the defendants are infants or absentees, the notice of motion should follow the language of the order in Form No.* 11], and for such other and further relief as may be just.[1]

Dated the day , 18 .

T. R.,
Plaintiff's Attorney.
[*Office and post-office address*].

To J. Z.,
Attorney for Defendant, [*name*].

No. 11.

Order of Reference, Preliminary to Judgment.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

On reading the complaint on file in this action, and on reading and filing the affidavit of T. R., the attorney for the plaintiff, and the affidavits of service and the notices of appearance, from which

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[1] See *ante* §§ 460, 461.

it appears that this action was brought to foreclose a mortgage, and that the whole amount secured thereby is (not) due; and it further appearing that the summons was duly served on all of the defendants herein, more than twenty days since; that the time to answer has expired as to all of the defendants, and that no answer or demurrer has been received from any of them, and that none of the defendants are infants or absentees, (*or*, that no answer has been served by any defendant, except the usual general answer of the infant defendants, R. P. and D. P., who have appeared and answered by their guardian *ad litem*, and that the defendant O. S., is an absentee); and it further appearing that a notice of the pendency of this action was filed more than twenty days since; and on filing due notice of this motion, with due proof of the service thereof on the attorneys for all of the defendants who have appeared herein:

Now, on motion of T. R., attorney for the plaintiff, and after hearing J. Z., of counsel for the defendant C. D., it is

ORDERED, that it be referred to X. Y., Esq., a counselor at law, of , to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint, (and also to compute the amount due to such of the defendants as are prior incumbrancers of the mortgaged premises).

[*Where the whole amount secured by the mortgage has not become due, the order should be*]: to ascertain and compute the amount due and yet to become due on the bond and mortgage set forth in the complaint, including interest thereon to the date of his report, and also to ascertain and report the situation of the mortgaged premises, and whether, in his opinion, the same can be sold in parcels, without prejudice to the interests of the parties; and if he shall be of the opinion that a sale of the whole of said premises in one parcel will be most beneficial to the parties, then that he report the same with his reasons for such opinion.

[*If one of the defendants is an infant, and has put in a general answer by his guardian ad litem, or if any of the defendants are absentees, the order should read in addition*]: to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made, and to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint.

No. 12.

Subpœna to Attend Before Referee.

[*Title of the action*].

By virtue of an order made and entered in the above entitled action, on the day of , 18 , to ascertain and compute the amount due to the plaintiff for principal and interest on the

bond and mortgage set forth in the complaint [*Or, insert the substance of the order of reference, following its language*], I, X. Y., the referee appointed herein, do hereby summon you to appear before me, at my office, No. street, in the city of , on the day of , 18 , at o'clock in the noon, to attend a hearing of the matters in said action, in reference before me, as such referee, pursuant to said order. And hereof, fail not at your peril.

Dated the day of , 18 .

X. Y.,
Reference.

No. 13.

Oath of Referee.

[*Title of the action*].

COUNTY OF , *ss.*:

I, X. Y., the referee named in the order of this court, made in the above entitled action, at a term thereof held on the day of , 18 , by which it was referred to the undersigned referee, to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint, [*following the language of the order*], being duly sworn, do depose and say:

That I will faithfully and fairly try and determine the questions referred to me, as the case requires, and that I will make a just and true report, according to the best of my understanding.

[*Jurat*] [*Signature*].

No. 14.

Report of Referee, Preliminary to Judgment.

Whole Amount Due. No Infants or Absentees.

[*Title of the action*].

To the court of :

In pursuance of an order of this court, made in the above entitled action, on the day of , 18 , by which it was referred to the undersigned referee, to ascertain and compute the amount due to the plaintiff on the bond and mortgage set forth in the complaint in this action, [*following the language of the order*].

I, X. Y., the referee in said order named, do report, that, having first taken the referee's oath herein as required by law, I have computed and ascertained the amount due to the plaintiff, upon and by virtue of the said bond and mortgage, and that I find and accordingly report, that there is due to the plaintiff for principal and interest on the said bond and mortgage at the date of this, my report, the sum of dollars.

Schedule "A," hereunto annexed, shows a statement of the amounts due for principal and interest respectively, the periods of the computation of interest, and its rate.

Dated the day of , 18 .

[*Signature of Referee*].

SCHEDULE "A."

EXHIBIT No. 1. Bond executed by C. D. to E. F., dated the day of , 18 , to secure the payment of the sum of dollars and interest.

EXHIBIT No. 2. Mortgage executed by C. D. and M. D., his wife, to E. F., to secure the payment of said bond; same date as bond; recorded the day of , 18 , in the office of the clerk of the county of , in book No. , of mortgages, at page .

EXHIBIT No. 3. [*Insert in case of assignment*]. Assignment of said bond and mortgage from E. F. to H. O., dated the day of , 18 , and recorded in the office of the clerk of the county of , in book No. , of assignments of mortgages, at page

EXHIBIT No. 4. Policy of insurance for dollars in the fire insurance company. Premium paid, dollars.

EXHIBIT No. 5. Tax receipts for taxes paid by plaintiff for the year 18 , to the county (*or* city) treasurer, amounting to dollars.

Principal sum on bond.....$
Interest thereon from to , being years, months and days, at per centum per annum.....
Amount paid by plaintiff for taxes.....
Interest thereon from to this date, at per centum per annum .....
Amount paid by plaintiff for insurance.....
Interest thereon from to this date, at per centum per annum .....

Total amount due.....$

Dated the day of , 18 .

[*Signature of Referee*].

No. 15.

Report of Referee Preliminary to Judgment.

Whole Amount Not Due. No Infants or Absentees.

[*Title of the action*].

To the court of :

In pursuance of an order of this court, made in the above entitled action, on the day of , 18 , by which it was referred to the undersigned referee, to ascertain and compute the

amount due, and yet to become due, to the plaintiff on the bond and mortgage set forth in the complaint, which is filed in this action, including interest thereon to the date of this report; and also to ascertain and report the situation of the mortgaged premises, and whether, in his opinion, the same could be sold in parcels, without injury to the interests of the parties, and if he should be of the opinion that a sale of said premises in one parcel would be most beneficial to the parties, to report his reasons for such opinion,

I, X. Y., the referee in said order named, after having first taken the referee's oath herein as required by law, do report:

That I have ascertained and computed the amount due to the plaintiff upon and by virtue of the said bond and mortgage, and that the amount so due, with interest to the date of this report, is the sum of dollars.

That I have also ascertained and computed the amount yet to become due to the plaintiff upon said bond and mortgage, and that the amount which is not yet due, but which will hereafter become due thereon, including interest to the date of this report, is the sum of dollars.

That the whole amount secured by the said bond and mortgage and still remaining unpaid, including interest thereon to the date of this report, is the sum of dollars.

Schedule "A," hereunto annexed, shows a statement of the amounts of principal due, and yet to become due, respectively; the amounts of interest thereon, the periods of computation of interest, and its rate.

I do further certify and report that I have ascertained the situation of the mortgaged premises, and am of the opinion that the same can not, (*or* can) be sold in parcels, without injury to the interests of the parties; that my reasons for such opinion are as follows: [*Here state the reasons for such opinion*].

The testimony upon which I have formed said opinion is hereto annexed, and forms a part of this report.

Dated the day of , 18 .

[*Signature of Referee*].

SCHEDULE "A."

[*Set out the bond and mortgage and the other papers used as exhibits on the reference, as in the preceding form, and continue as follows*]:

Principal sum now due .....$

Interest thereon from to , being years, months and days, at per centum per annum,

Amount due.....$

Principal sum secured by said bond and mortgage, but not yet due .....$

Interest thereon from to , being years, months and days, at per centum per annum,

Amount to become due .....$

Amount due, as above .....$
Amount to become due, as above .....

Total amount of plaintiff's claim at this date...$
Dated the day of , 18 .

[*Signature of Referee*].

No. 16

Report of Referee Preliminary to Judgment.

Whole Amount Due. Infants or Absentees.

[*Title of the action*].

To the court of :

In pursuance of an order of this court, made in the above entitled action, on the day of , 18 , by which it was referred to the undersigned referee, to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made, and to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint,

I, X. Y., the referee in said order named, do certify and report, that after having first taken the referee's oath herein, as required by law, I took proof of the facts and circumstances stated in the complaint, and examined the plaintiff (*or* U. R., his agent), on oath as to any payments which have been made, and that I am of the opinion, and accordingly do report, that the facts and circumstances stated in said complaint are true, and that no payments have been made on said bond and mortgage, except such as are duly credited in the said complaint.

The said examination of the plaintiff, (*or* of U. R., the said agent of the plaintiff), and the proofs taken by me of the facts and circumstances stated in the complaint, except such of said proofs as were documentary, are annexed to this report.

And I do further certify and report, that I have ascertained and computed the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint, and that I find and accordingly do report, that there is due to the plaintiff for principal and interest on the said bond and mortgage, at the date of this my report, the sum of dollars.

Schedule "A," hereto annexed, shows a statement of the amounts due for principal and interest respectively, the periods of the computation of the interest, and its rate.

Dated the day of , 18 .

[*Signature of Referee*].

SCHEDULE "A."

[*Insert Schedule "A," as in the preceding form*].

No. 17.

Judgment of Foreclosure and Sale.

Whole Amount Due.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

On reading and filing the affidavits of service of the summons herein, and the notices of appearance, showing the due service of the summons on all of the defendants in this action, and the affidavit of T. R., attorney for the plaintiff, showing that none of the defendants are infants or absentees (*or*, that none of the defendants are infants excepting the defendant R. P., and that none of the defendants are absentees excepting the defendant O. S., who has been duly served with the summons by the publication thereof pursuant to an order of this court), and that the time to answer has expired as to all of the defendants, and that no answer or demurrer has been put in by any of the defendants (excepting the general answer of the defendant R. P., who is an infant, and whose answer by his guardian *ad litem* does not controvert any of the allegations of the complaint, and excepting also the answer of the defendant C. D., the issues raised by which have been duly tried at a term of this court, before Hon. , one of the Justices thereof, and a decision therein rendered for the plaintiff and duly filed) [*If computation is by the court on the trial of the issues*], (and the court on such trial having ascertained and computed the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint to be the sum of dollars, and interest thereon from the day of , 18 , the date when said computation was made); and on reading and filing the report of X. Y., Esq., to whom it was referred, to ascertain and compute the amount due to the plaintiff, for principal and interest on the bond and mortgage set forth in the complaint (and to such of the defendants, as are prior incumbrancers of the mortgaged premises), [*If any of the defendants are infants or absentees, continue in the language of the order of reference;* and to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff, or his agent, on oath, as to any payments which have been made], by which report, bearing date the day of , 18 , it appears [*in the case of infants or absentees*], that the facts and circumstances stated in said complaint, are true, and that no payments have been made, except such as are duly credited in the said complaint, and that the sum of dollars was due thereon, at the date of said report; and on reading and filing due proof that notice of the pendency of this action was filed in the office of the clerk of the county of , on the day of , 18 .

Now, on motion of T. R., attorney for the plaintiff, no one appearing in opposition (*or*, after hearing J. Z., attorney for the defendant C. D., in opposition thereto), it is

ORDERED, that the said report be, and the same hereby is, in all things confirmed; and, on like motion as aforesaid, it is adjudged, that the mortgaged premises, described in the complaint in this action, as hereinafter set forth, or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest and costs, and which may be sold separately, without material injury to the parties interested, be sold at public auction, in the county of , by and under the direction of J. R., Esq., of the city of , counselor at law, who is hereby appointed a referee for that purpose, (*or* by, and under, the direction of the sheriff of said county); that the said referee give public notice of the time and place of such sale, according to law and the practice of this court; that either, or any, of the parties to this action, may purchase at such sale; that the said referee execute to the purchaser, or purchasers, a deed, or deeds, of the premises sold; that out of the moneys arising from such sale, after deducting the amount of the fees and expenses on such sale, and any lien, or liens, upon said premises so sold for taxes, assessments or water rates, at the time of such sale, and the amount necessary to redeem the property sold, from any liens for unpaid taxes, assessments or water rates, which have not apparently become absolute, the said referee pay to the plaintiff, or to his attorney, the sum of dollars, adjudged to the plaintiff for costs and disbursements in this action, with interest thereon, from the date hereof; that he pay to M. N., guardian *ad litem* for said infant defendant, R. P., the sum of dollars, as an allowance of costs, and that he also pay to the plaintiff, or to his attorney, the amount so reported due to him, as aforesaid, together with the legal interest thereon, from the date of said report, or so much thereof, as the purchase money of the mortgaged premises will pay of the same, and that he take a receipt therefor, and file it with his report of sale; that he pay over the surplus money, if any there should be, arising from the said sale, to the treasurer of said county of . (*or, if the property is situated in the city of New York, to the chamberlain*), within five days after the same is received and ascertainable, subject to the order of this court; that he make a report of such sale, and file it with the clerk of this court, with all convenient speed; that if the proceeds of such sale are insufficient to pay the amount so reported due to the plaintiff, with the interest and costs, as aforesaid, then that the said referee specify the amount of such deficiency in his report of sale, and that the defendants, C. D., J. H. and H. O., pay to the plaintiff the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds thereof, pursuant to the directions contained herein, and that the plaintiff have execution therefor, and that the purchaser, or purchasers, at such sale, be let into possession on production of the referee's deed.

And it is further adjudged, that the defendants, and all persons claiming under them, or any or either of them, after the

filing of the said notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption, in the said mortgaged premises, so sold, and in every part thereof.

The following is a description of the mortgaged premises, hereinbefore mentioned: [*Insert description of the premises as contained in the mortgage and the complaint*].

No. 18.

Judgment of Foreclosure and Sale.

Part only Due—Premises Sold in One Parcel. (As in Preceding Form No. 17, to * and Continue).

To ascertain and compute the amount due, and yet to become due, to the plaintiff, on the bond and mortgage set forth in the complaint, including the interest thereon, to the date of his report, and also, to ascertain the situation of the mortgaged premises, and whether the same can be sold without prejudice to the interests of the parties, by which report, bearing date the day of , 18 , it appears that the amount due to the plaintiff, with interest, to the date of said report, is the sum of dollars, and that the amount which is not yet due to the plaintiff, but which will hereafter become due to him, on said bond and mortgage, including interest thereon, to the date of said report, is the sum of dollars, and, that the whole amount secured by said bond and mortgage, and still remaining unpaid, including interest thereon, to the date of said report, is the sum of dollars, and that the said mortgaged premises can not be sold in separate parcels, without injury to the interests of the parties, for the reason that [*insert reason as contained in the referee's report*].

Now on motion of T. R., attorney for the plaintiff, and after hearing J. Z., attorney for the defendant, C. D., in opposition thereto, it is

ORDERED, [*Continue as in preceding Form No. 17, except that the direction to pay the "amount due," should be changed to a similar direction*] pay to the plaintiff, or his attorney, the whole amount so reported to be secured by the said bond and mortgage, and still remaining unpaid, together with the legal interest.

And it is further adjudged, that in case the amount reported as actually due to the plaintiff, with interest, and the costs of this action, shall be paid before such sale, the plaintiff shall be at liberty at any time hereafter, when any of the principal sum or interest, secured by said bond and mortgage, shall become due, to apply to the aforesaid referee, who is hereby continued a referee for that purpose, under, and in pursuance of, this judgment, and obtain a report of the amount which shall then be due; to the end, that upon the coming in and confirmation of such report, a judgment

may be made for a sale of the said premises, to satisfy the amount which shall then be due, with interest, and the costs of such report and sale.

And it is further adjudged, that, in case the said premises shall be sold under this judgment, and shall not produce sufficient to satisfy the amount so reported as being secured by the said bond and mortgage, and still remaining unpaid, with interest, and the costs of this action and of such sale, the plaintiff may, at any time thereafter, when any future installment of principal or interest on said bond and mortgage shall become due, apply to this court, for an execution against the said defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, for the amount which shall then be due, with interest and the costs of such application.

The following is a description of the mortgaged premises hereinbefore mentioned: [*Insert description*].

No. 19.

Judgment of Foreclosure and Sale.

Part Only Due—Premises to be Sold in Separate Parcels.

[*As in preceding Form No.* 18, *except that the opinion of the referee to the effect, that the premises can be sold in parcels without injury to the interests of the parties, should be stated according to the facts. The addition to Form No.* 17, *immediately before the description should be as follows*]:

And it is further adjudged, that the plaintiff be at liberty, at any time hereafter, as any installment of principal or interest, secured by said bond and mortgage, shall become due, to apply to the aforesaid referee, who is hereby continued a referee for that purpose, under, and in pursuance of this judgment, and to obtain a report as to the amount which shall then be due to the plaintiff, to the end that, upon the coming in and confirmation of such report, an order may be made for a sale of the residue of said premises, not sold under this judgment, to satisfy the amount which shall then be due, with interest, and the costs of such report and sale.

And it is further adjudged, that in case the said premises shall be sold under this judgment, and shall not produce sufficient to satisfy the amount so reported as secured by the said bond and mortgage, and still remaining unpaid, with interest, and the costs of this action, and of such sale, the plaintiff may, at any time thereafter, when any future installment of principal or interest, on said bond and mortgage, shall become due, apply to this court for an execution against the said defendants, C. D., J. H. and H. O., who are personally liable for the payment of the debt secured by the said bond and mortgage, for the amount which shall then be due, with interest, and the costs of such application.

The following is a description of the mortgaged premises, hereinbefore mentioned and specified, and the order in which the said several parcels thereof are to be sold separately, to wit:

I. The lot or parcel, to be sold first, is bounded as follows: [*Insert description*].

II. The lot or parcel, to be sold next or second, is bounded as follows: [*Insert description*].

No. 20.

Judgment of Foreclosure and Sale.

Direction to be Inserted in Judgment for a Sale of Separate Parcels in the Inverse Order of Alienation.

[*Insert at the end of the judgment, immediately before the description*]:

And it is further adjudged, that the said referee summon before him all of the parties who have appeared in this action, and that he take proof of the order and manner of alienation of the mortgaged premises, and that if it shall appear to the said referee, that separate parcels of the said mortgaged premises have been conveyed or incumbered by the said mortgagor, or by those claiming under him, subsequently to the lien of the plaintiff's mortgage, the said referee shall sell the mortgaged premises in parcels, in the inverse order of their alienation, according to the equitable rights of the parties who are subsequent grantees or incumbrancers, as such rights shall be made to appear to said referee.

No. 21.

Judgment of Foreclosure and Sale.

Provision to be Inserted in Judgment for Sale, When One of the Defendants is Merely a Surety.

And it is further adjudged, that if the plaintiff is not able to collect the amount of such deficiency out of the estate of the said [*naming mortgagor*], upon the issuing of an execution against his property, to the sheriff of the county in which he resides, or of the county where he last resided in this state, the defendants, [*naming the sureties*], upon the return of such execution unsatisfied, pay so much of such deficiency, as the proceeds of the sale hereinbefore directed, and the amount, if any, which shall have been collected of the said [*naming mortgagor*], personally, (subsequent to the assignment by said sureties to the plaintiff), exclusive of the costs and expenses of the foreclosure and sale, shall be less than the principal (*or other limit of sureties' liability*), and the interest thereon, from the time of the commencement of this action, to the time of such sale, with the interest on that part of

the deficiency, from the time of the said sale, until it shall be so paid by them.

And it is further adjudged, that if they pay the amount thus decreed against them personally, or if the same is collected out of their property, they shall have the benefit of this judgment, against the said [*naming mortgagor*], for the purpose of enabling them to obtain remuneration from him, to the same extent with interest, but no further, either by a new execution against his property, or by bringing an action thereon, as they may think proper.

No. 22.

Notice of Sale Under Judgment.

[*Title of the action*].

In pursuance of a judgment of foreclosure and sale, made and entered in the above entitled action, bearing date the day of , 18 , and entered in the county clerk's office, on the day of , 18 , I, the undersigned referee, in said judgment named, (*or* the sheriff of the county of), will sell at public auction, at the , in the city of , county of , and state of , on the day of , 18 , at o'clock in the noon of that day, the following described premises: [*Insert description*].

Dated the day of , 18 .

J. R.,
Referee (*or Sheriff*).

T. R.,
Plaintiff's Attorney.

No. 23.

Terms of Sale.

[*Title of the action*].

The premises described in the annexed notice of sale, will be sold under the direction of J. R., referee (*or* sheriff of the county of), upon the following terms:

I. Ten per centum of the purchase money of the said premises will be required to be paid to the said referee (*or* sheriff), at the time and place of sale, for which the referee's (*or* sheriff's) receipt will be given.

II. The balance of said purchase money will be required to be paid to said referee (*or* sheriff), at his office, No. , in the city of , on the day of , 18 , at which time the said referee's (*or* sheriff's) deed, will be ready for delivery.

III. The referee (*or* sheriff), is not required to send any notice to the purchaser; and if he neglects to call at the time and

place above specified, to receive his deed, he will be charged with interest thereafter, on the whole amount of his purchase, unless the referee (*or* sheriff), shall deem it proper to extend the time for the completion of said purchase.

IV. All taxes, assessments and water rates upon said premises, will be allowed by the referee (*or* sheriff), out of the purchase money, provided the purchaser shall, previously to the delivery of the deed, produce to the referee (*or* sheriff), proof of such liens and duplicate receipts of the payment thereof.

V. The purchaser of said premises, or of any portion thereof, will, at the time and place of the sale, sign a memorandum of his purchase, and pay, in addition to the purchase money, the auctioneer's fee of ten dollars, for each parcel separately sold.

VI. The biddings will be kept open, after the property is struck off, and, in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him, will be again put up for sale under the direction of said referee (*or* sheriff) under these same terms of sale, without application to the court, unless the plaintiff's attorney shall elect to make such application; and such purchaser will be held liable for any deficiency that may exist between the sum for which said premises were struck off upon the sale, and that for which they may be sold on the resale, and also, for all costs and expenses occurring on such resale.

VII. [*If there is a prior incumbrance*]. The said premises will be sold subject, however, to a mortgage for dollars, and interest thereon, from the day of , 18 , and subject to [*describing any other incumbrances*].

J. R.,
Referee (*or Sheriff*).

MEMORANDUM OF SALE.

I, M. N., have this day of , 18 , purchased the premises described in the annexed printed notice of sale, for the sum of dollars, and I hereby promise and agree to comply with the terms and conditions of sale of said premises, as above mentioned and set forth.

Dated 18 .

M. N.,
Purchaser.

RECEIPT.

$

Received from M. N., the sum of dollars, being ten per centum of the amount bid by him, for the property sold by me, under the judgment in the above entitled action, and pursuant to the foregoing terms of sale.

Dated 18 .

J. R.,
Referee (*or Sheriff*).

No. 24.

Affidavit of Posting Notice of Sale.

[*Title of the action*].

COUNTY OF , *ss.:*

, being duly sworn, says that he is more than 21 years of age, and resides at ; that on the day of , 18 , he posted, and conspicuously fastened up, a printed notice of sale, of which the prefixed notice is a copy, in three public places, in the city of , in said county of , as follows: one notice on the outer door of the court house in said city; one notice on the bulletin board at ; one notice in the post-office at ; that said city of , is the place where said sale is to take place, as mentioned in said notice; and that the day of , 18 , is at least forty-two days before the day of sale, mentioned in said notice.

Deponent further says, that on the said day of , 18 , he also posted, and conspicuously fastened up, said printed notice of sale in three public places, in the town of , in said county of , as follows: one notice of sale in the store of ; one notice in the post-office of said town; one notice in the hotel; that said town of , is the town where the property described in said notice, is situated; and that said day of , 18 , is at least forty-two days before the day of sale mentioned in said notice.

[*Jurat.*]

No. 25.

Referee's Report of Sale.

[*Title of the action*].

To the court of :

In pursuance and by virtue of a judgment of this court, granted in the above entitled action, at a term thereof, held at , on the day of , 18 , and heretofore duly entered, by which it was, among other things, ordered and adjudged, that all and singular the mortgaged premises mentioned in the complaint in this action, and hereinafter described, or so much thereof as might be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, and which might be sold separately without material injury to the parties interested, be sold at public auction, in the county of , by or under the direction of the undersigned referee (*or* sheriff); that the referee (*or* sheriff) give public notice of the time and place of such sale, according to law and the rules and practice of this court; that the plaintiff, or any of the parties to this action, might become a purchaser on such sale; that the referee execute a deed to the purchaser of the mortgaged premises so sold; that said referee pay all taxes, assessments and water rates, which are liens

upon the property sold, and the amount necessary to redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute; that said referee pay to the said plaintiff, or his attorney, out of the proceeds of the sale, dollars, his costs and charges in this action as adjusted, with interest from the date of said judgment, and also the amount reported due to the plaintiff, together with the legal interest thereon from the date of the referee's report, or so much thereof as the purchase money of the mortgaged premises would pay; that the referee take the plaintiff's receipt therefor and file the same with his report; that he pay the surplus moneys arising from said sale, if any there should be, into court, to the treasurer of the county of , (*or*, to the chamberlain of the city of New York), within five days after the same should be received and ascertainable, for the use of the person or persons entitled thereto, subject to the further order of this court; and that if the moneys arising from said sale should be insufficient to pay the amount so reported due to the plaintiff, with the interest, costs, taxes and expenses aforesaid, the said referee (*or* sheriff), specify the amount of such deficiency in his report of sale,

I, the undersigned, J. R., the referee (*or* sheriff) named in said judgment, do respectfully certify and report such sale and proceedings as follows:

That, having been charged by the attorney for the plaintiff with the execution of said judgment, I advertised said premises to be sold by me, at public auction, at , in the town (*or* city) of , in the county of , on the day of , 18 , at o'clock in the noon; that previous to said sale, I caused notice thereof to be publicly advertised for weeks successively, as follows, to wit: by causing a printed notice thereof to be fastened up in three public and conspicuous places in the , where the said premises were to be sold, and also in three public and conspicuous places in the , where the said mortgaged premises are situated, at least days before the sale, and also by causing a copy of such notice to be published once in each week during the weeks immediately preceding such sale, in a public newspaper printed in said county of , to wit: the , published at , in said county, which notice contained the same description of said mortgaged premises as did said judgment.

And I do further report, that on the day of , 18 , the day on which said premises were so advertised to be sold as aforesaid, I personally attended, at the time and place fixed for said sale, and exposed said premises for sale at public auction to the highest bidder, and that the said premises were then and there fairly struck off to , for the sum of dollars, he being the highest bidder therefor and that being the highest sum bidden for the same.

And I do further report that I have executed, acknowledged and delivered to the said purchaser, the usual referee's (*or* sheriff's)

deed for said premises, and have paid over or disposed of the purchase money, or the proceeds of said sale, as follows, to wit: I have paid to the attorney for the plaintiff the sum of dollars, being the amount of his costs of this suit, as adjusted, with interest, and have taken his receipt therefor, which is hereto annexed.

I have also retained in my hands the sum of dollars, being the amount of my fees and disbursements on said sale, including the expense for publishing the notice of sale.

I have paid to the plaintiff (*or* his attorney) the sum of dollars, adjudged to him, and have taken his receipt therefor, which is hereto annexed.

I have paid to the county treasurer of county, for the use of the person or persons entitled thereto, the sum of dollars, the surplus herein, and have taken his receipt therefor, which is hereto annexed.

I have paid for city taxes.....$
For county taxes.....
For printing and posting the notice of sale.....
For all of which receipts are hereto annexed.
I have retained for my fees and commissions .....

Total.....$

[*In case of deficiency, instead of the clause for the surplus, insert*]:

And I do further report that after such sale herein, and the disposal of the proceeds thereof, as above provided, the amount of the deficiency is the sum of dollars, with interest thereon from the date of this report.

And I do further report that the premises so sold and conveyed by me, as aforesaid, were described in said judgment and in the deed executed by me, as aforesaid, as follows:

[*Insert same description of premises as in judgment*].

All of which is respectfully submitted to this court.

Dated the day of , 18 .

J. R.,
Referee (*or Sheriff*).

Receipt for Amount Due Plaintiff.

[*Title of the action*].

Received, 18 , of J. R., the referee (*or* sheriff), who made the sale of the premises under and by virtue of the judgment in the above entitled action, the sum of dollars, which sum, being part of the proceeds of the sale of said premises, is received by me under and by virtue of the provisions of said judgment, being (*or* on account of) the amount adjudged to be paid to said plaintiff, with interest thereon, as mentioned in said judgment.

T. R.,
Attorney for Plaintiff.

RECEIPT FOR COSTS.

[*Title of the action*].

Received, 18 , of J. R., the referee (*or* sheriff), who made the sale of the premises under and by virtue of the judgment in the above entitled action, the sum of dollars, being the amount of the costs and disbursements of the plaintiff in said action, as taxed, with the interest, which costs are paid by said referee (*or* sheriff) under and by virtue of the provisions of said judgment.

T. R.,
Attorney for Plaintiff.

RECEIPT FOR SURPLUS MONEYS.

[*Title of the action*].

Received, , 18 , of J. R., referee (*or* sheriff) herein, pursuant to the judgment in this action, the sum of dollars, being surplus moneys received on the sale of the premises in the above entitled action.

N. V.,
Treasurer of County.

No. 26.

Order Confirming Report of Sale.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

The report of J. R., Esq., the referee appointed by the judgment in this action, to sell the mortgaged premises described in the complaint herein, having been duly filed in the office of the clerk of the county of , on the day of , 18 , and on reading and filing due notice of the filing of said report, with due proof of the service thereof on all of the parties who have appeared in this action, and eight days having elapsed since said notice of filing said report was served, and no exceptions having been filed thereto; now on motion of T. R., attorney for the plaintiff, it is

ORDERED, that the said report and the sale therein mentioned, be absolute and binding forever, and that they stand as in all things ratified and confirmed.

No. 27.

Petition to Sell Balance of Mortgaged Premises

[*Title of the action*].

To the court of :

The petition of E. F., the above named plaintiff, respectfully shows that a judgment of foreclosure and sale was entered in this action in the office of the clerk of county, on the day of , 18 , on the report of the referee herein, whereby it appears that the sum of dollars was due on the bond and mortgage mentioned in the complaint, on the day of , 18 , and that the amount secured, and not then due, was the sum of dollars.

That such proceedings were thereupon had upon such judgment, that, under and by virtue thereof, a portion of the premises described in said judgment, and in the complaint herein, sufficient for the payment of the amount reported due on said bond and mortgage, and the interest thereon, together with the costs and disbursements, as settled by the clerk of the county of , and entered in said judgment, was sold, and brought the sum of dollars, which said sum paid the costs and expenses on said foreclosure, and a portion of the principal secured by the said mortgage, leaving unpaid on said mortgage, the sum of dollars, with interest thereon from the day of , 18 .

That the premises so sold, comprised the lot first described in the said judgment and complaint, and was the whole of the premises described therein, except the lot last described therein, which said lot so remaining unsold, is bounded and described as follows: [*Insert description from judgment*].

That under and by virtue of the terms of said bond and mortgage, the interest thereon was payable [*state terms of bond and mortgage*]; that the interest on the amount unpaid on said mortgage, became due on the day of , 18 , and remains unpaid; that no party has appeared in said action, except the defendants C. D. and M. D., who have appeared by J. Z., as their attorney, and that none of the defendants herein are infants or absentees.

Wherefore, your petitioner prays, that an order may be granted in this action, founded on said judgment, and directing a sale of said unsold lot, hereinbefore described, under and pursuant to the said judgment, to satisfy the amount due the said plaintiff, with the costs of this proceeding; and as said lot is not capable of division, your petitioner prays that the whole of the premises may be sold, and that the proceeds may be applied to the payment of such costs and interest, and that the balance may be applied to the payment of the amount due on the mortgage of this plaintiff.

Dated the day of , 18 . E. F., *Petitioner.*

[*Add verification in the usual form*].

No. 28.

Order Directing Sale of Balance of Mortgaged Premises.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

On reading and filing the petition of E. F., the above named plaintiff, by which it appears, among other things, that the sum of dollars remains unpaid on the judgment of foreclosure in the above entitled action, with interest thereon, from , 18 , after the application of all the proceeds of the sale of the premises sold under said judgment, on 18 ; that the interest on said sum of dollars, from 18 , became due and payable on the day of , 18 , and still remains unpaid; and that all the premises described in said complaint and judgment, have been sold, except a single lot, which said lot can be sold more advantageously by being sold in one parcel; and on reading and filing due proof of the service of this petition and notice of this motion on C. D. and M. D., the only defendants who have appeared herein; now, on motion of T. R., plaintiff's attorney, it is

ORDERED, that the residue of the said mortgaged premises, described in the said complaint and judgment in this action, and remaining unsold, be sold under the direction of the referee heretofore appointed herein, for the payment of the amount remaining unpaid on said mortgage, to wit: the sum of dollars, and interest thereon from 18 , together with the costs of this proceeding, under and pursuant in all respects and according to the terms and the directions for sale contained in said judgment.

And it is further ordered, that the said defendants, and all persons claiming under them, or either of them, after the filing of the notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption of or in the said mortgaged premises so sold, or any part thereof.

[*Add clause from preceding forms directing judgment for deficiency against certain defendants, if desired*].

No. 29.

Request to Docket Judgment for Deficiency.

[*Title of the action*].

SIR:—Please docket a judgment in your office, in favor of E. F., the above named plaintiff, against the defendants C. D. and J. H., for the sum of dollars, and interest thereon from the day of , 18 , for deficiency.

Judgment of foreclosure and sale, and the judgment roll, filed in your office, on the day of , 18 .

Report of J. R., Esq., the referee (*or* sheriff) to sell, named in said judgment, filed in your office on the day of , 18 showing a deficiency of dollars.

Dated the day of , 18 .

T. R.,
Plaintiff's Attorney.

To R. S., Esq., [*Office and post-office address*].
Clerk of the county of .

No. 30.

Judgment for Deficiency on Foreclosure.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

The report of J. R., the referee (*or* sheriff) appointed to sell the premises described in the judgment in the above entitled action, having been filed on the day of , 18 , by which it appears that the proceeds of said sale were insufficient to pay the amount directed to be paid in and by said judgment, and that there remains due from the defendants C. D. and J. H., to the plaintiff for such deficiency, the sum of dollars, with interest thereon from the day of , 18 , and the said report of sale having been duly confirmed by an order of said court entered on the day of , 18 ; now, on motion of T. R., attorney for the plaintiff, it is

ADJUDGED, that the plaintiff recover from said defendants C. D. and J. H., the said sum of dollars, with interest thereon from the day of , 18 , amounting in all, to the sum of dollars.

R. S.,
Clerk.

No. 31.

Execution for Deficiency.

The People of the State of , to the Sheriff of the County of , Greeting:

Whereas, by a certain judgment made in the court and entered in the office of the clerk of the county of , on the day of , 18 , in a certain action, wherein E. F. is plaintiff and C. D., J. H. and others, are defendants, it was, among other things, ordered and adjudged, that the mortgaged premises described in said judgment should be sold by and under the direction of J. R., Esq., as referee (*or* sheriff); that the said referee (*or* sheriff) should, out of the proceeds of said sale, retain the costs and expenses of said sale and pay the costs and allowances of the plaintiff and the amount reported due to the

plaintiff for principal and interest, or so much thereof as the purchase money of the mortgaged premises would pay of the same; that if the moneys received from said sale should be insufficient to pay the amount so reported due to the plaintiff, with the interest and costs as aforesaid, then that the said referee (*or* sheriff) specify the amount of such deficiency in his report of sale; and that the defendants C. D. and J. H., should pay the same to the plaintiff.

And whereas, the said referee has duly filed his report of sale in the office of the clerk of the county of , from which it appears that the money received from said sale was insufficient to pay the amount so reported due to the plaintiff, with interest and costs as aforesaid, and that the amount of such deficiency is the sum of dollars, and interest thereon from the day of 18 , and the report of said referee has been duly confirmed.

And whereas, said judgment for said deficiency, in favor of E. F., the said plaintiff, and against the said defendants C. D. and J. H., for the sum of dollars, and interest thereon from the day of 18 , was on the day of 18 , duly docketed in the office of the clerk of the county of , and the said sum of dollars, and interest thereon from the day of 18 , is now actually due on said judgment.

YOU ARE, THEREFORE, required to satisfy the said judgment out of the personal property of said judgment debtors, or either of them, within your county; and if sufficient personal property can not be found, then out of the real property in your county belonging to said judgment debtors, or either of them, on the day of , 18 , when said judgment was so docketed in your county, or at any time thereafter, and to return this execution within sixty days after its receipt by you to the clerk of the county of , where said judgment roll is filed as aforesaid.

WITNESS, Hon. , one of the Justices of said court, this day of , 18 .

T. R.,
Plaintiff's Attorney.

No 32.

Sheriff's or Referee's Deed on Foreclosure.

THIS INDENTURE, made this day of , 18 , between J. R., the sheriff of the county of , (*or* the referee, in the action hereinafter mentioned), of the city of , county of , and state of , of the first part, and of the second part.

WHEREAS, at a term of the court of , held at , on the day of , 18 , it was, among other things, ordered, adjudged and decreed, by the said court in a certain action then pending in said court between E. F. plaintiff, and [*name all the defendants*] defendants, that all and singular, the premises

described in a mortgage executed by C. D. and M. D., his wife, to E. F., and recorded in the county clerk's office in liber of mortgages, at page , and being the same premises mentioned in the complaint in said action, and described in said judgment, or such part thereof, as might be sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of said action, and which might be sold separately, without material injury to the parties interested, be sold at public auction, according to law and the course and practice of said court, by and under the direction of said sheriff, of said county, (*or* of said J. R.), who was appointed a referee in said action, and to whom it was referred by said judgment, among other things, to make such sale; that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that the said referee, (*or* sheriff), give due public notice of the time and place of such sale, according to law and the course and practice of said court; that the plaintiff, or any of the parties to said action, might become a purchaser or purchasers, on such sale; and that the said referee execute to the purchaser or purchasers of said mortgaged premises, or of such part or parts thereof, as should be sold, a good and sufficient deed or deeds of conveyance for the same, and pay all taxes, assessments or water rates, which were liens upon the property sold.

And whereas, the said referee (*or* sheriff), in pursuance of the order and judgment of said court, did, on the day of , 18 , sell at public auction, at [*state the time and place of sale*], the premises described in the said judgment, due notice of the time and place of such sale being first given, pursuant to the said judgment, at which sale, the premises hereinafter described were fairly struck off to the said party of the second part, for the sum of dollars, that being the highest sum bidden for the same.

Now This Indenture Witnesseth, that the said referee, (*or* sheriff), the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden, as aforesaid, having been first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant, and convey unto the said party of the second part, all the right, title and interest which the said C. D. and M. D., his wife, the mortgagors aforesaid, had at the time of the execution or recording of said mortgage, it being their interest in said premises so sold and hereby conveyed, in and to [*insert from the judgment the description of the parcel intended to be conveyed*], to have and to hold, all and singular, the premises above mentioned and described, and hereby conveyed, unto the said party of the second part, his heirs and assigns forever.

In Witness Whereof, the said party of the first part, referee (*or* sheriff) as aforesaid, hath hereunto set his hand and seal the day and year first above written. J. R.,

Referee.

[*Acknowledgment in the usual form*].

No. 33.

Affidavit on Application for Order of Possession.

[*Title of the action*].

COUNTY OF , *ss.:*

M. N., being duly sworn, says that this action was brought for the foreclosure of a mortgage on certain real estate situated in the said county of , and state of ; that judgment of foreclosure and sale was entered herein in the office of the clerk of the county of , on the day of , 18 , J. R., Esq., of the city of , being therein duly appointed the referee to sell; that said judgment contained the usual provision that the purchaser be let into possession on the production of the referee's deed, to which said judgment, reference is hereby had as part hereof; that due notice of said sale was given by said referee, and that on the day of 18 , the mortgaged premises described in said judgment were duly sold at public auction by said referee to this deponent for the sum of dollars, that being the highest sum bidden for the same; that this deponent has duly paid the said purchase money, and that the said referee has also executed, acknowledged and delivered to deponent a deed of conveyance of said mortgaged premises; that the report of sale of said referee was duly filed in the office of the clerk of this court on the day of , 18 , to which reference is hereby had as a part hereof, and that said report has been duly confirmed; that on the day of , 18 , deponent went to the said mortgaged premises and found C. D., who is one of the defendants in this action, in possession thereof; that he then produced and showed to said C. D. the said deed of said referee and demanded to be let into possession by virtue thereof, but the said C. D. refused and still refuses to surrender the said premises, or any part thereof, and still forcibly holds possession thereof from deponent.

[*Jurat*]. M. N.

No. 34.

Order for Possession.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

On reading and filing the affidavit of M. N., the purchaser at the sale of the mortgaged premises in this action, verified 18 ,

and on all of the papers and proceedings herein, including the judgment of foreclosure and sale, entered herein in the office of the clerk of the county of , on the day of , 18 , and on the report of the sale by J. R., Esq., the referee appointed to sell, filed in said office, on the day of , 18 , and on the order confirming said report entered herein on the day of , 18 , and on the deed from the said referee to said M. N., which said deed bears date the day of , 18 , and on the notice of this motion, with due proof of the service thereof on the defendant, C. D., who is now in possession of the said premises; and after hearing X. Y., Esq., attorney for the said M. N., the purchaser, and J. Z., Esq., attorney for the said C. D., in possession thereof, it is

ORDERED, that the sheriff of the county of , be, and he is hereby required, forthwith to put the said M. N. into possession of the said premises, and that this order be executed as if it were an execution for the delivery of the possession of said premises.

The said premises are described as follows: [*Insert description*].

No. 35.

Affidavit on Which to Apply for a Receiver of Rents.

[*Title of the action*].

COUNTY OF , *ss.:*

E. F., being duly sworn, says that he is the plaintiff in this action; that this action is brought to foreclose a mortgage given to secure the payment of the sum of dollars, and interest thereon, from the day of , 18 , on the following described premises: [*Insert description*].

That said mortgage is a second mortgage, and is inferior as a lien to a mortgage for dollars upon the same premises, held by , upon which there is now unpaid and owing interest from the day of , 18 .

That there are unpaid taxes and assessments on said premises, amounting at this date, to the sum of dollars, as nearly as can be ascertained by deponent, being as follows: the general tax for the year 18 , for dollars, and interest thereon, and an assessment for dollars, for paving street, and interest thereon.

That the whole amount of the incumbrances on said property, including the plaintiff's claim, and the said prior mortgage, and the costs and expenses of this action, and of a sale, will amount at least to the sum of dollars.

That the said mortgaged premises are an inadequate and insufficient security for the plaintiff's demand, and that they are not worth more than the sum of dollars, as deponent verily believes; that the grounds of deponent's belief are [*State fully the reasons for fixing the value of the property at the sum named*].

That the defendant, C. D., is the only person who is personally obligated for the payment to the plaintiff of the said mortgage debt, and that the said defendant is entirely irresponsible and insolvent. [*State reasons for believing this to be so*].

That there are judgments against said defendant, which are unsatisfied of record, and that the defendants O. H. and G. K., are holders of said judgments, and are made parties to this action for that reason.

That said mortgaged premises are rented to the defendant C. L., at the price, as deponent is informed and believes, of the sum of dollars per year (*or* month), and that the said defendant (*mortgagor*), is collecting and receiving the rents therefor.

[*Jurat*]. E. F.

No. 36.

Order Appointing Receiver of Rents.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

On reading and filing the affidavit of E. F., verified , 18 , and the notice of this motion, with proof of the due service thereof, and on the complaint which has been filed herein; and it appearing that the mortgaged premises are an inadequate security for the mortgage debt, and that no one, except the defendant C. D., is personally liable therefor, and that he is insolvent, and that said defendant is about to collect the rents; and after hearing T. R., attorney for the plaintiff, in support of the motion, and J. Z., attorney for the defendant C. D., in opposition thereto, it is

ORDERED, that J. B., of the city of , counselor at law, be, and he hereby is appointed, with the usual powers and directions, receiver of all the rents and profits now due and unpaid, or to become due, pending this action, and issuing from the mortgaged premises mentioned in the complaint, and described as follows: [*Insert description*].

That before entering upon the duties of his trust, the said receiver execute to the people of this state, and file with the clerk of this court, his bond with two sureties, to be approved by a judge of this court, in the penal sum of dollars, conditioned for the faithful performance of his duties as such receiver.

That said receiver be, and he hereby is directed to demand, collect and receive from the tenant or tenants in possession of said premises, or other persons liable therefor, all the rents thereof, now due and unpaid, or hereafter to become due.

That the tenants in possession of such premises, and such other person or persons as may be in possession thereof, do, and they

are hereby directed to attorn as such tenant or tenants, to said receiver, and until the further order of this court, to pay over to such receiver all rents of such premises, now due and unpaid, or that may hereafter become due.

That all tenants of the premises, and other persons liable for such rents, are hereby enjoined and restrained from paying any rent for such premises, to the defendant, his agents, servants or attorneys.

That all persons now, or hereafter in possession of said premises, or any part thereof, and not holding such possession under valid and existing leases, do forthwith surrender such possession to said receiver.

That the said receiver be, and he hereby is authorized to institute and carry on all legal proceedings necessary for the protection of all premises described in the complaint or referred to in this order, including such proceedings as may be necessary to recover possession of the whole, or any part of said premises, and to institute and prosecute suits for the collection of rents now due, or hereafter to become due on the aforesaid premises, or any part thereof; and to institute and prosecute summary proceedings for the removal of any tenant or tenants, or other persons therefrom.

And said receiver is hereby authorized, from time to time, to rent or lease, as may be necessary, for terms not exceeding one year, any of said premises; to keep the property insured against loss or damage by fire, and in repair, and to pay the taxes, assessments and water rates upon said premises.

That said receiver is hereby authorized to employ an agent, if he shall deem proper, to rent and manage said premises, to collect the rents, and to keep the premises insured and in repair, and to pay the reasonable value of his services, out of the rent received.

That during the pendency of this action, the defendant and his agents and attorneys, be enjoined and restrained from collecting the rents of said premises, and from interfering, in any manner, with the property or its possession.

That the said receiver retain the moneys which may come into his hands, by virtue of his said appointment, until the sale of the premises mentioned in the complaint under the judgment to be entered in this action; and that he then, after deducting his proper fees and disbursements therefrom, apply the said moneys to the payment of any deficiency there may be, of the said amount directed to be paid to the plaintiff, in and by the said judgment; and in case there is no such deficiency, that he retain the said moneys in his hands, until the further order of this court in the premises.

That the said receiver, or any party hereto, may at any time, on proper notice to all parties who may have appeared in this action, apply to this court for further or other instructions and power, necessary to enable said receiver properly to fulfill his duties.

No. 37.

Bond of Receiver.

[*Title of the action*].

KNOW ALL MEN BY THESE PRESENTS, that we, J. B., of the of , county of , and state of , as principal, and O. P. and R. S., of the same place, as sureties, are held and firmly bound unto the people of the state of , in the sum of dollars, to be paid unto the said people of the state of ; for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly, by these presents.

Sealed with our seals, and dated the day of , 18 .

Whereas, by an order of this court, entered in the above entitled action, on the day of , 18 , the above bounden J. B. was appointed receiver of the rents and profits of the mortgaged premises described in the complaint herein.

Now, the condition of this obligation is such, that if the above bounden J. B. shall, according to the rules and practice of this court, duly file his inventory, and annually or oftener, if thereunto required, duly account for what he shall receive or have in charge, as receiver in the said action, and apply what he shall receive or have in charge, as he may from time to time be directed by the court; and if he shall faithfully perform his duties as such receiver, in all things, according to the true intent and meaning of the aforesaid order, then this obligation to be void; otherwise to remain in full force and virtue.

[*Signatures and seals*].

COUNTY OF , *ss.:*

O. P. and R. S., being severally duly sworn, say, each for himself, that he is a householder (*or* freeholder) in this state, and is worth the sum of dollars [*double the amount of the penalty of the bond*], over and above all his debts and liabilities, and exclusive of property exempt by law from levy and sale under an execution.

[*Jurat*]. [*Signatures*].

COUNTY OF , *ss.:*

On this day of , 18 , before me, the subscriber, personally appeared J. B., O. P. and R. S., to me known to be the individuals described in, and who executed the within instrument, and they severally acknowledged to me that they executed the same.

[*Signature of Officer*].

[*Indorsed*], Approved the day of , 18 .

[*Signature of Judge*].

No. 38.

Notice of Claim to Surplus Moneys.

[*Title of the action*].

To R. S., Esq., clerk of the county of :

SIR :—Take notice that D. B., who resides at , in the of , is entitled to the surplus moneys, or some part thereof, arising from the sale of the mortgaged premises, under the judgment of foreclosure and sale entered in the above entitled action ; that the nature and the extent of the claim of the said D. B. is as follows : [*State nature of claim, as*] :

That the said D. B. is the owner of a judgment for dollars, and interest from the day of , 18 , obtained by him in the court, against the defendant C. D., on the day of , 18 , and docketed in the county clerk's office on the day of , 18 , and while the said defendant was the owner of the equity of redemption in the said mortgaged premises, and before the sale thereof under foreclosure ; that there is now due upon said judgment the sum of dollars, with interest from the day of , 18 , and that the said D. B. claims that the said judgment is a lien upon said mortgaged premises next in priority after the mortgage of the plaintiff in this action, and is the first lien upon said surplus moneys.

Dated the day of , 18.

D. B., *Claimant*,
by R. A., *His Attorney*.
[*Office and post-office address*].

No. 39.

Affidavit on Motion for Reference to Distribute Surplus Moneys.

[*Title of the action*].

COUNTY OF , *ss.* :

R. A., being duly sworn, says that he is attorney for D. B., one of the defendants in the above entitled action (*or*, who had a lien on the mortgaged premises at the time of the sale in this action).

That this action was brought for the foreclosure of a mortgage upon certain premises therein described, situated in the county of .

That on the day of , 18 , a final judgment was entered therein, in the county clerk's office, for the foreclosure of said mortgage and a sale of said premises, and that said premises were sold pursuant to said judgment, by J. R., referee (*or* sheriff of the county of), on the day of , 18 .

That the report of said referee (*or* sheriff), dated , 18 , has been filed with the clerk of the county of , by which report it appears that, after paying the amounts directed in and by

said judgment to be paid out of the proceeds of said sale, there remained a surplus of dollars, which amount has been paid by said referee (*or* sheriff) into court, and deposited with the treasurer of county (*or, in the city of New York*, with the chamberlain of the city of New York), to the credit of this action, and for the use of the persons entitled thereto.

That said D. B. is entitled to said surplus moneys, or some part thereof, and that the nature and extent of his claim thereto are set forth in the notice hereinafter mentioned, a copy of which is hereto annexed.

That from all the searches for conveyances and incumbrances made in this action and filed with the judgment roll herein, the following and no other unsatisfied liens upon said surplus moneys appear, to wit: [*specify liens*], and that no other unsatisfied liens thereon are known to this deponent to exist.

That the notice of the claim of said D. B. to such surplus moneys has been filed by him with the clerk of the county of , a copy of which notice is hereto annexed and marked "Exhibit A."

[*Jurat*]. R. A.

No. 40.

Notice of Motion for Reference to Distribute Surplus Moneys.

[*Title of the action*].

SIRS:—Take notice that on the annexed affidavit of R. A., and upon the pleadings and all the proceedings and papers in this action, the claimant, D. B., will apply to this court, at a term thereof, to be held at , on the day of , 18 , at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order of reference to a suitable referee to be selected by the court, to ascertain and report the amount due to D. B., or to any other person, which is a lien upon the surplus moneys received upon the sale of the mortgaged premises in this action, and to ascertain the priorities of the several liens thereon, to the end that on the coming in and confirmation of the report on said reference, such further order may be made for the distribution of such surplus moneys, as may be just, and for such other or further relief as the court may deem proper.

Dated the day of , 18 .

R. A.,

Attorney for Claimant, D. B.

[*Office and post-office address*].

To T. R., Esq.,

Attorney for Plaintiff.

[*Name the parties or their attorneys who have appeared in the action or filed a notice of claim with the clerk, previous to the granting of the order of reference*].

No. 41.

Order of Reference as to Claims to Surplus Moneys.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

On reading and filing the affidavit of R. A., and notice of this motion, with due proof of the service thereof on all of the parties who have appeared herein, or who have filed with the clerk of this court, a notice of claim to the surplus moneys, or some part thereof; and on motion of R. A, attorney for the claimant D. B., and after hearing C. R., counsel for P. S., in opposition thereto, (*or*, no one appearing in opposition thereto), it is

ORDERED, that it be referred to O. N., Esq., counselor at law, of , as referee, to ascertain and report the amount due to D. B., and to every other person, who has a lien upon the surplus moneys in this action, and to ascertain the priorities of the several liens thereon, to the intent that on the coming in and confirmation of the report of said referee, such further order may be made for the distribution of such surplus moneys, as may be just, and that the said referee make his report thereon with all convenient speed. [*If unsatisfied liens appear from the searches on file, or are known to exist, the court should designate the manner of serving the notice upon the holders of such liens, for example*]:

And it is further ordered, that in addition to the other notices required by the rules of this court, notice of the proceedings on such reference, be given to G. H. and L. M., either by service on them personally, or by leaving the same at their respective places of residence, not less than days prior to the hearing.

No. 42.

Subpœna to Attend Reference.

[*Title of the action*].

SIRS:—I, O. N., the referee appointed by an order of this court, granted at a term thereof, held at the of , on the day of , 18 , to ascertain and report the amount due to the defendant D. B., and to any other person who has a lien upon the surplus moneys, arising upon the sale of the premises described in the complaint in this action, and to ascertain the priorities of the several liens thereon, do hereby appoint the day of , 18 , at o'clock in the noon, for the hearing of the matters so referred to me, at which time and place all parties concerned are to attend.

Dated the day of , 18 . O. N., *Referee.*

To . [*Name all the parties who appeared in the action, or who filed a notice of claim with the clerk previous to the entry of the order of reference, also the owner of the equity of redemption, and all persons who are known to have unsatisfied liens*].

No. 43.

Certificate of Clerk as to Who Have Appeared and Filed Claims Against the Surplus Moneys.

[*Title of the action*].

I, R. S., the undersigned, clerk of the county of , and of the above named court, do hereby certify, that the following named defendants, and no others, have entered appearances in this action, to wit: C. D., by his attorney, J. Z., and D. B., by his attorney, R. A.

I further certify, that the following notices of claim to the surplus moneys in the above entitled action, and no others, were filed in my office, previous to the entry of the order of reference as to such surplus moneys, to wit: one claim on the part of C. D., another on the part of D. B., [*name other claims in like manner*]; and that no notice of claim to such surplus was annexed to the referee's report of sale, filed in my office on the day of , 18 .

Dated the day of , 18 . R. S.,

[*Seal*]. *Clerk.*

No. 44.

Claim of Creditor Before Referee, to Surplus Moneys.

[*Title of the action*].

To O. N., Referee:

The claim of G. D., (*a judgment*) creditor of C. D., the defendant in this action, to the surplus moneys arising from the sale of the mortgaged premises under the decree herein, respectfully states that he resides at , in the county of , and state of ; that he has a lien upon the said surplus moneys, by virtue of a judgment recovered in the supreme court, against the mortgagor C. D., for the sum of dollars, on the day of , 18 , and docketed in county clerk's office, on the day of 18 , while he, the said C. D., was the owner of the equity of redemption in said mortgaged premises, and before the commencement of this action, which lien is next in priority after the mortgage of the plaintiff, the whole of which judgment is still due and unpaid.

Wherefore, he claims the whole of said surplus moneys from said sale, which only amount to the sum of dollars.

Dated the day of , 18 .

G. D.,
Claimant.

COUNTY OF , *ss.*:

G. D., the above named claimant, being duly sworn, says that the facts set forth in the above claim are true; that the amount therein claimed as being due to him upon the judgment therein

mentioned, is justly due ; that neither he, nor any person by his order, to his knowledge or belief, or for his use, has received the amount that is claimed, or any part thereof, or any security or satisfaction whatever for the same, or any part thereof.

[*Jurat*]. G. D.

No. 45.

Referee's Report on Surplus Moneys.

[*Title of the action*].

To the court of :

I, the undersigned, referee appointed by an order of this court, granted on the day of , 18 , to ascertain and report the amount due to D. B., and to any other person who has a lien upon the surplus moneys in this action, and to ascertain and report the priorities of the several liens thereon, do respectfully report :

That I caused all parties who have appeared in this action, and all persons who have filed notices of claim upon the surplus moneys, and all persons who were known to have liens thereon, as appears by the certificate of the clerk, which is hereto annexed, showing who have appeared in the action and filed notices of claim, and by the affidavit of R. A., attorney for the claimaint D. B., showing what liens appear upon the searches on file, to be summoned to appear before me, as appears from the proof of service of the subpœna herein, which is also hereunto annexed.

That on said hearing I was attended by R. A., attorney for the claimant, D. B., and by [*such other persons as appeared*] ; that the testimony of the witnesses upon such hearing was read and signed by them ; and that such testimony and all the evidence, except such of it as was documentary, is annexed to this report.

That from such testimony and evidence, I make the following

Findings of Fact :

I. That the amount of the surplus moneys in this action, is the sum of dollars, as appears by the certificate of the county treasurer of the county of , which is hereto annexed.

II. [*Set forth the full findings of fact of the referee as in the trial of issues in an action*].

And from the foregoing findings of fact, I further find the following

Conclusions of Law :

I. That there is due and owing to the said claimant D. B., the sum of dollars, and interest thereon, from , 18 , amounting at the date of this report, to the sum of dollars, upon and by virtue of said judgment recovered by him against the said C. D., as aforesaid, and that the said amount is the first lien on the said surplus moneys in this action.

II. [*Continue in the order in which the liens are found until the whole fund is disposed of*].

Dated the day of , 18 .

O. N.,
Referee.

No. 46.

Notice of Motion to Confirm Report and to Distribute Surplus.

[*Title of the action*].

SIRS :—Take notice, that the report of O. N., Esq., the referee appointed herein to ascertain and report the amount due to D. B., and to any other person, who has a lien on the surplus moneys in this action, and to ascertain the priorities of the several liens thereon, was this day duly filed in the office of the clerk of the county of .

Also that upon said referee's report, and upon the testimony and papers annexed thereto, the claimant D. B., will apply to this court, at a term thereof, to be held at , on the day of , 18 , at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order confirming said report, and directing the treasurer of county to pay to the claimant D. B., or to his attorney, the sum of dollars, with interest thereon, from the day of , 18 , the date of said report, out of said surplus moneys, together with an allowance by way of costs in this proceeding, and for such other and further relief as may be just.

Dated the day of , 18 .

R. A.,
Attorney for said Claimant, D. B.

To

[*Names of all parties to whom the subpœna in Form No. 42 was addressed*].

No. 47.

Order Confirming Report of Referee and Directing Distribution of Surplus Moneys.

At a term, *etc.*

Present : Hon. , *Judge.*

[*Title of the action*].

On the report of O. N., Esq., the referee appointed herein to ascertain and report the amount due to D. B., and to any other person, which amount is a lien on the surplus moneys in this action, and to ascertain the priorities of the several liens thereon, which report was dated the day of , 18 , and filed in the office of the clerk of this court, on the day of , 18 ,

and on all of the testimony and papers annexed to said report and filed therewith; and it appearing that due notice of the filing of said report and of this motion has been given to the attorneys for the parties who have appeared in this proceeding and who filed notices of claim to such surplus moneys previous to the entry of said order of reference, and after hearing R. A., attorney for the claimant D. B., in support of this motion, and P. S., attorney for the claimant G. D., in opposition thereto, it is

ORDERED, that the said report be, and the same hereby is, in all things confirmed, and that the treasurer of county pay out and distribute the moneys in his hands to the credit of this action, after deducting therefrom the fees and commissions allowed to him by law, as follows and in the following order of priority:

I. That he pay to O. N., Esq., referee in this proceeding, the sum of dollars, for his fees as such referee.

II. That he pay to R. A., attorney for the claimant D. B., the sum of dollars, as an allowance by way of costs in this proceeding.

III. That he pay to the claimant D. B., or to his attorney R. A., the sum of dollars, and interest thereon from the day of , 18 , the date of said referee's report.

IV. That he pay to the claimant C. R., or to his attorney P. S., the sum of dollars, and interest thereon from the day of , 18 , the date of said referee's report.

V. That he pay to the claimant C. D., or to his attorney J. Z., the balance of said surplus moneys.

No. 48.

Complaint in Action for Strict Foreclosure.

[*Title of the action*].

[*Commence as in complaint in action to foreclose by a sale, following Form No. 1 to and including paragraph VI., so far as that form may apply*].

That thereafter the said E. F. commenced an action in the court, in the county of , against C. D., M. D. and J. H., for the foreclosure of the said mortgage and for a sale of said mortgaged premises, to satisfy and discharge said indebtedness; that such proceedings were had in said action that, on the day of , 18 , it was duly ordered and adjudged by the said court, that the said mortgaged premises, or so much thereof as might be necessary to raise the amount then due to the said E. F., for principal, interest and costs, and which might be sold separately without material injury to the parties interested, be sold at public auction, in the county of , by and under the direction of J. R., Esq., counselor at law, who was duly appointed

referee; that subsequently to the entry of said judgment, and in pursuance thereof, the said referee duly sold said mortgaged premises at public auction to this plaintiff, and this plaintiff duly paid to him the purchase money therefor and received from him a deed of conveyance thereof, all of which will more fully appear by said deed of conveyance, which was, on the day of , 18 , duly recorded in the office of the clerk of county, in book No. of deeds, at page , by the report of sale of said referee, which was duly filed in the office of said clerk, on the day of , 18 , and by the order of said court confirming said report of sale, which was duly entered in said action, on the day of , 18 .

That under said foreclosure and sale and the said deed of conveyance of said referee, executed in pursuance of said judgment, the plaintiff entered into possession of said mortgaged premises and the receipt of the rents and profits thereof, and has since continued and still is in possession thereof; that he then believed he had acquired, under said foreclosure, a perfect title to the said mortgaged premises, free from all liens and incumbrances, but that he has since been informed, and believes, that the defendant , has, or claims to have, an interest in or a lien upon the said premises by virtue of a certain mortgage [*describe it*], the lien of which mortgage was and is inferior and subsequent to the lien of the mortgage under which said foreclosure sale was made.

That this plaintiff is advised that he has acquired by said foreclosure the title to the said mortgage under which said sale was had, and also the right which C. D. and M. D., his wife, who were defendants in said action, had to redeem from the mortgage held or claimed by the plaintiff, the said C. D. being, at the time of the commencement of said foreclosure, the owner in fee of the title and equity of redemption of said premises; that the amount which was due and owing to the plaintiff in said action on the said mortgage, at the time of the entry of said decree of foreclosure and sale, exclusive of the costs and expenses of said action, and of said sale, was the sum of dollars, and interest thereon from the day of , 18 , no part of which has been paid, except as it was paid by the proceeds of said sale, under which this plaintiff claims.

That this plaintiff has laid out and expended large sums for permanent improvements and repairs upon said premises, to wit: [*Describe the improvements and state their cost and value*].

That the rents and profits received by this plaintiff from said premises, have not been so great in amount as the annual interest on said mortgage, under which said foreclosure was had, and have not amounted to more than the sum of dollars; that the plaintiff claims that the amounts paid by him for taxes, assessments and repairs, and the value of the permanent improvements made by him as aforesaid, should be allowed to him and added to the amount of said mortgage and interest thereon, and that there is now due and owing to him thereon, the sum of dollars.

That the plaintiff has applied to said defendant , and requested him to pay the plaintiff the said sums so due on the said mortgage held by the plaintiff, or to come to an accounting with him thereon, and after the proper charges and credits, to pay to the said plaintiff what should appear to be due him on the said mortgage; or, in default thereof, to release his right and equity of redemption in the said mortgaged premises; but that the said defendant has hitherto refused, and still refuses so to do, or to comply with any part of said plaintiff's request.

Wherefore, the plaintiff demands judgment, that an account may be taken of what is due and owing to the plaintiff for principal and interest on said mortgage, and that an account may also be taken of the rents and profits of the said mortgaged premises which have been received by the plaintiff, and also of the expenditures of the plaintiff for permanent improvements and repairs, and for taxes and assessments.

That the said defendant pay to the plaintiff what may be due him on taking the said account, with the costs of this action, within a time to be appointed by the court for that purpose; or, in default thereof, that the said defendant and all persons claiming under him be absolutely barred and foreclosed of and from all right, title and equity of redemption in and to the said mortgaged premises, and each and every part thereof, and that the plaintiff have such other or further relief, or both, in the premises as may be just and equitable.

T. R.,
Plaintiff's Attorney.

[*Add verification in the usual form*].

No. 49.

Judgment for Strict Foreclosure.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

[*Commence by reciting the proceedings in the action, which will be similar to Form No.* 17. *In all cases, an affidavit of filing the notice of pendency of action, similar to Form No.* 9, *must be furnished when applying for judgment, and should be recited. The following will be the essential parts of the judgment*]:

It is adjudged that, upon the defendant's paying unto the said plaintiff the amount which is so found and reported due to him, as aforesaid, with interest thereon, from the date of said report, together with the further sum of dollars, and interest, from this date, which is hereby adjudged to the plaintiff for his costs and charges in this action, within six months after the entry of this judgment, and service of notice thereof upon the attorney for

the defendant, said payment to be made at the office of T. R., Esq., attorney for the plaintiff, No. street, in the of , between the hours of 10 A. M. and 3 P. M. of any business day, on or before the expiration of the said six months, and which said day shall have been named by the said defendant in a notice in writing, to be served by him on said attorney for the plaintiff, not less than five days prior to said date; the said plaintiff do then convey the said mortgaged premises to the said defendant, by a suitable and proper deed of conveyance, to be approved by this court, in case the parties can not agree upon the form thereof, free and clear of all incumbrances suffered by him, or by any person claiming by, from or under him, (and with the usual covenants against his and their acts); and that he deliver up all deeds and writings in his custody relating thereto, upon oath, to the said defendant, or to whomsoever he may appoint to receive the same; and further, that the said plaintiff execute and acknowledge a certificate to cancel and discharge said mortgage of record. But in default of the said defendant's paying unto the plaintiff such principal, interest and costs, as aforesaid, by the time limited for that purpose, then it is adjudged that the said defendant, and all persons claiming by, from or under him, after the filing of the aforesaid notice of pendency of this action, do stand and be forever barred and foreclosed of and from all right, title, interest and equity of redemption in and to the said mortgaged premises, and every part thereof.

The following is a description of the said mortgaged premises herein mentioned: [*Insert description*].

No. 50.

Order Extending Time for Redemption.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

On reading and filing the affidavit of the defendant, and notice of this motion, with proof of the due service thereof, and on all of the papers and proceedings herein; and, after hearing M. N., attorney for said defendant, on his motion, and T. R, attorney for the plaintiff, in opposition thereto, it is

ORDERED, that the time granted to the said defendant , in and by the judgment entered in this action, on the day of , 18 , and within which time he was required to redeem the mortgaged premises by paying the amount due to the plaintiff for principal, interest and costs or stand foreclosed, be, and the same is hereby extended and enlarged for months, upon condition that the said defendant shall, within ten days after the entry of this order, pay to the plaintiff the sum of dollars, costs of this motion.

No. 51.

Final Order in Strict Foreclosure.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

Upon the judgment entered in this action, on the day of , 18 , and on reading and filing the notice of the entry of said judgment, with due proof of the service thereof on the defendant, and upon the affidavit of the plaintiff showing that the defendant has not paid the amount due to the plaintiff for principal, interest and costs, or any part thereof, though more than six months have expired since the said service of the notice of the entry of said judgment as aforesaid; and on due notice of this motion, with due proof of the service thereof; and after hearing T. R., attorney for the plaintiff, in support of this motion, and M. N., counsel for the defendant, in opposition thereto, it is

ORDERED, that the said defendant , and all persons claiming under him, after the filing of the notice of the pendency of this action, stand and be forever absolutely barred and foreclosed of and from all right, title, interest and equity of redemption in the mortgaged premises described in said judgment, and in each and every part thereof.

No. 52.

Notice of Sale on Foreclosure by Advertisement.

Whereas, default has been made in the payment of the money secured by a mortgage dated the day of , 18 , executed by C. D. and M. D., his wife, of , to E. F., of the same place, which mortgage was recorded in the office of the clerk of the county of , on the day of , 18 , at o'clock M., in book No. of mortgages, at page , (and which said mortgage was assigned by the said E. F. to H. O., by an assignment of mortgage dated the day of , 18 , and recorded in the county clerk's office, in book No. of assignments of mortgages, at page , on the day of , 18 , and the said H. O. is now the owner and holder thereof).

And whereas, the amount claimed to be due on said mortgage at the time of the first publication of this notice, is the sum of dollars, as follows: the sum of dollars principal, and the sum of dollars interest, which said sum of dollars is the whole amount claimed to be unpaid upon said mortgage.

Now, therefore, notice is hereby given that, by virtue of the power of sale contained in said mortgage, and duly recorded, as aforesaid, and in pursuance of the statute in such case made and provided, the said mortgage will be foreclosed by a sale of

the premises therein described, at public auction, at , in the city of , in the county of , on the day of , 18 , at o'clock in the noon of that day.

The said premises are described in said mortgage as follows: [*Insert description*].

E. F., *Mortgagee,*
(*or Assignee of Mortgage*).

T. R., *Attorney for Mortgagee,*
(*or Assignee*).

No. 53.

Notice of Sale on Foreclosure by Advertisement.

Short Form.

MORTGAGE SALE.—Mortgagors C. D. and M. D., his wife; mortgagee E. F.; assignee H. O.; second assignee and present owner and holder of the mortgage, G. H. Mortgage dated , 18 , and recorded in the office of the clerk of county, on the day of , 18 , in book No. of mortgages, at page . The amount claimed to be due upon said mortgage at the date of the first publication of this notice, is the sum of dollars.

Default having been made in the payment of the moneys secured by said mortgage, and no suit or proceedings at law or otherwise, having been commenced to recover said mortgage debt, or any part thereof; now, therefore, notice is hereby given, according to the statute in such case made and provided, that by virtue of the power of sale contained in said mortgage, and duly recorded therewith as aforesaid, the said mortgage will be foreclosed by a sale of the premises therein described, by the subscriber, at public auction, at , on the day of , 18 , at o'clock in noon of that day.

The said premises are described in said mortgage as follows: [*Insert description*].

Dated the day of , 18 .

G. H.,
Assignee of Mortgage.

T. R.,
Attorney.

No. 54.

Affidavit of Affixing Notice by County Clerk.

COUNTY OF , *ss.:*

R. S., being duly sworn, says that he is clerk of the county of , that being the county in which the mortgaged premises described in the annexed printed notice of foreclosure and sale are situated; that on the day of , 18 , he received a printed copy of the annexed notice of sale, and that immediately,

to wit: on the same day, he affixed the same in a book prepared and kept by him for that purpose, and also immediately entered in said book a minute at the bottom of such notice, of the time of receiving and affixing the same, duly subscribed by deponent as clerk of said county; and that he also immediately indexed the same against the name of the mortgagor, in said notice named.

Deponent further says, that the time when he did and performed said acts, was at least eighty-four days before the day of sale in said notice specified for the sale of the mortgaged premises therein described.

[*Jurat*]. R. S.

No. 55.

Affidavit of Affixing Notice of Sale to Outer Door of Court House.

COUNTY OF , *ss.:*

, being duly sworn, says that he resides at , and is more than twenty-one years of age; that on the day of , 18 , and at least eighty-four days prior to the time specified in the annexed printed notice of foreclosure for the sale of the mortgaged premises therein described, he fastened up a printed copy of said notice in a conspicuous place and in a proper and substantial manner, at or near the entrance of the court house or building, in the county of , where the county courts are directed to be held in and for said county of , which is the county in which said mortgaged premises are situated, that being the building in which the courts in said county are directed to be held, nearest to the mortgaged premises.

[*Jurat*].

No. 56.

Affidavit of Publishing Notice of Sale.

COUNTY OF , *ss.:*

, being duly sworn, says that he resides in the city of , in the county of , and is more than twenty-one years of age; that during the time of the publication of the notice hereinafter mentioned, he was (the foreman of) the printer of the , a newspaper, printed and published at , in said county of , that being the county in which the premises described in the annexed printed notice of sale, or a part thereof, are situated.

Deponent further says that the notice of the mortgage sale, a printed copy of which is hereto annexed, was published in said newspaper at least once in each of the twelve weeks immediately preceding the day of sale in said notice mentioned, said publication having been commenced on the day of , 18 , and ended on the day of , 18 . [*If there have been adjournments,*

add]: And deponent further says that the notice of postponement annexed to said notice of sale was also published in said newspaper, on the day of , 18 , and on the day of , 18 , in the form shown in said annexed printed copy thereof.

[*Jurat*].

No. 57.

Affidavit of Serving Notice of Sale.

COUNTY OF , *ss.*:

, being duly sworn, says that he resides at , and is over twenty-one years of age; that on the day of , 18 , at , he served the annexed notice of sale on , by delivering to and leaving with him, personally, a true copy thereof.

That deponent served the annexed notice of sale on , by leaving a true copy thereof, which was legibly addressed to him, at his dwelling house, at , in the city of , in charge of a person of full age, who received the same for him.

That on the day of , 18 , he served the said annexed notice of sale upon each of the following named persons by depositing true copies thereof in the post-office at the city of , duly enclosed and sealed in a post-paid wrapper and directed to each of said persons at their respective places of residence, as follows: to , at ; to , at ; to , at ; that the postage on each of said notices was prepaid, and that the said persons were known to deponent to reside at the several places to which the notices to them were respectively directed.

[*Jurat*].

No. 58.

Affidavit of Fact of Sale.

COUNTY OF , *ss.*:

, being duly sworn, says that he resides at , in the city of , in the county of , and is over twenty-one years of age; that at , in the city of , in the county of , on the day of , 18 , at o'clock in the noon of that day, he officiated as auctioneer at the mortgage foreclosure sale of the premises described in the notice of sale, a printed copy of which is hereto annexed, pursuant to such notice, and by virtue of the power of sale contained in the mortgage, which is therein mentioned; that said sale took place at said time and place and that the whole of said premises were then and there sold in one parcel to S. R., for the sum of dollars, he being the highest bidder therefor, and that being the highest sum bidden for the same.

Deponent further says that such sale was at public auction, in the day time, and in all respects honestly, fairly and legally

conducted, according to deponent's best knowledge and belief; that the premises, so far as the same consist of separate tracts, farms or lots, were sold separately, and no more tracts, farms or lots were sold than were necessary to satisfy the amount claimed to be due on said mortgage at the time of such sale, together with the costs and expenses allowed by law; that the following is a description of the premises sold: [*Insert description*].

[*Jurat*].

No. 59.

Petition by Purchaser Under Foreclosure by Advertisement, to Obtain Possession.

To the county judge of the county of :

The petition of G. R., of , in the county of , respectfully shows:

That heretofore C. D., being the owner of the premises hereinafter described, and being indebted to E. F., in sum of dollars, upon his bond for that sum, dated the day of , 18 , and payable in one year after that date, with interest thereon, payable semi-annually, executed, with M. D., his wife, duly acknowledged and delivered to the said E. F., a mortgage, to secure the payment of said bond, bearing even date therewith, and recorded in the office of the clerk of the county of , in book No. of mortgages, at page , on the day of , 18 , whereby they granted and conveyed unto the said E. F., the following described premises, to wit: [*Insert description*].

That said mortgage contained a like condition as the said bond, and that it also contained a power of sale, whereby in case of default in the payment of the said sum of money, the interest that might grow due thereon, or any part thereof, the said E. F., or his assigns, were duly empowered to sell said mortgaged premises in due form of law, and out of the moneys arising from the said sale, to pay the said sum of money and interest, with the costs and expenses of the proceedings thereupon, the surplus, if any, to be returned to the said mortgagor; (that thereafter the said E. F. duly assigned said bond and mortgage to H. O.); that thereafter default was made in the payment of the money secured by the said mortgage, whereupon the said E. F. commenced proceedings by virtue of said power of sale contained in said mortgage, and in pursuance of the statute in such case made and provided, to foreclose the said mortgage, by a sale of the premises therein described, at public auction; that due notice of the time and place of such sale was given, in the manner required by law; and that thereafter, to wit: on the day of , 18 , the said premises were, under the said power of sale, duly sold to and purchased by your petitioner, for the sum of dollars, that being the highest sum bidden for the same; that the affidavits of publication and of affixing the notice of sale, and of

the service of such notice, and of the circumstances of the sale, showing such foreclosure and the proceedings thereupon, and which affidavits are required by law to be made, were duly made, and that they were on the day of , 18 , duly filed in the office of the clerk of the county of , that being the county where the said mortgaged premises were and are situated, and where said sale took place; and that they were also on that day duly recorded at length by such clerk, in a book kept by him in said office for the record of mortgages, in book No. of mortgages, commencing at page ; that after the title to said mortgaged premises had been duly perfected in this petitioner, by the filing and recording of said affidavits, as aforesaid, this petitioner demanded possession of the said premises from the said C. D., who was then and is now in possession thereof, (*or* from J. H., who was then and is now in possession thereof, claiming to hold the same by some right or title derived from the said C. D., the said mortgagor, subsequently to the execution and delivery of said mortgage, by virtue of said title under said foreclosure); and that the said C. D. (*or* J. H.) refused, and still refuses to surrender said possession, and that he holds over and continues in possession of the said premises after the perfection of said title in said foreclosure proceedings and after such demand aforesaid, without permission of this petitioner, who is entitled to the possession thereof.

Your petitioner therefore prays for a final order to remove the said C. D. (*or* J. H.), and all persons holding under him from the possession of said premises, and for such other or further relief as may be just, together with the costs of this proceeding.

Dated the day of , 18 .

O. R., *Attorney for Petitioner.*

[*Add verification in the usual form*].

No. 60.

Precept to be Issued on Foregoing Petition.

Before the County Judge of county.

G. R.,
Petitioner,
against
C. D. (*or* J. H.),
In Possession.

The People of the State of New York:

To C. D. (*or* J. H.), above named, and each and every person in possession of the premises hereinafter described:

You, and each of you, are hereby required forthwith to remove from the premises described as follows: [*Insert description*]; or

to show cause before me, the county judge of the county of , at the court house, in the of , in the county of , aforesaid, on the day of , 18 , at o'clock, in the noon of that day, why the possession of said premises should not be delivered to said petitioner.[1]

Dated the day of , 18 .

[*Signature of County Judge*].

No. 61.

Final Order in Summary Proceedings.

[*Title as in precept*].

The petitioner, G. R., having appeared on the day of , 18 , and the precept issued herein having then been returned with due proof of the service thereof, and the petitioner having then demanded possession of the premises described in his petition, which petition was dated and verified on the day of , 18 .

And the respondent, C. D., in possession, having then also appeared by his attorney and filed his verified answer to said petition, and the issue thus made having been duly tried before the said county judge without a jury, who, after hearing the allegations and proofs of the parties, rendered his decision in favor of the petitioner.

Now, therefore, on motion of O. R., attorney for the petitioner, final order is hereby made in favor of said petitioner, awarding to said petitioner the delivery of the premises described in said petition, by reason of the facts therein alleged and set forth, together with the sum of dollars costs.

Dated the day of , 18 .

[*Signature of County Judge*].

No. 62.

Warrant to Obtain Possession in Summary Proceedings.

To the sheriff of the county of , or to any constable of said county of , Greeting:

Whereas, G. R. has heretofore presented to me his verified petition, alleging that heretofore C. D., being the owner of the premises hereinafter described, and being indebted to E. F. in the sum of dollars, upon his bond for that sum, dated on the day of , 18 , and payable in one year after said date with interest thereon payable semi-annually, executed,

---

[1] In New York, if the precept is served otherwise than personally, § 2241 of the Code of Civil Procedure, must be indorsed thereon.

with M. D., his wife, acknowledged and delivered to said E. F. a mortgage, to secure the payment of said bond. [*Follow substantially the language of the petition in Form No.* 59].

Whereupon I issued a precept requiring the said C. D. (*or* J. H.), and each and every person in possession of said premises, forthwith to remove from the said premises, or to show cause before me, at a certain time now past, why the possession of said premises should not be delivered to the said G. R.; [*If an answer has been interposed and a trial had, recite the proceedings as in Form No.* 61], and no good cause having been shown, or in any way appearing to the contrary, and due proof of the service of such precept having been made to me, and I having made a final order awarding the possession of said premises to said petitioner, with the sum of dollars costs.

Now, therefore, in the name of the People of the state of New York, you are hereby commanded to remove all persons from said premises, and to put the said G. R. into the full possession thereof.

In witness whereof, I have subscribed these presents this day of , 18 .

[*Signature of County Judge*].

No. 63.

Sheriff's or Constable's Return Upon the Warrant.

Pursuant to the command of the within warrant, I have this day put the said G. R. into the full possession of the premises therein mentioned.

Dated the day of , 18 .

[*Signature of Sheriff or Constable*].

[*To be indorsed on the preceding warrant*].

GENERAL INDEX.

References are to Pages.

ABSENTEES. See PARTIES.

ACCIDENT. See MISTAKE.

ACCOUNTING.

for rents and profits may be compelled by junior mortgagee, upon redemption, 191.

of rents, taxes and disbursements for improvements may be required by purchaser, on redemption by omitted judgment creditor, 199.

ACKNOWLEDGMENT.

by mortgagor, not remove bar as against his grantee, 77.

foreclosure, complaint, necessity of allegation as to, 330, 332.

OF DEBT.

created by recital of mortgage in a deed, 76.

may remove bar, 73, 74.

must be made by debtor or in his behalf, 74.

must be made to creditor or his agent, 74.

want of, is matter of defence, 330.

ACTION.

AT LAW.

allowable when, 8.

where mortgaged property not sufficient, 12.

as a concurrent remedy, 8.

barred by foreclosure, during pendency of latter, 304.

can not be brought after foreclosure, without leave of court, 304.

consent of court may be granted *nunc pro tunc* and *ex parte*, 305.

equity of redemption can not be sold on judgment therein, 8.

may be brought in New York, 8.

may be maintained against guarantor of mortgage debt, 287.

on one of the several notes secured by a mortgage, 95.

when bars foreclosure, 386-389.

by and against receivers, 776.

by assignee against mortgagee, on the latter's guaranty, does not require consent of court, 305.

by purchaser relieved from purchase, to recover disbursements, costs, etc., 680.

concurrent and successive remedies to recover debt secured, 315.

equitable; to set aside mortgage for fraud, 430.

ACTION—*Continued.*
for damages, may be maintained by ejected tenant against lessor, 186.
for deficiency against wife's separate estate not barred by foreclosure, 306.
foreclosure, necessity of stating whether action at law has been brought to recover debt, 339, 341.
independent; not lie to enforce claim of mortgagee for taxes paid, 542.
in equity; the usual method of foreclosure, 7.
legal and equitable; distinction abolished in Ohio, 446.
mistake; in describing premises; new action to correct, 440.
not lie in favor of purchaser at foreclosure to correct misdescription in mortgage, 699.
not necessary to put purchaser at foreclosure sale into possession, 713.
On Note.
discontinued by commencement of action to foreclose, 388.
illegal consideration as defence, 410.
stay pending foreclosure, 389.
other remedies not impaired by accepting mortgage, 314.
Pendency. See Lis Pendens.
surplus; enforcement of claim for, 862, 863.
To Foreclose.
commenced by service of summons, 292.
consolidation, 324, 325.
not dismissed because subsequent incumbrancers not made parties, 189.
To Redeem.
assignee of mortgage absolute, a necessary defendant, 218.
can not be maintained after mortgage paid, 192.
may be maintained by owner of equity of redemption, not made a party, 150.
upon promise to assume mortgage, 350.
ADJOURNMENT.
Of Sale. See Sale, 627, 629.
no fees allowable to officer for services, 937.
of trial of foreclosure, not authorize change of venue, 557, 558.
ADMINISTRATORS. See Executors and Administrators, 334.
ADVANCES AND ADVANCEMENTS.
actual consideration, 407.
by mortgagor to mortgagee; application on debt, 517, 518.
mortgage to secure; failure to make; set-off, 460, 461.
of money on parol agreement to execute mortgage, 320.
priority over subsequent judgment, 843.
protection of junior incumbrancers, 517, 518.
statute of frauds, 320.
to be made in future; mortgage to secure; foreclosure, 407.
unrecorded mortgage to secure, 843.
ADVERSE CLAIMANTS.
to premises, not proper defendants, 231.
except in Indiana and Kansas, 233.

ADVERSE CLAIMS.
can not be litigated in foreclosure, 231, 232.
except in Indiana and Kansas, 233.
ADVERSE POSSESSION.
By Mortgagor.
becomes such upon breach of conditions, 62.
defeats mortgage in same manner as it might affect other demands, 62.
mortgagor not tenant at will, 62.
not become such by neglect to pay interest, 62.
presumption not conclusive, 63.
presumptive evidence that debt is satisfied, 61.
what sufficient to bar foreclosure, 60.
what sufficient to divest mortgagee's right, 61.
by several successive owners, 66.
raises presumption of payment in twenty years, 66.
writ of assistance to dispossess adverse claimant, 718.
ADVERSE TITLE.
dower right; not litigated in foreclosure, 506.
effect of making claimants defendants, 503–506.
no defence on foreclosure, 500–503.
AFFIDAVITS.
admissibility in evidence on reference to compute amount due, 534, 537.
of proceedings on statutory foreclosure, 915–921.
of service by mail; statutory foreclosure, 891, 892.
on motion for reference to compute amount due, 530, 531.
requisites of, 296.
to secure order for service of summons by publication, 296.
AFTER-ACQUIRED TITLE inures to mortgagee's benefit, 462, 465, 466
estoppel, 462, 465, 466.
AGENT. See Principal and Agent.
AGREEMENT. See Contract.
ALTERATION of mortgage; defence of in foreclosure, 399.
AMENDMENT.
Of Complaint.
to correct mistake in description, 440.
Of Decree.
error in describing premises; compelling purchaser to take title, 700, 701.
Of Judgment.
not necessary to compel purchaser to complete purchase, 675.
of order to sell premises as whole, 586.
of proofs of statutory foreclosure, 918, 919.
To Correct Mistake. See Mistake.
AMOUNT.
allegation of in complaint, 329, 333.
reference to compute; notice; motion; proceedings, 528–551.
statement of in notice on statutory foreclosure, 892, 894–896.

ANNUITY.
annuitants of subsequent incumbrancers not necessary defendants, 207.
annuitants to be paid from proceeds of premises, necessary defendants, 170.
ascertainment of dower rights in surplus moneys, 853.
Northampton tables, 853.
ANSWERS AND DEFENCES.
administrator of mortgagee; not concluded by payment to heirs, 484.
admission of execution admits cause of action, 404.
advances; mortgage to secure; failure to make; set-off, 460, 461.
ADVERSE OR PARAMOUNT TITLE.
effect of making claimants defendants, 500–506.
not litigated unless set up by claimant, 504.
affirmative relief, if desired, must be demanded, 459.
after-acquired title; inures to mortgagee's benefit, 465, 466.
after opening default, 556, 557.
against assignee of bond and mortgage, 425.
against assignee of mortgage, 416–418.
payment by assumption of prior mortgage, 486, 487.
securing non-negotiable instrument, 424–427.
against *bona fide* purchaser of negotiable paper secured, 420–424.
against fraudulent assignee of mortgage, 418, 419.
against purchase money, for fraud, 430, 431, 433, 434.
against purchaser subject to mortgage; estoppel, 471–474.
against voluntary assignee in bankruptcy, 418.
AGENCY.
denial of authority to make demand, 476.
payment by third person; ratification, 484.
all questions necessary to complete justice are proper defences, 510.
alteration of mortgage, 399.
answer by claimants of interest in equity of redemption, 382
answers by only part of defendants; trial of issues, 559, 560.
by senior mortgagee made party to foreclosure of junior mortgage, 322.
should set up new matter; general answer insufficient, 380.
appeal; costs of both courts; taxes; application on mortgage, 484.
application of payments; whether upon mortgage or open account, 485.
ASSIGNMENT.
of mortgage; equitable; defence of payment as against assignee, 482.
of note and mortgage before maturity; payment after, 483.
assumption of mortgage; denial of, 498, 499.
failure of consideration, 499.
qualified by contemporaneous agreement, 499.
attorney's fee; payment of, 485, 486.
bankruptcy; assignment for creditors by mortgagee, 418.
boundaries; fraud as to, 437, 438.
breach of independent or collateral covenant, 477.
by grantee not assuming mortgage, 382.

ANSWERS AND DEFENCES—*Continued.*
by prior incumbrancers; necessity and sufficiency of answer, 507.
can not assail subsequent incumbrance of co-defendant by answer; cross-bill requisite, 383.
cause of action not accrued; nothing due, 475, 476.
claims as to priority, 510, 511.
condition as to perfecting title; non-performance, 476.
condition precedent; non-performance, 476, 477.
CONSIDERATION.
illegal or void, 408, 409, 410.
insufficiency of; partial failure, 405–407.
want of, 403–405.
COSTS.
on appeal; application on mortgage, 484.
payment of, 485, 486.
counter-claims, 450–461.
COVENANT.
independent or collateral; breach, 477.
to pay existing incumbrance; breach, 476.
cross-bill to set off debt due mortgagor, 451.
DEFAULT.
against defendant's claiming interest; conclusiveness, 529.
failure to appear at trial after answering, 531.
or admission; reference to compute amount, 528, 529.
reference to compute amount due, 531.
defect in or want of title, 524, 525.
of parties; objection by parties personally liable for debt, 385, 386
of title of mortgagor; is not, 501, 502.
defective execution and record, 397–399.
defective service on other defendant, 384.
defence confined to grounds set up in answer, 383.
defence of payment as against assignee, 482.
defences against assignee, 418.
demand by agent; agency denied; proof of authority, 476.
denial of execution of mortgage, 390.
denial of title in mortgagor, 526, 527.
denial of validity of title; conclusion of law, 461.
discharge by joint creditor; validity, 493.
procured by fraud; innocent purchasers, 493.
satisfaction; what constitutes and how alleged, 493, 494.
disputed title; controversies between defendants, 502.
dower; right subsequently accrued, 506.
duress, defence of; relief, 444–449.
defence available to surety, 444.
of person; relief, 448, 449.
Ohio doctrine, 445, 446.
over married woman; relief, 446–449.
ejectment; against mortgagor; eviction, 521.
election in which of several foreclosures to set up counter claim, 456.

ANSWERS AND DEFENCES—*Continued.*
eminent domain; condemnation money paid to mortgagor, 486.
equitable assignment of mortgage, 482.
equities; between incumbrancers; adjustment, 517, 518.
ESTOPPELS, 461–474.
against married women, 465.
agreement to release part of mortgaged premises, 467, 468.
AS AGAINST PURCHASER OF MORTGAGE.
to set up; usury, 464.
or failure of consideration, 464.
or fraud of mortgagee, 464.
or misappropriation of money by mortgagee, 464.
as against third persons, 469.
by acts, declarations and agreements, 464, 465.
by failure of interested party to give notice of his rights, 469.
by silence as to his lien, 469, 470.
by silence at public sale, 469, 470.
fraud or concealment, 468.
inures to mortgagee, 462.
knowledge of conveyance by mortgagor, 467.
necessity of fraudulent intent, 468, 469.
of mortgagee; as against purchasers at public sale, 469, 470.
of mortgagee, as against purchasers from mortgagor, 468, 469
of purchaser subject to mortgage, 464.
to complain of indefinite description, 462.
to contest validity of other notes of same series, 463.
to deny authority of mortgagee as agent of foreign corporation, 462.
to deny his appointment and authority as executor, 463.
to deny purchaser's assumption of debt, 464.
to deny that mortgage covers entire tract intended, 462.
to deny title in mortgagor, 463.
to deny validity of title, 461, 463.
to dispute recitals in mortgage, 463.
to plead outstanding title in third person, 463.
to set up defect of title, 463.
to set up partnership, and want of authority in mortgagee, 462.
to set up property held by him in trust, 463.
to show mortgage void for usury, as against assignee in good faith, 464.
eviction of mortgagor, 522–524.
extension of time of payment; consideration, 478–481.
failure of title, 524–527.
as to part; mortgagor must release whatever title acquired, 476.
of whole title; mortgagor must offer to rescind, 477.
false representations, 434–438.
fixtures; on lands leased for term of years; what are, 515–517.
foreclosure barred by deposit of collateral security, 486.
foreclosure of previous mortgage; title of claimant under, 505.

ANSWERS AND DEFENCES—*Continued.*
form of answer regulated by Code, 380.
fraud, artifice, deceit, etc., 401, 402.
as against creditors; defence of, 429.
as to extent and boundaries of land sold, 437, 438.
as to number of acres; purchase money mortgage, 436, 437.
by agent of mortgagee, 430.
cancellation of mortgage for, 432.
concealment; set-off, 459–461.
discharge procured by; innocent purchasers, 493.
generally, 428, 429.
of or upon married women, 434, 435.
participation by mortgagee essential, 434.
purchase money mortgage; relief, 430, 431, 433, 434.
recoupment of damages, 432.
upon mortgagor; remedies, 429, 430, 432, 433.
upon purchaser subject to mortgage, 435, 436.
frivolous plea; application to have stricken out, 562.
highway; gravel road tax; set-off of, 455, 456.
illiteracy and negligence of mortgagor, 401, 402.
indebtedness of mortgagee to mortgagor, 517.
indemnity; mortgage given for, 478.
infancy; as defence generally, 390, 395.
answer by guardian *ad litem*, 300.
in foreclosure by assignee of mortgage, 416–418.
by assignee of bond and mortgage, 425.
by assignee of mortgage as collateral security, 424–427.
by fraudulent assignee, 418, 419.
of mortgage payable to mortgagee alone; defences, 419, 420
insanity of mortgagor, 395–397.
insolvency of plaintiff; set-off by purchaser from mortgagor, 453.
installment; payment of, 482.
interest; failure of title; set-off, 459.
illegal; set-off, 456
payment of; giving note for is not, 484.
issue, when ready for trial, 383.
joint liability; suretyship of defendant, 501.
judgment for debt; not discharge mortgage, 494.
legal title of mortgagee; want of; is not, 500.
lien divested by foreclosure of prior mortgage; is not defence, 501
limitations of action, 490.
payment or acknowledgment, 490.
sufficiency to prevent bar of statute, 490.
married women; fraud of or upon as defence, 428, 434, 435.
matters pleadable in defence; generally, 380, 381.
mistake, 438–443.
as to quantity of land; correction, 441–443.
as to title; correction, 440.
of parties, 438

ANSWERS AND DEFENCES—*Continued.*
mortgage as security for goods to be furnished, 407, 408.
for indemnity only, 478.
payable on occurrence of event that never happened, 475.
payable to mortgagee alone, 419, 420.
to secure future advances; consideration, 407.
mortgagee estopped to claim title in mortgaged premises, 505.
mortgagor or his grantee may reply to, 381.
necessity to file cross-bill, 382, 383.
negligence, 401, 402.
negotiable paper secured by mortgage; transfer, 420–424.
defences against, 420–424.
new matter in avoidance; essential averments, 381.
answer not setting up; relief, 381.
objection of defect of parties, how and by whom may be raised, 384.
amendment, 384–386.
outstanding claim; payment of by purchaser, 522.
outstanding title or incumbrance, 519–522, 526, 527.
ownership of fixtures, 515–517.
fixtures; what are, 511–517.
paramount title; subsequently acquired by mortgagor, 507–510.
parcels; demand of sale in inverse order of alienation, 518, 519.
order of foreclosure and sale, 517, 518.
protection of joint incumbrancers, 517, 518.
PARTIES GENERALLY. See PARTIES.
adverse claimants; effect of joining, 503–506.
against whom mistake may be corrected, 439.
amendment, 384–386.
claimants of prior rights, 510, 511.
defect of, 384, 386.
junior incumbrancers, 451.
objection to defect of; how and by whom raised, 384–386.
by parties personally liable for debt, 385, 386.
principal and surety; defence of duress, 444.
prior incumbrancers; default in answering, 345, 346.
prior lienholders; joinder of and decree against, 506, 507.
set-off of debt due mortgagor; cross-bill, 451.
subsequent grantee; when proper, 510, 511.
tax title holder; when barred by decree, 507.
PAYMENT.
after transfer of note and mortgage before maturity, 483.
application; balance on account in subsequent transactions, 490
by court; according to equitable rights of all interested, 488.
general payments, 489.
upon mortgage instead of open account, 489.
upon secured debts, to release securities, 488.
when not made by parties, 488.
by creditor; failure of debtor to direct, 488.

ANSWERS AND DEFENCES—*Continued.*
PAYMENT.
application; how made, 487–490.
implied by attending circumstances, 488.
in discharge of duty in which others interested, 489.
intention of parties, 490.
not used as mere consideration for assignment to third person, 489.
of book account indebtedness, 489.
right of junior incumbrancers, 489.
of wages earned by mortgagor, 490.
once made must stand, 489.
can not be transferred to subsequent debt, 489.
right of debtor to direct, 487.
whether upon mortgage or open account, 488.
as against equitable assignee of mortgage, 482.
record of assignment; notice, 482.
at maturity; effect, 483.
before due; effect, 483.
before maturity; option, 492.
election must be pleaded and proved, 492.
by assumption of prior mortgage, 486, 487.
as against subsequent assignee, 486, 487.
by deposit of collateral security, 486, 487.
by mortgagor, after conveyance, 490, 491.
after transfer; effect in keeping debt alive, 491.
by third person; agency; ratification, 484.
change in form of indebtedness not operate as, 484.
costs and taxes; on appeal: application of, 484.
discharge and satisfaction, 493, 494.
by joint creditor; validity, 493.
by warranty deed by mortgagee after entry for installment, 494.
equitable; agreement to accept other security, 493, 494.
not effected by recovery of judgment for debt, 494.
settlement; judgment on new note for balance, 494.
to give priority to second mortgage, 494.
not a satisfaction as between parties, 494.
what constitutes and how alleged, 493, 494.
extension of time of; consideration, 478–481.
for purpose of re-mortgaging; satisfaction, 494.
interest; by purchaser of equity of redemption, 491.
by tenant for life, 491.
effect to prevent running of limitation against mortgagor's liability, 491.
inability to find mortgagee, 492.
manner of pleading, 491, 492.
mortgage kept alive after; when, 483.
must be a full liquidation of debt, 484.

ANSWERS AND DEFENCES—*Continued.*
PAYMENT.
must be clearly established, 482.
of condemnation money to mortgagor, 486.
foreclosure not barred by, 486.
of costs and taxes, 485, 486.
of debt, 482–485.
of installment, 482.
of interest; by life tenant, 491.
giving note for is not, 484.
preserves life of mortgage against remainderman, 491.
prevents statute of limitations from running, 491.
of outstanding claim, 522.
of part, pending foreclosure; effect, 484.
parol evidence of, 492.
partial; sufficiency to prevent bar by limitation, 490, 491.
to stop interest; subsequent acceptance, 487.
application as of date made, 487.
presumption from circumstances, 492.
from discharge of record; rebuttal, 493.
from failure to produce bond, 492.
from possession by mortgagor of notes and mortgage, 493.
rebuttal, 493.
reliance on statement as to ownership of mortgagee's administrator, 483.
renewal notes is not, 484.
to mortgagee's heirs; no bar to action by administrator, 484.
what constitutes; requisites and sufficiency, 484, 485.
who may plead, 482.
with funds of third person; to purchase mortgage for latter, 494.
not a satisfaction, 494.
pendency of action at law on notes, 386, 389.
prayer; affirmative relief must be demanded, 459.
price; excess; counter-claim, 459.
prior incumbrancers; answer by, 507.
priority of claims, 510, 511.
profits; set-off against debt; agreement to apply, 457.
purchase money mortgage; fraud; relief, 430, 431, 433, 434.
quantity of land; mutual mistake as to; correction, 441, 443.
questions of title; only those affecting equity of redemption, 502.
recovery of judgment on note or bond, 387–389.
reference; infant defendants; requisites of order, 529.
to compute amount due; motion; notice; proceedings, 528–551.
reforming instrument; to correct mistake, 439.
release; fraudulent; is void, 495.
by attorney; of old mortgage without receiving new, 495.
by payee after transfer of note secured, 495.
manner of pleading; description of, 496.
mortgage kept alive to subserve justice, 495.

ANSWERS AND DEFENCES—*Continued.*
release; of part of premises; application of proceeds, 497–498.
breach of covenant; damages: set-off, 461.
enforcement of agreement, 497, 498.
knowledge of prior conveyance of other part, 496, 497.
notice of exemption of other portion, 496.
what constitutes; effect, 496, 497.
of prior, by holder of subsequent mortgage, 495.
priority of intervening mortgages, 495.
priority over intermediate incumbrancer, 495.
taking of new for old mortgage, 495.
without authority; is void, 495.
right and necessity of prior incumbrancers answering, 381.
right of junior incumbrancer to have money paid on account applied on mortgage, 517.
rights and equities between incumbrancers; adjustment, 517, 518.
between mortgagee and grantee of mortgagor, 510.
of grantee of mortgagor to remove building, 510.
satisfaction of judgment on note or bond, 388.
services rendered; set-off, 454.
service; sufficiency, 384.
defective service, how and by whom taken advantage of, 384.
set-off, etc., 450–461.
affirmative relief, if desired, must be demanded, 459.
against assignee of mortgage, 453, 454.
by purchaser from mortgagor; insolvency of plaintiff, 453.
can not be of an independent claim, 454.
election in which of several foreclosures to plead counterclaim, 456.
future advances; failure to make, 460, 461.
illegal interest; usury, 456.
in action on note, 457.
invalidity of foreclosure proceedings on another note of same series, 457.
insolvency of plaintiff, 458.
claim in favor of assignee of equity of redemption, 458.
invalidity of mortgage; reply, 458.
must be based upon legal obligation, 458.
equitable or supposed right insufficient, 458.
must be of debt due and payable, 455.
must be pleaded, 461.
must exist in favor of defendant and against plaintiff, 454.
must tend to diminish or defeat recovery, 452, 454.
not of unliquidated damages, 455.
of contract obligation, 452.
of damages, 459–461.
breach of covenant to release portions sold by mortgagor, 461.
delay in foreclosing; loss from depreciation, 459.

ANSWERS AND DEFENCES—*Continued.*
set-off; of damages; excess of price paid, 459.
failure to make advances, 460.
for failure of title, 459.
for fraud; concealment, 459–461.
not recover interest in estimating damages, 459.
of debt due at date of filing complaint, 456.
of debt due mortgagor, 450, 451.
of loss by depreciation in value caused by laches, 456.
of outstanding claim; payment by purchaser, 522.
of over payment by mortgagor, 451.
of partial payment; application, 455.
of profits against debt; agreement to apply, 457.
of road tax; when permissible, 455, 456.
of services rendered, 454.
prayer; affirmative relief must be prayed for, 458.
requisites; what proper, 454–461.
to whom available; personal liability, 452, 453.
special and general defences, 383.
subsequent grantee, 510, 511.
when rights of must be brought into issue, 510, 511.
surety may object to want of service on persons interested, 384.
taxes; application on mortgage, 484.
gravel road; set-off, 455, 456.
payment of, 485, 486.
tax title; estoppel of mortgagee to set up as against mortgagor, 506.
in mortgagor, is not a defence, 501.
that mortgage absolute on face was given as collateral, 426.
time of payment; extension of; consideration of, 478–481.
of recording, 398.
trust deed; validity, 505.
undue influence; relief, 443, 444.
usury, 411, 412.
as defence in favor of wife to protect homestead, 414.
how alleged and proved, 412–414.
of mortgage executed in another state, 413.
how pleaded and proved, 413.
proof must conform to allegations; variance, 412, 413.
set-off of, 456.
to whom available as defence, 414, 415.
APPEAL.
appointment of receiver pending, 789.
attorney's fees; allowance of, 955, 956.
continuance of receivership during pendency of, 814, 815.
Costs on; in General. See Costs.
from allowance of, 941–943.
by referee, 942.
of costs not demanded in complaint, 940.
in both courts; application on mortgage, 484.

APPEAL—*Continued.*
costs on; who chargeable with, 965.
effect on title of purchaser, 709–711.
from final judgment, 533.
brings up order of reference, interlocutory decrees, 533.
from order appointing receiver, 765–767.
confirming sale, 673.
fixing fees of officer making sale. See costs, 937.
of distribution of surplus, 877.
of reference; neglect to; effect, 866.
of resale; when appealable, 667–669.
refusing resale, 691.
not interfere with right of purchaser to have sale completed, 691.
from order confirming sale; when appealable, 635.
from refusal to direct order of sale of parcels, 611.
injunction restraining statutory foreclosure sale to enable appeal to be taken, 905.
mistake in describing premises; correction, 440.
motion for sale in inverse order of alienation, 610.
can not be first made on, 610.
not lie from order granting or decreeing resale, 640, 656.
nor from order of reference to compute amount due, 533.
interlocutory orders and decree, 533.
nor from appointment of receiver, 800.
nor from judgment for variation from referee's report, 554.
proceedings not stayed; mistake; setting aside sale, 663.
refusal of court to dismiss foreclosure for small installment of interest, 317.
removal of receiver; insufficient sureties, 772.
review on, where verdict of jury disregarded, 16.
writ of error; *lis pendens*, when effective, 363.
APPEARANCE.
of defendant by attorney without authority; effect, 303.
equivalent to personal service, 303.
waives all objections to regularity of service of summons, 303.
APPLICATION OF PAYMENTS. See PAYMENT, APPLICATION OF.
ASSIGNMENT.
absolute of mortgage, assignee never a necessary defendant, 218.
as collateral security; claim of assignee in surplus, 853, 854.
fraudulent discharge by assignee, 341.
priority, 853, 854.
assignee takes subject to equities, 419.
assignor can not foreclose, 85, 86.
may be made defendant, 89.
ASSUMPTION OF MORTGAGE. See ASSUMPTION.
by foreign personal representative; assignee may foreclose, 124.
by mortgagee in possession, 78.
assignee may retain possession until mortgage is satisfied, 78.

ASSIGNMENT—*Continued.*
by purchaser of equity of redemption, 415.
assignee bound by acknowledgment of debt by mortgagor; statute of limitations, 490, 491.
assignee for the benefit of creditors may set up usury as defence in foreclosure, 415.
counsel fee against assignee, 956, 957.
estoppel of mortgagee as against assignee, 468, 469.
judgment for deficiency against assignee assuming mortgage, 728–730.
knowledge by mortgagee; estoppel, 467.
notice to assignee of statutory foreclosure, 888, 889.
payment of interest by purchaser, 491.
effect to prevent bar by limitation against mortgagor's liability, 491.
purchaser at foreclosure sale becomes mortgagor as to assignee in possession, 697.
subsequent payment by mortgagor, 491.
effect in keeping debt alive, 491.
when mortgagor need not be made a party in foreclosure, 386.
covenants inure to benefit of assignee, 316.
equitable, 482.
of rights to surplus; reference to ascertain surplus, 871.
protection of rights of assignee against payment to mortgagee; record; notice, 482.
FORECLOSURE.
allegation as to ownership, etc., 329.
as to assignment, 336–338.
by assignee; allegation as to claim, 328.
complaint; necessary averments, 333, 334.
fraudulent; foreclosure by assignee; defences, 418, 419.
intermediate; of mortgage; guaranteeing payment, 288.
assignor personally liable, 288.
litigation of rights of assignee, in foreclosure, 510.
mistake; correction as against assignee; foreclosure, 439.
of bid at foreclosure sale; rights of assignee, 689, 690
of bond and mortgage, 424, 425.
assignee takes subject to equities; defences, 424, 425.
OF DEBT.
assignee may foreclose in name of assignor, still holding the mortgage, 112, 113.
not actual holder of the mortgage; may foreclose 111.
should be made a party to foreclosure by assignor, still holding the mortgage, 113.
assignor still holding the mortgage should be made a party to foreclosure by assignee, 112.
to purchaser at foreclosure sale, 687.
not affected by sale during wrong term, 987.
without mortgage; assignor a necessary defendant, 217.

ASSIGNMENT—*Continued.*
of equity of redemption ; set off of claim in favor of assignee, 458.
of judgment against sheriff ; for failure to return execution, 848, 849.
distribution of surplus ; priority, 848, 849.
of lease for years ; effected by foreclosure sale, 697.
of mortgage ; absolute, 218.
as collateral ; foreclosure ; allegations of complaint, 341, 342.
assignee a necessary party, 99, 100.
assignee may foreclose, 101.
assignor refusing to become a co-plaintiff, 202.
a necessary defendant, 202.
foreclosure ; defences, 426.
assignee acquires only assignor's rights and title, 90.
bound by agreement of mortgagor and mortgagee as to priority ; distribution of surplus, 840.
may sue guaranteeing mortgagee during foreclosure, without consent of court, 305.
takes free from equities between mortgagor and prior assignee, 426.
takes subject to equities between the parties to the mortgage, 425–427, 454.
assignee a necessary defendant in an action to redeem, 218.
assignor a desirable party, when usury or fraud is alleged, 216.
assignor, having parted with all interest therein, not a necessary defendant, 215.
assignor's heirs and personal representatives not necessary defendants, 215.
by heirs of mortgagee; gives assignee no right to foreclose, 120.
by parol ; assignor a necessary party, 217.
collaterally ; assignee refusing to join in its foreclosure a necessary defendant, 202.
assignee a necessary party in foreclosure by assignor, 220.
conditionally ; assignor a necessary party, 218.
covenanting as to title and against defences, 288.
assignor a proper defendant, 288.
defence of payment by assumption of prior mortgage, 486, 487.
foreclosure by assignee ; defences, 416–418.
form of, to enable assignee to foreclose, 87.
from heirs of mortgagee, 120.
assignee obtains thereby no right to foreclose, 120.
guaranteeing payment ; assignor a necessary defendant, if deficiency judgment is sought, 216.
guaranteeing payment ; assignor a proper defendant, 286.
assignor may be sued by assignee during foreclosure without consent of court, 305.
assignor personally liable, 286.
imperfect form ; assignor a necessary party, 217.
passes power of sale, 882.

ASSIGNMENT—*Continued.*
of mortgage; payable to mortgagee alone; foreclosure; defences, 419, 420.
pendente lite; assignee may continue foreclosure, 116.
quit-claim of half of premises, 882.
right to statutory foreclosure, 882.
right of assignee to have payments applied, 489, 490.
securing non-negotiable instrument, 424–427.
foreclosure; defences, 424–427.
set-off against assignee, 453, 454.
setting aside sale, 640.
assignor not notified of time and place, 640.
statutory foreclosure by assignee, 882.
to indemnify against contingent liability, 337.
to wife of mortgagor, effect of, 87.
with guaranty of payment, 727, 728.
judgment of deficiency against assignor, 727, 728.
without the bond; assignee can not foreclose, 110.
gives no right to foreclose, 110.
without the note or bond, transfers naked trust, 111.
assignee holds mortgage at will and disposal of bond-holder, 111.
of note; assignee takes free from defence, 410.
and mortgage; before maturity; payment after; effect, 483.
carries collateral security, 416.
doctrine that assignee takes free from equities, 420–424.
exceptions; maturity, 420–424.
foreclosure; defence of illegal consideration, 410.
release of mortgage by payee, when invalid, 495.
of several mortgages, foreclosure in one action, 323.
OF SUBSEQUENT INCUMBRANCES.
assignee necessary defendant, 203.
notice to assignee of statutory foreclosure, 887–889.
assignee not bound by decree unless his assignor was a defendant, 205.
pendente lite; assignee not necessary defendant, 204.
of subsequent judgment creditor, having parted with all interest, assignor not a necessary defendant, 200.
of subsequent lien as collateral security, 202.
assignor a necessary defendant, 202.
of subsequent mortgage; assignee a necessary defendant, 202, 203.
assignor not a necessary defendant, 201.
record of need not to be averred, 337.
right of assignee to foreclose in his own name, 337, 338.
title of assignee, 334.
to married woman, of mortgage on husband's land, does not discharge it, 131.
transfer of negotiable paper secured by mortgage, 420–424.
foreclosure; defences, 420–424.

ASSIGNMENT—*Continued.*
what form of assignment gives assignee the right to foreclose, 87.
without title to mortgage; assignee can not foreclose, 87.
ASSIGNMENT FOR CREDITORS.
appointment of receiver after, 809.
assignee; takes subject to equities; is trustee, 418.
may set up usury as defence in foreclosure, 414.
not a purchaser; takes only title of assignor, 418.
of person liable for deficiency, a proper defendant, 264.
assignor is proper party defendant in foreclosure by his assignee, 115.
by mortgagee; foreclosure; defences against assignee, 418.
by owner of equity of redemption, 642.
right of assignor to apply to have foreclosure sale set aside, 642.
creditors not necessary parties to foreclosure by assignee, 418.
ASSIGNMENT IN BANKRUPTCY. See BANKRUPTCY.
ASSUMPSIT.
to recover back fines paid to loan associations, 540.
where proper against grantee assuming mortgage, 271.
ASSUMPTION.
OF MORTGAGE.
by intermediate purchaser makes him personally liable, 285.
by junior mortgagee does not make him personally liable to prior mortgagee, 279.
by married woman purchasing premises makes her personally liable, 289.
by oral agreement; enforcement, 736, 737.
liability of purchaser for deficiency, 736, 737.
defective title no defence, while purchaser is in quiet possession, 275.
evidence that assumption clause inserted by mistake, 731.
governed by intention of parties, 737, 738.
grantor can not release from liability in New York, 282.
otherwise in New Jersey, 283.
makes purchaser personally liable, when, 269, 278.
otherwise in Pennsylvania, 279.
mortgagor becomes his surety only, 272.
not effected by deduction of amount of debt from purchase price, 737.
not personally liable unless grantor is, 278.
order of sale on foreclosure; rights of purchasers, 615–617.
presumption from proof of record of deed, 732.
purchaser can not avoid payment because of usury, 275.
can not be released by grantor, in New York, 282.
otherwise in New Jersey, 283.
estopped to contest validity of mortgage, 732.
liable to mortgagor; compelled to pay, 732.
nor because of defective title, while he is in quiet possession, 275.
proper party to foreclosure, 732.

ASSUMPTION—*Continued.*
OF MORTGAGE.
purchaser subject to mortgage; denial of assumption, 498, 499.
liability for deficiency, 728–738.
no liability for deficiency in absence of agreement, 735, 736.
release from liability by subsequent agreement, 734, 735.
remedies to enforce, 270, 271.
theories allowing mortgagee the benefit thereof, 276, 277.
usury no defence, 275
what words and acts constitute, 273.
ATTACHMENT.
against purchaser failing to comply with terms of sale, 647, 648.
against purchaser neglecting to complete purchase, 677, 678.
assertion of prior lien in foreclosure, 510.
attaching creditor of premises necessary defendant, 196, 197.
lien as affected by appointment of receiver in foreclosure, 774.
mistake; correction as against attaching creditor; foreclosure, 439.
surplus; action by attaching creditor to enforce claim in, 862, 863.
ATTORNEY AND CLIENT.
attorney for plaintiff must subscribe summons, 293.
power to purchase at foreclosure sale, 631.
FEES OF ATTORNEY.
generally. See COSTS, 952–959.
payment on foreclosure, 485, 486.
LIEN FOR COSTS. See COSTS, 952–959.
on surplus moneys, 857.
protection of on reference to ascertain surplus, 871.
reference to compute amount due, 532.
proper person to be appointed referee, 532.
release by attorney; of old mortgage without receiving new, 495.
to foreclose mortgage, 622.
when notice to attorney of subsequent incumbrancers not notice to client, 622.
BACON (LORD). Ordinances. See LIS PENDENS, 359–361.
BANKRUPTCY.
ASSIGNMENT.
assignee a necessary party defendant, when, 179, 181, 210, 211.
bound by *lis pendens* in foreclosure, 372.
may foreclose, 115.
not interfere with receiver appointed in foreclosure, 753.
takes only title of assignor, 418.
takes subject to equities; is trustee; not a purchaser, 418.
assignee no longer owning equity of redemption, not necessary party, 137, 138.
appointment of receiver on application of assignee, 805.
foreclosure by, creditors not necessary parties, 418.
by mortgagee; defences against assignee, 418.

BANKRUPTCY—*Continued.*
ASSIGNMENT.
by mortgagor; joinder of assignee in foreclosure sale, 694.
purchaser entitled to rents and profits, 694.
between sale and confirmation, 694.
right to rents and profits as between assignee and mortgagee, 785.
sale by assignee; mortgagee estopped by silence, 470.
under decree in, emblements do not pass as against purchaser at foreclosure sale, 707.
BENEFICIARIES. See TRUST.
BILL OF REVIEW.
mistake; in describing premises, 440.
correction, 440.
BILLS AND NOTES.
doctrine that assignee takes free from equities; exceptions, 420–424.
before maturity, 420–424.
non-negotiable; transfer subject to equities, 425.
transfer; foreclosure of mortgage to secure; defences, 420–424.
secured by mortgagee, 420–424.
BOARD OF SUPERVISORS.
of counties holding tax liens, proper defendants, 212.
BONDHOLDERS. See BONDS.
BONDS.
assignment; assignee takes subject to equities, 424.
description of in complaint in foreclosure, 330–332.
holders of bonds secured by subsequent mortgage may interplead, 191.
not necessary defendants when, 190, 191.
negotiability; assignment, 424.
official; indemnity mortgage, 356.
foreclosure; pleading, 356.
OF RECEIVER. See RECEIVER.
BOUNDARY.
false representations as to; defence in foreclosure, 437, 438.
foreclosure; complaint; defective description, 353.
BREACH.
of conditions; allegation of in complaint to foreclose, 354–356.
BUILDING AND LOAN ASSOCIATIONS.
mortgage; reference to compute amount due, 539–541.
fines and dues, 539–541.
BURDEN OF PROOF. See also EVIDENCE.
mortgagee must show that a conveyance of the premises to him was voluntary and fair, 310.
that mortgage was procured by fraud, 436.
to establish insanity of mortgagor, 396–397.
ratification by infant, 391.
to show amount due less than plaintiff's claim, 533.
partial failure of consideration, 405.
priorities; distribution of surplus, 840.

CALENDAR.
application for judgment without placing case on, 552.
default; application for judgment, 561, 562.
necessity of placing cause on, 561, 562.
noticing cause for trial, 383, 559.
reference to compute amount; motion for, 530.
cause need not be placed on, 530.
CANCELLATION.
of mortgage, for fraud, 432.
CESTUIS QUE TRUST. See TRUST.
CHANCERY. See EQUITY.
CHATTEL MORTGAGE.
deduction of value of goods seized on sale under real estate mortgage, 620.
to secure same debt, effect of foreclosure, 313.
CITIES.
holding tax liens, proper defendants, 212.
CIVIL LAW.
foreclosure under, 2.
CODE.
complaint in foreclosure regulated by, 326.
foreclosure; practice when action pending on note, 389.
of New York; foreclosure, form, etc., of complaint, 333.
prescribes form of notice of object of action, 294.
and of summons, 294.
COLLATERAL ASSIGNMENT.
Of mortgage. See ASSIGNMENT.
COLLATERAL SECURITY.
deed intended as; mortgagee a necessary defendant, 144.
does not suspend right to foreclose, 313.
subsequent lien assigned as; assignor a necessary defendant, 202.
COMMISSIONS.
of officers, etc., in foreclosure proceedings. See COSTS.
COMMITTEE.
of lunatics, etc. See HABITUAL DRUNKARDS, INSANE PERSONS, ETC.
COMMON LAW.
doctrine of mortgages, 3.
COMPLAINT.
allegations against mortgagor, subsequent purchasers and co-defendants, 332.
against grantee assuming payment; personal judgment, 349, 350.
against infant defendants; necessary averments, 341.
against prior incumbrancers, 345, 346.
as to claim, 327, 328.
assignment of mortgage, 336–338.
collaterally, 341, 342.
defendant's title or interest, 356–358.
demand before suit, 355.

COMPLAINT—*Continued.*
allegations; as to interest of subsequent incumbrancers, 345.
as to mistake in name of mortgagee, 329.
ownership, etc., of mortgage, 328, 329.
possession of property, 333.
proceedings at law, 339–341.
recording, 343.
seizure, possession, etc., of property, 333.
title and ownership of mortgage, 328, 329.
breach of condition, 354–356.
by or against executors, trustees, etc., 334.
consideration, amount due, 333.
defendant's interests, 344.
execution and delivery, record, etc., 329, 330.
mistake in name of mortgagee, 329.
of amount due, 329.
on foreclosure of mortgage securing several notes, 338, 339.
payable on demand, 335, 336.
title and ownership of mortgage, 328, 329.
to bar dower, 343.
to charge personal representatives of deceased mortgagor, 347.
amendment to correct mistake in description, 440.
by assignee, 336–342.
by assignee of mortgage as collateral; allegations, 341, 342.
by executors, etc., allegation of appointment and authority, 334.
by personal representative holding funds in trust, should specifically allege plaintiff's character, 121.
of indemnity mortgage; averments, 356.
of mortgages by different persons for same debt; joinder, 323.
of mortgage securing several notes, 338, 339.
necessary and sufficient averments, 338, 339.
by executors, etc., must allege appointment and authority, 334.
can not be filed *nunc pro tunc* so as to effect rights acquired by judgment creditor in the meantime, 206.
defective description of property, 352–354.
defects cured by verdict, 332.
demand for judgment of deficiency, 348.
description of debt secured, 330–332, 334.
of mortgaged property, 350, 351.
of note or bond, 330–332.
of property; reference to other instruments, 351, 353.
DISMISSAL.
failure of plaintiff to establish anything due, 476.
upon payment into court, 358.
formal requisites, 326, 327.
infant defendants, 341.
in strict foreclosure. See STRICT FORECLOSURE.
joinder of causes in action, 322–325.
of matured and unmatured notes, 338, 339.

COMPLAINT—*Continued.*
joinder of mortgage not yet due, 323.
of senior and junior mortgages, 323.
mistake; in description; amendment, 440.
mortgage covering several parcels, 351.
allegation as to breach, 355.
incorrect description of premises, 351.
stipulating in mortgage for payment of taxes, 328.
setting forth amount paid, 328.
to secure bond for support of husband and wife, 355.
must aver performance of condition precedent, 355.
and set forth payments indorsed on mortgage, 328.
and the amount of unpaid taxes, 347.
and set up junior mortgage held by plaintiff, 193.
need not allege acknowledgment, 330.
nor anticipate defence, 328.
need not be served, where summons is accompanied with notice of object of action, 294.
parties; subsequent grantees, 510.
allegations as to claims, etc., 510, 511.
prayer, 346–348.
prior incumbrancers; joinder, 506.
necessary allegations against, 506, 507.
setting forth payments indorsed on mortgage, 328.
several breaches; proof of only one required, 355.
should specifically demand judgment for deficiency, 243.
and state facts, not evidence of facts, 333.
to foreclose senior mortgage, must set forth junior mortgage held by same mortgagee, 48.
under New York practice, 333.
COMPOUNDING FELONY.
duress; Ohio doctrine; defence in foreclosure, 445–446.
COMPTROLLER. See STATE COMPTROLLER.
CONCURRENT REMEDIES.
action at law, 8.
in equity, 8.
CONDITIONS.
precedent; non-performance; defence, 476, 477.
CONFESSION OF JUDGMENT. See JUDGMENT.
CONFIRMATION.
of referee's report, 549–551.
OF SALE. See SALE, 670–675.
report of sale, 635, 636.
CONFLICT OF LAWS.
usury; *lex loci;* defence in foreclosure, 412–414.
CONSIDERATION.
abatement on foreclosure for fraud as to number of acres, 436.
purchase money mortgage, 436, 437.
allegation of, 331, 333.

CONSIDERATION—*Continued.*
extension of time of payment, 405.
failure of; estoppel to set up, 464.
illegal or void; avoids mortgage, 408, 409, 410.
as defence to action on note, 408, 409, 410.
immoral, against public policy, etc., 409, 410.
mortgage entrusted to agent to procure loan, 406.
given to secure pre-existing debt of third person, 406.
misappropriation; consideration, 406.
on wife's property to secure husband's debt, 406.
to secure confessed judgments, 406.
of agreement to extend time of payment, 480, 481.
of mortgage as security for goods to be furnished, 407, 408.
securing future advances, 407.
what sufficient, 405–407.
paid for note, 416.
not a defence against assignee, 416, 417.
partial failure; as defence in foreclosure, 405.
pre-existing indebtedness, 406.
promise to pay debt of third person, 406.
release from unfounded claim is not, 405.
want of, as defence in foreclosure, 403–405.
withdrawal of prosecution for conspiracy, 409.
CONSOLIDATION.
of actions to foreclose, 324, 325.
of separate foreclosures, 323–325.
CONTEMPT.
by party in refusing to deliver possession to purchaser on foreclosure, 714.
CONTRACT.
counter-claim arising on; foreclosure, 452.
executory; to execute mortgage, 847, 848.
priority over lien of execution; distribution of surplus, 847, 848.
for sale of land, 319.
equitable mortgage to repay purchase money, 319.
illegal; assignment of mortgage to procure performance of, 417.
defence against assignee, 417.
of purchase subject to mortgage, 349, 350.
rescission; notice, 350.
parol; to extend time of payment; consideration, 479, 481.
statute of frauds, 320.
equitable lien, 319.
void unless in writing, 320.
to execute mortgage, 320.
part performance, 320.
CONTRIBUTION.
on sale of mortgaged premises; parcels, 618, 619.
pro rata according to value, 618, 619.

CONVERSION.
of proceeds of chattel mortgage to secure same debt, 313.
COPIES.
annexed to complaint in foreclosure, 351.
description of property, 351
of note or bond, annexed to complaint, 331.
CORPORATIONS.
costs against; counsel fee, 956.
foreclosure against, 783.
appointment of receiver, 783.
foreign, 462.
estoppel of mortgagor to deny authority of agent, 462.
owning premises, 184.
necessary defendants by corporate name, 184.
stockholders not usually necessary defendants, 184, 185.
receiver of may foreclose mortgage, 116.
COSTS.
additional allowance; when granted, 940.
against successful party, 938.
when allowed, 938.
allowance of, 939.
although not demanded in complaint, 939, 940.
discretionary, 938, 940–942.
not appealable, 941.
on offer to confess judgment, 938.
APPEAL.
application on mortgage of costs of both courts, 484.
exceptions, etc., to allowance, 942, 943.
from order fixing referee's fees, 937.
not from allowance of, 941.
are as a general rule statutory, 939.
attorney's fees, 952–959.
against whom enforceable, 956.
subsequent purchasers, etc., 956–957.
allegations and averments as to, 957, 958.
allowance generally, 952, 953.
allowance of discretionary, 955, 956.
not appealable, 955, 956.
in Kentucky and Michigan, 954.
stipulation for; usury, 954–956.
lien on surplus moneys, 857.
on statutory foreclosure, 959–961.
reasons for disallowing, 958, 959.
statutory or contract obligation, 956.
counsel fees, 952–959.
dismissal, without costs, upon payment into court, 858.
equity practice as to allowance, etc., 937–939.
excessive demand for in complaint, 947.
effect of, 947, 948.

COSTS—*Continued.*
exoneration from, by tender, 336.
fees of officer conducting sale, 936, 937.
are statutory, 936, 937.
in general, 936.
guardian *ad litem*, 949.
allowance to, 949, 950.
in case of death of guarantor of mortgage, 940.
in distributing surplus moneys, 962–966.
in equitable actions to foreclose, 939, 940.
in favor of prior incumbrancer made a party, 944.
in general, 937, 938.
in strict foreclosure, 942.
judgment; confession of, 938.
allowance of costs in case of, 938.
may be awarded against one who unreasonably defends, 946.
notice of no personal claim, 947.
not imposed in absence of statutory authority, 939.
of receivership, 817.
compensation of receiver, 817, 818.
of resale, 676.
against purchaser not completing purchase, 676.
omitted judgment creditor, redeeming, need not pay, 199.
on appointment of receiver, 950.
on default, 949.
on redemption, 959.
on reference, 942.
discretion of referee, 942.
on resale, 950, 951.
on reversal of judgment, 940.
costs to abide event, 940.
on separate foreclosures of several mortgages on same premises, 323.
payment, 952.
on foreclosure, 485, 486.
out of what fund, 952.
personal liability, 951.
who liable, 951, 952.
persons unnecessarily made defendants, 345.
prevailing party entitled to, 937.
although recovering only part of demand, 937, 938.
regulated by statutes of various states, 941.
statutory foreclosure, 960.
expenses, etc., of trustee, 960.
power of sale, 959, 960.
taxation of costs, 960–962.
code allowances, 960–962.
successful party must apply for, 940.
successful party, *prima facie* entitled to, 938.

COSTS—*Continued.*
surplus proceedings, 962.
disbursements, 965, 966.
distribution, etc., 960-966.
who chargeable with, 964, 965.
who entitled to, 964.
taxation of, 960-962.
foreclosure by advertisement, 960-962.
mode of, 962.
who may require, 962.
tender, 948.
after action brought, 948.
effect of, 949.
to defendants. when disallowed, 946.
to mortgagee, when disallowed, 946.
to persons unnecessarily made defendants, 345.
to prior incumbrancer made a party, 944.
under New York code, 942.
who entitled to ; guardian *ad litem*, 949, 950.
all defendants, when, 943.
in general, 943.
mortgagee, 943.
on two foreclosures against same property, 945, 946.
party to action, 943.
prior mortgagee, 944.
subsequent incumbrancer, 944, 945.
COUNTER-CLAIM. See SET-OFF AND COUNTER-CLAIM.
COUNTIES.
holding tax liens ; proper defendants, 212.
COUNTY TREASURER.
custodian of money paid into court, 358.
COURTS.
FEDERAL.
rule in, as to deficiency ; judgments, 242.
OF EQUITY. See EQUITY.
COVENANT.
for maturity of entire debt upon default in payment of installment, 316.
independent or collateral, 477.
breach ; defence, 477.
to pay existing incumbrance ; breach ; defence, 476,
to release portions of premises sold by mortgagor, 461.
breach ; damages ; set-off, 461.
CREDITORS.
FRAUD OF. See FRAUDULENT CONVEYANCE.
CROPS. SEE EMBLEMENTS.
CURTESY.
four requisites, 165.
marriage ; actual seizin of the wife ; issue, and death of wife, 165.
in New York, the wife must die intestate, 165.

DAMAGES.
foreclosure ; counter-claim for, 459–461.
fraud as to extent or boundaries of land sold, 437, 438.
recoupment, 438.
for wrongful injunction of sale under statutory foreclosure, 905.
fraud ; recoupment on foreclosure, 432.
upon mortgagor ; additional relief, 430.
purchase money mortgage ; fraud ; counter claim, 433.
unliquidated ; mortgage to secure, 881.
not subject if set off, 455.
statutory foreclosure, 881.
DEATH OF MORTGAGOR.
foreclosure may be against heirs, 307.
DECEDENT'S ESTATE. See Executors and Administrators.
DECEIT. See Fraud.
DECREE. See Judgment.
DEEDS.
assumption of mortgage. See Assumption.
by mortgagor and mortgagee of part of the premises, 139.
inoperative as a release, 139, 140.
covenants ; breach ; defect of title, 460.
foreclosure ; counter-claim for damages, 460, 461.
deposit of title deeds ; equitable mortgage, 319.
failure of title, 431.
relief from payment of purchase money, 431.
foreclosure ; subsequent purchaser made party ; allegation as to record, fraud, etc., 343.
In Escrow.
mortgagor conveying by, a necessary party to foreclosure, 145.
mistake in ; relief on foreclosure, 437–443.
Of Mortgaged Premises.
assumption clause in unusual place, 274.
grantee not bound for mortgage debt, when, 274.
need not be signed by grantee assuming mortgage, 274.
Of Trust.
executed prior to mortgage, 505.
validity not litigated on foreclosure ; ejectment proper action, 505.
rights of beneficiary in surplus moneys, 856, 857.
On Foreclosure Sale. See Sale.
Purchase Subject to Mortgage. See Assumption.
rights of vendees in surplus moneys, 856, 857.
strict foreclosure by grantee, 931.
To Purchaser at Foreclosure Sale. See Sale.
warranty by mortgagee, after entry for installment, 494.
discharge of mortgage by, 494.
DEFAULT.
after pleading, to appear at trial, 531.
reference to compute amount due, 531.

DEFAULT—*Continued.*
against prior incumbrancers, 345, 346.
decree conclusive, 351.
although premises incorrectly described in mortgage, 351.
in answering, by one of defendants, 535.
by prior incumbrancer, 345.
contents of order of reference in case of, 535.
order of reference to ascertain amount due, 528, 529.
judgment on application, after, 561.
after report, 554.
extent of relief, 554, 556.
against defendants claiming interests, 529.
conclusiveness, 529.
application for; after reference, 551–554.
what must be shown, 551.
costs on, 949.
opening, 556.
subsequent pleadings and proceedings, 556–557.
time; notice, 561, 562.
merely technical will not be enforced, 33.
recovery in case of, 327.
limited to cause stated in complaint, 327.
sale not decreed if mortgage not set out in complaint, 330.
DEFENCES.
To Foreclosure. See Answers and Defences.
DEFENDANTS.
See Parties.
DEFICIENCY.
action on bond for, 12.
ascertainment of, 723.
amount, 723, 724.
decree of sale should direct report of, 722.
execution for, 635.
confirmation of sale not pre-requisite, 635–637.
specified in report of sale, 635.
time and mode of issuing, 742, 743.
when confirmation of referee's report not prerequisite, 725.
when issued, 723.
guarantor of mortgage debt liable for, 252.
husband, signing bond secured by mortgage on wife's separate estate, liable for, 251.
judgment for; defined, 247.
against assignor of mortgage, with guaranty of payment, 727, 728.
any person liable as guarantor or surety, 728, 729.
mortgagor, 724, 725.
mortgagor's administrator; action by to have declared lien on surplus arising from foreclosure sale of other lands, 845.

DEFICIENCY—*Continued.*
judgment for; against purchaser subject to or assuming mortgage, 349, 350, 728–730.
against purchaser; mortgaged premises primary fund, 731, 732
purchaser; no liability in absence of agreement, 735, 736.
subsequent liability, 731, 732.
third persons, 725, 726.
amount; how determined, 739, 741.
assumption of mortgage by oral contract, 736.
defences available to grantee, 733.
enforcement, 736, 737.
intention of parties governs liability, 737, 733.
release from liability by subsequent agreement, 734, 735.
when grantee not liable, 733, 734.
can be rendered only for part of debt due, 247.
can not be rendered against one not appearing nor served, 246.
common laws and chancery practice opposed to, 240.
contingent decree, 723, 724, 741, 742.
demand for in complaint, 348.
docketed upon confirmation of referee's report, stating amount, 247.
entry; docketing; time of, 741, 742.
general principles; statutes modifying common law rule, 241.
manner of determining amount, 248.
may be rendered *in personam*, although remedy on the debt is barred, 78.
miscellaneous matters, 743.
necessity of previous confirmation of report of sale, 741, 742.
NON-RESIDENT.
not liable to deficiency judgment unless he appears, 247.
no proceedings upon until amount ascertained by referee, 725.
not allowed in strict foreclosure, 925.
not entered with decree of foreclosure, 741.
Wisconsin rule, 741.
not for installments not yet due, 739.
not granted unless demanded, 327, 348.
not rendered until amount ascertained, 741.
not rendered where non-resident defendant not served, 247, 738, 739.
object of statute authorizing, 721.
parties liable not relieved by delay in foreclosing, 726.
power of chancery to decree, 724.
prerequisites to entry of, 637.
rendered only when demanded, 348.
rule in federal courts, 242.
should be specifically demanded in complaint, 243.
should specify order of liability, 287.
statutory authority essential, 722.
when lien attaches, 742.

DEFICIENCY—*Continued.*
married woman executing mortgage liable for, to extent of value of mortgaged lands, 257.
signing bond or note secured by mortgage, liable for, 253, 255.
general rule, 253, 255.
New York, Act of 1884, 254.
order of liability for, should be fixed by decree, 244.
parties originally liable, 250.
all persons signing bond or note secured by the mortgage, 250.
deceased ; liability of their estates, 258.
general principles, 249.
mortgagor agreeing to pay debt, 249.
proceedings to collect purely statutory, 721.
purchaser at judicial sale, made subject to mortgage, not liable for, 267.
purchaser of premises assuming mortgage, liable for, 269.
not liable, 266.
otherwise in New Jersey, 268.
the rule in New York, 269.
referee to sell should be required by decree to report amount, 244.
report of ; by officer conducting sale, 722, 723.
report of sale should state amount, 636, 637.
under New York code ; what comprises, 724.
remedy to recover, 724.
DEFINITION.
foreign, 122.
necessary parties defendant, 188
necessary party, 133.
DELIVERY.
foreclosure, complaint, allegation of, 329.
DEMAND.
by agent ; denial of authority ; sufficiency thereof, 476.
not necessary when, 30.
of payment, by mortgagee, of mortgage payable to mortgagee alone, 419.
prerequisite to foreclosure by personal representatives, 419.
previous to foreclosure, necessity of alleging, 335, 336, 355.
DEMURRER.
not liable for failure of complaint to set forth acknowledgment, 330.
to complaint in foreclosure of mortgage securing several notes, 338.
not praying for a sale of the premises, 348.
to relief demanded on foreclosure, 347.
DESCRIPTION.
indefinite, 462.
estoppel of mortgagor to complain of, 462.
of premises, in complaint on foreclosure, 350.
mistake ; correction, 439, 440.
DEVISE. See WILLS.

DISAFFIRMANCE.
of mortgage by infant, 390, 393.
DISBURSEMENTS.
See Costs.
DISCHARGE.
by husband of mortgage to him and wife, really belonging to her, can not prevent her from foreclosing, 130, 131.
In Bankruptcy. See Bankruptcy.
of record, by collateral assignee, when void, 341.
what constitutes, 493.
how alleged and proved, 493, 494.
DISCONTINUANCE.
of action on note, by commencement of action to foreclose, 388.
of pending suit for debt, 881.
prerequisite to foreclosure by advertisement, 881.
DISMISSAL.
of action to foreclose for non-payment of small installment of interest, 317.
of foreclosure upon payment of money into court, 358.
DISTRIBUTEES.
Foreclosure by. See Executors and Administrators.
DOWER. See also Husband and Wife; Widow.
bar by foreclosure, 349:
necessary averments, 343, 344.
when not barred by, 506.
bar by statutory foreclosure; service of notice, 886, 889, 890.
can not be extinguished unless wife is a party, 157.
costs in surplus proceedings on allowance of, 964.
extinguished, where wife, not made a party, dies during foreclosure, 157, 158.
inchoate right of, is inalienable, 158.
in surplus, 853.
annuity; Northampton tables, 853.
investment of interest, 852, 853.
priority, 850–853.
not extinguished where mortgage executed by husband alone, 11.
of widow admeasured in premises, mortgaged by husband alone, decree of foreclosure, 161.
outstanding right of, 680.
will relieve purchaser at foreclosure sale from completing purchase, 680.
right subsequently accrued, 506.
widow as defendant, 506.
surplus; action to enforce claim in, 863.
priority of judgment liens, 847.
where abolished by statute, wife not a necessary defendant, 158, 159.
where wife is omitted as a defendant, may be computed and paid before husband's death, 162.

DRUNKENNESS.
committee of drunkard as defendant, 211.
defendant; service of summons on, when not necessary, 302.
owner of premises, heirs, devisees, or legatees necessary defendants, 182, 183.
statutory foreclosure of mortgage upon property of habitual drunkard, 881.
subsequent incumbrancer a proper defendant, 211.
committee a necessary defendant, 211.
DURESS.
as defence in foreclosure, 410.
of person, 448.
defence in foreclosure; relief, 448–449.
Ohio doctrine, 445, 446.
over married woman; defence in foreclosure; relief, 446–449.
threats; relief against in foreclosure, 444.
undue influence,; relief in foreclosure, 443, 449.
DWELLING-HOUSE.
removed from premises, not subject to mortgage, 308.
EASEMENT.
extinguishment of by foreclosure sale and deed to purchaser, 702.
in mortgaged premises, 149.
purchaser a necessary defendant, 149.
EJECTMENT.
against mortgagor; defence on foreclosure, 521.
can not be maintained by a wife or widow omitted as a defendant, 162.
eviction of mortgagor 522.
as defence in foreclosure, 522–524.
what constitutes, 523.
formerly allowable in New York, 8.
may be maintained against tenant when, 186.
by owner of premises, omitted as a defendant, 150.
not lie in favor of purchaser until time for redemption expired, 702.
of mortgagor; in strict foreclosure, 931.
to put purchaser at foreclosure sale into possession, see also SUMMARY PROCEEDINGS.
trust deed; validity; proper action to determine, 505.
ELECTION.
notice of, 45.
sufficiency, 46.
where necessary, 45.
of mortgagee that debt become due, 44.
to declare whole debt due; who may have, 44–46.
power of court to relieve mortgagor, 46.
to foreclose on default in payment of installment, 315–319.
EMBLEMENTS.
pass to purchaser on foreclosure, 706–708.
upon premises at expiration of lease belong to tenant not made a defendant, 185, 186.

EMINENT DOMAIN.
compensation; payment to mortgagor, 486.
foreclosure not barred, 486.
order of alienation in case of; sale on foreclosure, 613.
ENTRY AND POSSESSION.
constructive entry; how made, 5.
nature of the remedy, 4.
open and visible entry not now required, 5.
when title becomes absolute, 6.
EQUITABLE CONVERSION.
as affecting character of surplus, 829.
EQUITABLE MORTGAGE.
by deposit of title deeds, 319.
for purchase money, 319.
omission of statutory formalities, 321.
statute of frauds, part performance, 320.
EQUITABLE REMEDY.
origin and growth of, 4.
EQUITABLE SUBROGATION. See SUBROGATION.
EQUITY.
actions in, consolidation, 325.
adjustment of equities between incumbrancers, 517. 518.
cancellation of mortgage for fraud, 432.
chancery rules and ordinances, Bacon's, 359–361. See LIS PENDENS.
EQUITY, COURTS OF.
enforcing statutes of limitation in, 58.
fraud upon mortgagor, 430.
setting aside mortgage for, 430.
jurisdiction of, 14.
can not be deprived of jurisdiction by agreement of parties, 17.
effect of commencement in federal court on jurisdiction of state court, 20.
federal courts, 19.
state courts, 16.
circuit courts of Missouri, 19.
city courts, 18.
terms of New York city courts, 18.
county courts, 17.
no power to reform mortgage, 17, 18.
New York supreme court, 16.
to decree judgment for deficiency, 724.
to decree possession to purchaser on foreclosure, 711, 712.
to enforce contract to execute mortgage, 321.
transitory action, 26.
where property situated in two states, 25.
where the parties reside in another state, 26.
can not render judgment for deficiency, 26.
mistakes; relief against, 438–443.
no relief in, against purchase money mortgage, except for fraud, 430.

EQUITY OF REDEMPTION. See REDEMPTION, EQUITY OF.
ERROR.
in refusing to dismiss foreclosure, 317.
ERROR, WRIT OF.
lis pendens, when effective, 363.
ESCROW. See DEED.
ESTOPPEL.
against married woman, 465.
purchaser subject to mortgage, 471–474.
purchaser subject to usurious mortgage, 474.
allowable as defence in foreclosure, 461–474.
See FORECLOSURE.
by agreement not to enforce mortgage, 51.
negligence, or acquiescence in sale, 660.
setting aside sale, 660, 661.
silence at public sale, 469, 470.
IN PAIS AGAINST MORTGAGOR.
after-acquired title; inures to mortgagee's benefit, 461, 462.
although by public grant or patent, 462.
to complain of indefinite description, 462.
to contest validity of other notes of same series, 463.
to deny authority of mortgagee as agent of foreign corporation, 462.
to deny that mortgage covers entire tract intended, 462.
to deny validity of title, 463.
to dispute recitals in mortgage, 463.
to set up partnership, and want of authority of mortgagee, 462.
necessity of fraudulent intent, 468, 469.
of executors, etc., to deny appointment and authority, 334.
of husband to set up usury to protect homestead against foreclosure, 414.
of mortgagee; against purchasers at public sale; by silence as to his lien, 469, 470.
agreement to release part of premises, 467, 468.
as against purchasers from mortgagor, 468, 469
as against third persons, by failure to give notice of his rights, 469.
fraud or concealment, 468.
in possession; to set up tax title against mortgagor, 506.
knowledge of conveyance by mortgagor, 467.
to claim title as against mortgagor, 505.
OF MORTGAGOR.
after-acquired title; inures to mortgagee's benefit, 465, 466.
as against purchaser of mortgage, 464.
by acts, declarations and agreements, 464, 465.
by warranty of title; subsequently acquired title inures to mortgagee, 508, 527.
to claim property to have been held by him in trust, 463.

ESTOPPEL—*Continued.*
Of Mortgagor.
to deny his authority as executor, 463, 464.
to deny title in himself, 463, 500, 501, 527.
to plead outstanding title in third person, 463, 500–503, 526, 527.
to set up defect of title, 463, 501, 502.
to set up failure of consideration, 464.
to set up fraud of mortgagee, 464.
to set up misappropriation of money by mortgagee, 464.
to set up usury, 464.
of purchaser subject to mortgage, 473.
to contest validity, 732.
to deny his assumption of debt, 464.
EVICTION.
as defence; what constitutes, 521–524.
against assignee of mortgage, 416.
EVIDENCE. See also Presumption.
admissions of mortgagor to prove consideration, 405.
burden of proof to show amount due, less than plaintiff's claim, 538.
to show priorities; distribution of surplus, 840.
competency on reference to compute amount due, 534, 537, 538.
judicial notice of county in which lands situated, 353.
may rebut presumption of payment arising from mortgagor's adverse possession, 63.
of insanity of mortgagor, 396, 397.
of parol agreement as to time of payment, 51.
parol extension of time, 55.
of partial failure of consideration, 405.
of payment; circumstantial, 492.
presumption, rebuttal, 492, 493.
of record of deed; presumption of assumption of mortgage, 732.
of usury, must conform to allegations; variance, 412, 413.
on reference to ascertain surplus, 873. See Testimony.
signing and filing, 873.
on reference to compute amount due, 538.
witness need not sign testimony, 538.
Parol.
of payment, 492.
to prove terms of sale omitted from proofs in statutory foreclosure, 917.
to show that clause of assumption of mortgagee was inserted by mistake, 734.
to show fraud or mistake, 432.
to show grantee did not assume mortgage, 499.
to show mortgage for indemnity only, 478.
under answer, of agreement to apply profits on mortgage debt; set-off, 457.
what competent on application for final judgment, 553.

EXCEPTIONS.
generally. See APPEAL.
to referee's report, 549–551.
EXECUTION.
exemption of homestead. See HOMESTEAD.
failure to return, 848.
judgment against sheriff, 848.
distribution of surplus; priority, 848, 849.
for deficiency. See DEFICIENCY.
in suit for debt; return unsatisfied, 881.
prerequisite to statutory foreclosure, 881–882.
lien of, on surplus; priority, 847, 848.
OF MORTGAGE; allegation of, in complaint, 329, 330.
sale of mortgaged premises under several, 614.
order of alienation on foreclosure sale, 614.
sale of mortgagor's interest; effect as to parties, 142.
surplus; distribution; priority, 847, 848.
upon foreclosure decree; levy not necessary before sale, 569.
upon judgment for mortgage debt; sale under, 696.
what title passed and equities cut off, 696, 697.
EXECUTORS AND ADMINISTRATORS.
appointment of receiver against, 785, 786.
assignor of mortgage to heir, as share of estate, not a necessary defendant, 215, 216.
averments of complaint necessary to charge personal representatives, 347.
defendants in foreclosure, 334.
estoppel to deny appointment and authority, 334.
disability to foreclose attaches only to person, not to subject matter, 124.
distributees of mortgagee allowed to foreclose, after administration closed, 120.
estate in hands of; surplus; distribution in surrogate's court, 859–861.
estoppel of mortgagor to deny his authority, 463.
executing mortgage to pay debts of estate, a desirable defendant, 184.
foreclosure against, 334.
authority to, 419.
complaint, allegations as to authority, 334.
averment to charge with deficiency, 347.
surplus; preference of judgment lien over legatee's claims, 847.
FORECLOSURE BY.
allegation of appointment and authority to foreclose, 334.
mortgage payable to deceased only, 419.
FOREIGN.
disability to foreclose attaches only to person, not to subject matter, 124.
foreclosing mortgage, objection must be made by demurrer or answer, 125.

EXECUTORS AND ADMINISTRATORS—*Continued.*
FOREIGN.
may assign bond and mortgage for foreclosure, 124.
may foreclose by advertisement under power of sale, 125, 126.
may not usually foreclose, 122, 123.
must obtain letters within the state, in order to foreclose, 123.
payment of mortgage debt to, cancels lien, 124, 125.
holding funds in a fiduciary capacity, to whom a mortgage is executed, may foreclose, 121.
holding funds in trust, foreclosing mortgage; character should clearly appear in bond and mortgage, 121.
character should be specifically alleged in pleadings, 121.
investing estate funds in his individual name, only his personal representative can foreclose, 122.
judgment for deficiency against, 347, 863.
action by mortgagee to enforce claim for deficiency, 863.
action to have declared lien on surplus arising from foreclosure sale of other lands, 845.
letters irregularly granted: setting aside sale for, 639.
may revive foreclosure, 118.
mistake; correction of as against, 439.
foreclosure, 439.
mortgage executed by decedent; foreclosure, 334.
allegations by and against executor, etc., 334.
objection to foreign personal representative as plaintiff, must be made by answer or demurrer, 125.
of assignor of mortgage, and all interest therein, not necessary defendants, 215.
of deceased joint mortgagees, must be made parties to foreclosure, 94.
of deceased mortgagee, may foreclose mortgage securing annuity, if the condition was broken during decedent's life-time, 117, 118.
of deceased owner of mortgage, may foreclose, 116, 117.
of deceased vendor may foreclose land contract, 119.
of executors or administrators to whom mortgages are executed as such, may not foreclose, 122.
of executor who invests estate funds in his individual name, alone can foreclose, 122.
of guarantor of mortgage; costs against, 940.
of joint mortgagors, not usually necessary parties, 141.
of mortgagee; allowed to foreclose mortgage specifically bequeathed, 120, 121.
may foreclose, when a bequest is to be paid from proceeds of mortgage, 120.
owner in severalty, must be a party in foreclosure, 95.
of mortgagor; necessary defendants in foreclosure by advertisement in New York, 168.
no longer owner of equity of redemption, not necessary, 138.

EXECUTORS AND ADMINISTRATORS—*Continued.*
of owner of equity of redemption a necessary defendant in foreclosure by advertisement, in New York, 172.
usually not a necessary defendant, 170, 171.
always proper, 171, 172.
of persons liable for deficiency, proper defendants, 258.
of persons subsequently liable for deficiency, proper defendants, 291.
of subsequent incumbrancer, necessary defendants, 208.
should be appointed and made defendant, before foreclosure, 209.
of trustee allowed to foreclose, 118, 119.
of wife dying during foreclosure, not necessary defendants, 158.
payment; in reliance statements of mortgagee's administrator as to ownership of mortgage; defence of, 483.
to mortgagee's heirs, 484.
as defence against administrator, 484.
should be made defendants, in foreclosure by legatee of mortgage, 120.
statutory foreclosure by, 882.
parties; service, 886, 887.
strict foreclosure by, 931.
in whom title vests, 931.
surplus; distribution; estate held by executors, etc., 836, 837.
arising on estate in hands of; character of; whether realty or personalty, 828–830.
payment into surrogate's court, 826, 827.
to whom a mortgage is executed, may foreclose, 121.
their personal representatives may not foreclose, 122.
their successors may foreclose, 122.
EXTENSION OF TIME.
by parol, of time to pay interest, 317, 318.
of payment, 478.
defence on foreclosure; consideration, 478–481.
FALSE REPRESENTATIONS. See FRAUD.
FEDERAL COURTS. See COURTS.
FEES.
ATTORNEYS AND COUNSELORS. See ATTORNEY'S FEES.
in foreclosure proceedings. See COSTS.
FELONY.
compounding; duress, 445.
Ohio doctrine, 445, 446.
FINDINGS.
of court, omission to set out note or bond cured by, 332.
FIXTURES.
on land lease for term of years, 515.
what are; answer of ownership, 511–517.
pass to purchaser on foreclosure, 703, 704.
exceptions to rule, 704, 705.
removed from premises, not subject to mortgage, 308.

FIXTURES—*Continued.*
right of tenant to remove not prejudiced by foreclosure before end of term, 186
right to upon statutory foreclosure, 913.
what are; defence as to ownership, 511–517.
FORECLOSURE.
accrument of right upon breach of conditions, 355.
on default in payment of installments, 315–319.
action at law on notes; when a bar to, 386, 389.
AFTER DEBT BARRED.
effect of statutory prohibition, 72.
when allowed, 70.
when not allowed, 72.
against infant; purchase money mortgage, 394, 395.
ratification and disaffirmance, 390–393.
against one of separate parcels covered by mortgage, 312.
when bars foreclosure against other parcel, 312.
against purchaser subject to mortgage; denial of assumption, 498.
answers and defences in. See ANSWERS AND DEFENCES.
as to part of single tract, 313.
barred against mortgagor's grantor, only when barred against mortgagor, 76.
bars action at law during its pendency, 304.
by advertisement. See STATUTORY FORECLOSURE.
by assignee, for default in payment of installment, 316.
by foreign specific legatee of bond and mortgage does not produce perfect record title, 124.
definition, 1.
demand can not be split, 328.
DEMURRER. See DEMURRER.
effect of, 1, 9.
payment of debt, 12.
who barred by, 11.
persons made parties, 11.
subsequent incumbrancers, 12.
election to foreclose for overdue installment, 319.
ESTOPPEL. See ESTOPPEL.
by agreement not to enforce mortgage, 51.
future advances; mortgage securing, 407.
validity; consideration, 407.
history, 2.
judgment on note or bond, when bars, 387–389.
lis pendens. See LIS PENDENS.
matters pertaining to trial. See TRIAL.
methods of, 4.
concurrent remedies, 8.
action on bond, 8.
equitable action, 7.
early practice in New York, 3.

FORECLOSURE—*Continued.*
methods of; entry and possession, 4.
equitable action, 7.
statutory foreclosure or foreclosure by advertisement, 5.
strict foreclosure, 5.
mode of noticing for and bringing to trial, 383.
mortgage covering real and personal property, 313.
not barred by prior mortgage for same debt, 313.
object of, 2.
of equitable mortgage; by deposit of title deeds, 320.
to repay purchase money, 319.
of mortgage payable to mortgagee alone, 419.
representatives can not foreclose if demand not made by mortgagee, 419.
of overdue installment, will not bar right to foreclose for subsequent installments, 316.
of separate mortgages on real and personal property, 313.
of several mortgages in same action, 323.
of single mortgage to secure two debts, joinder; 323.
other liens, right of plaintiff to have established, 322.
PARTIES TO. See PARTIES.
PENDENCY. See LIS PENDENS.
PLEADINGS IN. See ANSWERS AND DEFENCES; COMPLAINT; DEMURRER; REPLY, ETC.
previous demand not necessary, when, 30.
right not suspended by mortgage given as collateral, 313.
right of; inherent, 28.
exhausted, 34.
when arises by indorser for accommodation, 51.
default in payment of installment, 40.
default in payment of interest on note secured by the mortgage, 40.
default in payment of principal or interest, 40, 41.
the rule in California, 40.
election of mortgagee that whole debt become due, 44.
fraud by holder of mortgage, 47.
court will relieve from forfeiture, 47.
to declare whole debt due, 47.
to declare whole debt due; notice of, 45.
sufficiency of, 46.
where necessary, 45.
to declare whole debt due; power of court to relieve mortgagor, 46.
election to declare whole debt due; who may so elect, 46.
extension of time of payment, 53.
what is a sufficient consideration, 53.
when valid, 53.
when void, 53.

FORECLOSURE—*Continued.*
right of; when extension of time of payment by parol, 55.
when failure to pay taxes and assessments, 42.
mortgage secures note payable on demand, 36.
note first maturing not payable till maturity of last, 35.
payment of taxes and assessments by mortgagee, upon mortgagor's default, 43.
principal not to be called in during mortgagor's life, 35.
property sold for installment due, 34.
single mortgage secures two debts, 49.
may be foreclosed in favor of both creditors at the same time, 49.
stipulation indorsed on mortgage by mortgagee, not to foreclose while interest paid, 35, 36.
where foreclosure optional upon default for certain time, 39.
where mortgage contains stipulation against forfeiture, 35
where mortgagee holds more than one mortgage on the same property securing different debts, 48.
separate actions not allowable, 48.
where one mortgage secures several notes maturing at different times, 48.
where time of payment not specified, 37.
right of junior mortgagee to compel, 322.
set-offs, 450–461.
STATUTORY; by advertisement. See STATUTORY FORECLOSURE.
stay and discontinuance of action on note, 388, 389.
upon payment of installment, 317.
STRICT. See STRICT FORECLOSURE.
SURPLUS. See SURPLUS.
under power of sale, 313, 314.
what claims may be foreclosed, 307.
when barred, 68.
after lapse of time which would bar a recovery of the premises, 68.
after twenty years' uninterrupted possession, 68, 70.
when right to foreclose arises, 28.
default in payment of installment or interest, 31.
indemnity mortgage, 29.
lapse of time not always criterion, 29.
works discontinuance of action on note, 388.
FORECLOSURE BY ADVERTISEMENT.
See STATUTORY FORECLOSURE.
FOREIGN.
term defined, 122.
FOREIGN EXECUTORS, ETC.
See EXECUTORS AND ADMINISTRATORS.
FOREIGN LEGATEE.
of bond and mortgage; may foreclose, 124.

FORMS.
AFFIDAVIT.
affixing notice of foreclosure by county clerk, 1018.
affixing notice of sale to outer door of court house, 1019.
application for order for possession, 1002.
application for receiver of rents, 1003.
motion for reference to distribute surplus, 1007.
of filing notice of pendency of action, 979.
posting notice of sale, 993.
publishing notice of sale, 1019.
sale under foreclosure by advertisement, 1020.
serving notice of sale, 1020.
ANSWER.
general form, 976.
infant defendants, 977.
bond of receiver, 1006.
CERTIFICATE.
of clerk as to who have filed claims to surplus, 1010.
of filing *lis pendens*, 978.
COMPLAINT.
action for strict foreclosure, 1013.
foreclosure of loan association mortgage, 973
foreclosure, of mortgage executed by infants pursuant to order of court, 971.
general, 967.
creditor; claim of before referee, 1010.
deed; sheriff's or referee's, on foreclosure, 1000.
DEFICIENCY.
execution for, 999.
judgment for, 999.
request to docket judgment for, 998.
execution for deficiency, 999.
FORECLOSURE BY ADVERTISEMENT.
affidavit of affixing notice by county clerk, 1018.
affidavit of affixing notice of sale to outer door of court house, 1018.
affidavit of fact of sale, 1020.
affidavit of publishing notice of sale, 1019.
affidavit of serving notice of sale, 1020.
notice of sale under, 1017.
short form, 1018.
petition for obtaining possession under, 1021.
infants; general answer, 977.
judgment for deficiency, 999.
request to docket, 998.
JUDGMENT OF FORECLOSURE AND SALE.
direction to be inserted in judgment for a sale of separate parcels in inverse order of alienation, 996.
part only due; premises sold in one parcel, 988.

FORMS—*Continued.*
JUDGMENT OF FORECLOSURE AND SALE.
part only due ; premises to be sold in parcels, 989.
provision to be inserted in judgment for sale, when one of the defendants is a mere surety, 990.
whole amount due, 986.
judgment ; strict foreclosure, 1015.
NOTICE.
application for order of reference and judgment, 980.
claim to surplus moneys, 1007.
motion for reference to distribute surplus, 1008.
motion to confirm referee's report as to surplus, 1012.
no personal claim, 977.
object of action, 977.
of sale under judgment, 991.
pendency of action, 978.
sale on foreclosure by advertisement, 1017.
short form, 1018.
OBTAINING POSSESSION.
petition for under foreclosure by advertisement, 1021.
precept for, 1022.
ORDER.
appointing receiver of rents, 1004.
confirming report of referee and directing distribution of surplus moneys, 1012.
confirming report of sale, 996.
directing sale of balance of mortgaged premises, 998.
extending time to redeem, 1016.
final in strict foreclosure, 1017.
final in summary proceedings, 1023.
for possession, 1002.
of reference as to claims to surplus, 1009.
reference preliminary to judgment, 980.
PETITION.
obtaining possession by purchaser under foreclosure by advertisement, 1021.
to sell balance of mortgaged premises, 997.
precept to obtain possession, 1022.
RECEIVER.
affidavit for order appointing, 1002.
bond of, 1006.
order appointing, 1004.
redemption ; order extending time for, 1016.
REFEREE.
deed on foreclosure, 1000.
report of as to who are entitled to surplus, 1011.
referee's report of sale, 993.
REPORT OF REFEREE PRELIMINARY TO JUDGMENT.
whole amount due ; no infants or absentees, 982.

FORMS—*Continued.*
REPORT OF REFEREE PRELIMINARY TO JUDGMENT.
whole amount due; infants or absentees, 985.
whole amount not due; no infants or absentees, 983.
SALE.
affidavit of posting notice, 993.
notice of, 991.
referee's report of, 993.
terms of, 991.
sheriff's deed on foreclosure, 1000.
STRICT FORECLOSURE.
complaint in action for, 1013
final order in, 1017.
judgment for, 1015.
SUBPŒNA.
reference as to surplus moneys, 1009.
to attend before referee, 981.
SUMMARY PROCEEDINGS.
final order in, 1023.
warrant to obtain possession, 1023.
SURPLUS MONEYS.
affidavit on motion for reference to distribute, 1007
certificate of clerk as to who have filed claims to, 1010.
claim of creditor to, on reference, 1010.
notice of claim to, 1007.
notice of motion for reference to distribute, 1008.
notice of motion to confirm referee's report, 1012.
order confirming referee's report and directing distribution of, 1012.
order of reference as to claims to, 1009.
report of referee as to who are entitled to, 1011.
subpœna to attend reference, 1009.
terms of sale, 991.
warrant; constable's return upon, 1024.
for possession in summary proceedings, 1023.
FRAUD.
as defence, 401, 417, 418, 428–438.
against assignee of mortgage, 417, 418.
as ground for appointing receiver, 788–790.
as to extent and boundaries of land, 437, 438.
as to number of acres, 436, 437.
as to vendor's title, 436.
purchase money mortgage, 436.
attacking conveyance for on reference to ascertain surplus, 868.
by holder of mortgage, 47.
court will relieve from forfeiture by election to declare whole debt due, 47.
cancellation of mortgage for, 432.
concealment of outstanding title; effect, 520, 521.

FRAUD—*Continued.*
contracts and assignments avoided by, 418.
deceit; as defence in foreclosure, 401.
equitable relief, 432.
essential to estop married woman, 465.
false representations; as defence in foreclosure, 434–438.
foreclosure; counter-claim for damages, 459–461.
fraudulent intent; necessity to constitute estoppel, 468, 469.
in general; as defence in foreclosure, 428, 429.
may exist without intention to mislead, 428.
mistake caused by innocent misrepresentation of quantity of land; correction, 442.
not a defence to foreclosure, unless participated in by mortgagee, 434, 435.
of creditors; assignment; foreclosure by assignee; defences, 418, 419.
excessive consideration; foreclosure, 409.
defence, 409.
mortgage not void as between parties, 429.
mortgagor can set up want of consideration, 404.
OF MORTGAGEE.
estoppel, 466.
as against purchasers from mortgagor, 468, 469.
of mortgagor to set up, 464.
of vendor; as to incumbrances, 486.
subsequent agreement by vendee to assume incumbrances; payment, 486, 487.
on married woman, 434.
when available as defence in foreclosure, 434, 435.
purchase money mortgage, 433.
counter-claim for damages, 433.
defence on foreclosure; relief, 430, 431, 433, 434.
release obtained by; is void, 495.
satisfaction procured by, 493.
discharge as to innocent purchasers, 493.
setting aside foreclosure sale for, 643, 651, 657–660.
appeal from order, 668, 669.
setting aside statutory foreclosure for, 903.
subsequent purchaser, deed first recorded, 343.
complaint in foreclosure must allege fraud, 343.
undue influence, 443.
relief on foreclosure, 443, 444.
upon mortgagor, as defence in foreclosure, 429, 430.
defence and remedies in foreclosure, 432, 433.
upon purchaser assuming mortgage, 435.
defence in foreclosure, 435, 436.
when avoids mortgage, 428–438.
FRAUDS, STATUTE OF.
foreclosure sale; memorandum, 633.
parol agreement to execute mortgage; part performance, 320.

FRAUDULENT CONVEYANCE.
By Mortgagor.
of land mortgaged, 145.
he is necessary party to foreclosure. 145.
of mortgage, 418.
foreclosure by assignee ; defences, 418, 419.
validity as between parties, 429.
FUTURE ADVANCES.
mortgage to secure ; consideration ; foreclosure, 407.
failure to make ; set-off, 460, 461.
GIFT.
of debt secured by mortgage payable to mortgagee alone, 419.
by death of mortgagee without demand of payment, 419.
GRANTEE.
assuming mortgage, 269.
can not avoid payment because of defective title, while he is in quiet possession, 276.
nor because of usury, 275.
can not be released by grantor in New York, 282.
otherwise in New Jersey, 283.
need not sign the deed, 274.
not personally liable unless grantor is. 278.
otherwise in Pennsylvania. 279.
what words and acts bind him, 273.
at execution sale of equity of redemption, a necessary party, 142, 143.
can not object that mortgagor, his grantor, is not made a party, 138.
can not release purchaser, assuming mortgage, from liability in New York, 282.
otherwise in New Jersey, 283.
not liable for mortgage debt, unless he actually assumes it, 274.
of mortgaged premises not liable for deficiency, 266.
otherwise in New Jersey, 268.
the rule in New York, 269.
of mortgaged premises the primary debtor, after assuming mortgage, 270, 272.
of mortgagor, a necessary defendant, 145, 146.
can plead limitation only when mortgagor could have done so, 76.
no greater rights than mortgagor, 76.
not a proper party, where foreclosure is by *scire facias*, 147.
of mortgagor's assignee in bankruptcy a necessary defendant, 146, 147.
of mortgagor's grantee, bound by the latter's recognition of mortgage, 76.
bound by his vendor's acts and declarations, 76.
surety for grantee assuming mortgage discharged by extension of time without consent, 272.
GRAVEL ROAD TAX.
set-off on foreclosure, 455, 456.
GROWING CROPS. See Emblements.

GUARANTY.
of bond and mortgage by separate instrument; personal liability, 289.
of mortgage debt, 286.
guarantor a proper defendant, 286.
costs in case of death, 940.
judgment for deficiency against, 727, 728.
liable for deficiency, 252.
personally liable, 286.
GUARDIAN AND WARD.
answer by guardian. 529.
requisites of order of reference in case of, 529.
application for judgment against infant; what facts must be shown, 552.
costs to guardian *ad litem*, 949, 950.
guardian *ad litem* of infant defendant, 301.
appointment; how made, 301.
appointment void until service of summons on infants, 300.
effect of failure to appoint, 301
guardian; executing mortgage, a desirable defendant, 183.
of infant heir of owner, not a necessary defendant, 167.
of subsequent incumbrancer a necessary defendant, 211.
infant defendant; answer by guardian *ad litem*, 558.
appearance by guardian, 685.
infant under fourteen years must be served with summons, 300.
neglect, etc., of guardian, as ground for setting aside foreclosure sale, 666, 667.
notice to, of taxation of costs in foreclosure, 962.
power of guardian to purchase at foreclosure sale, 630.
release of purchaser from completing purchase, 685, 686.
successor of guardian may foreclose, 129.
undue influence by guardian; relief on foreclosure, 443.
HABITUAL DRUNKARD. See DRUNKENNESS.
HEIRS.
at law do not receive title and possession of personal property, 207.
may set up usury as defence in foreclosure, 414.
mistake; correction of, as against; on foreclosure, 439.
necessary defendants to foreclosure of mortgage executed by personal representatives to pay debts of estate, 183.
of assignor of mortgage, and all interest therein, not necessary defendants, 215.
of infant, lunatic, idiot, or habitual drunkard, owner of premises, necessary defendants, 183.
of joint mortgagors, not usually necessary parties, 141.
of mortgagee allowed to revive the action, 120.
can not assign mortgage so as to enable assignee to foreclose, 120.
can not foreclose, 119, 120.
when necessary parties, 118.

HEIRS—*Continued.*
of mortgagor, no longer owner of equity of redemption, not necessary, 138.
omitted as defendants, may appear and defend, 168.
or owner of equity of redemption, not necessary defendants in foreclosure by advertisement, 166, 167.
when necessary defendants, 165, 166, 167, 168.
of owner of equity of redemption not necessary defendants, where equity of redemption devised, 168, 169.
necessary defendants, 165, 166.
of persons liable for deficiency must be sued therefor, separately from foreclosure, 262.
not proper defendants, 262.
of persons subsequently liable for deficiency, not proper defendants, 291.
of subsequent incumbrancers, not necessary defendants, 207.
of tenants by entirety, not necessary defendants, 169.
of wife dying during foreclosure, not necessary defendants, 158.
HIGHWAYS.
gravel road tax, 455.
set-off on foreclosure, 455 456.
HOMESTEAD.
duress of wife in mortgage on, 447.
relief on foreclosure, 447.
FORECLOSURE.
defence of usury available to wife, 414.
sale; order of alienation, 622, 623.
mortgage covering; procured by fraud; foreclosure, 435.
foreclosure; complaint; description of property, 351.
rights in surplus moneys; distribution; priority, 853.
signature obtained by duress, 410.
defence against assignee of note, 410.
HOUSE.
removed from premises, not subject to mortgage, 308.
HUSBAND AND WIFE. See also DOWER; HOMESTEAD; WIDOWS.
competent witness for each other on reference to compute amount due, 534.
dower; bar by foreclosure, necessary averments, 343, 344.
equitable provision for wife and children in distribution of surplus, 849, 850.
foreclosure of mortgage executed by; decree, 349.
fraud as to creditors does not invalidate mortgage as between the parties, 429.
HUSBAND.
a necessary defendant to foreclosure against wife's separate estate, after her death, 165.
estate by curtesy; requisites, 165.
in New York, 165.
may execute valid mortgage to wife, 131.

HUSBAND AND WIFE—*Continued.*
HUSBAND.
of mortgagor of separate estate not usually a necessary defendant, 164.
of subsequent incumbrancer not a necessary defendant, 207.
signing bond secured by mortgage on wife's separate estate, liable for deficiency, 251.
marriage to mortgagor after taking mortgage does not extinguish mortgage, 131.
mortgage to secure bond for support, 355.
complaint; averment as to breach, 355.
WIFE.
allowed to foreclose mortgage to herself and husband, after his death, 130.
a necessary defendant, 157.
assigning mortgage and guaranteeing payment, personally liable in New York, 290.
a subsequent incumbrancer, a necessary defendant, 207.
defence of usury available to protect homestead, 414.
duress over; defence on foreclosure; relief, 446–449.
dying during foreclosure, heirs and personal representatives not necessary parties, 158.
estoppels against, 465.
executing mortgage, liable for deficiency to extent of value of mortgaged lands, 257.
fraud of, as defence in foreclosure, 434, 435.
fraud upon; defence in foreclosure, 435.
has same rights and remedies as *feme sole*, 130.
having made grant of dower, still a necessary defendant, 158.
loan association mortgage binds separate estate of, 540, 541.
may foreclose against husband, 131.
may foreclose in her own name, 130.
may, under the statutes, usually mortgage her separate estate, 157.
mortgage covering separate estate; rents and profits, 798.
mortgage on estate of, 156.
defence of fraud in procuring execution, 428.
mortgage on property of, to secure husband's debt, 406.
consideration, 406.
mortgaging separate estate, husband not usually a necessary defendant, 164.
not a necessary defendant, where dower rights abolished by statute, 158, 159.
where rights of husband and wife completely severed by statute, 161.
not joining in purchase money mortgage, a necessary defendant, 160.
otherwise in Illinois, Indiana and Michigan, 160.
not made a defendant, dower not extinguished, 157.

HUSBAND AND WIFE—*Continued.*
WIFE.
not prevented from foreclosing mortgage to her and husband, but really belonging to her, by discharge from him, 130, 131.
of infant, lunatic, idiot, or habitual drunkard, not a necessary defendant to foreclosure of mortgage by guardian or committee, and not executed by her, 182, 183.
of mortgagor, having separate estate, necessary defendant, 156.
of subsequent incumbrancer a necessary defendant, 207.
omitted as a defendant, can not maintain ejectment, 162.
may have value of dower computed and paid before husband's death, 162.
may redeem, 161.
right to redeem does not accrue till death of husband, 161, 162.
purchasing premises and assigning mortgage, personally liable, 289.
rights as to mortgaging her estate the same as those of a male or a *feme sole*, 157.
service of summons on, under early practice, 162.
service of summons on, under present practice, 163.
must be personal in New York, 163.
notice of statutory foreclosure, 886, 889, 890.
of summons upon separately; when necessary, 298.
signing bond or note secured by mortgage, liable for deficiency; general rule, 253, 255.
New York act of 1884, 254.
strict foreclosure against, 929.
under the common law, could not mortgage separate estate, 156.
IDENTIFICATION.
of notes imperfectly pleaded, 331.
IDIOTS. See also INSANE PERSONS.
heirs, devisees, or legatees; necessary defendants, 183.
owning premises necessary defendants, 182.
subsequent incumbrancers, proper defendants, 211.
committee of, a necessary defendant, 211.
ILLITERACY
as defence to foreclosure, 401, 402.
IMPRISONMENT.
duress of person; defence on foreclosure; relief, 448, 449.
IMPROVEMENTS.
pass to purchaser on foreclosure, 705, 706.
INCHOATE RIGHTS. See DOWER.
INCOMPETENT DEFENDANTS.
service of summons on; when not necessary, 302.
INCUMBRANCES.
covenant to pay; breach; defence, 476.
pendente lite incumbrancers not necessary defendants, 205.

INDEMNITY.
Mortgage.
defence, 478.
foreclosure; complaint; necessary averments, 353.
may be foreclosed by surety alone, 85.
when right to foreclose arises, 29, 49.
of surety; by confession of judgment, 848.
lien on surplus; priority, 848
INDEX.
no part of record, 398.
INDORSEMENTS.
on mortgage, complaint must set forth, 328.
INFANCY AND INFANTS.
answer by guardian *ad litem*. See Guardian and Ward.
as a defence in foreclosure, 390–395.
character, as realty or personalty, of surplus on sale of estate of, 880.
concluded by statutory foreclosure, 912.
costs; allowance to guardian *ad litem*, 949, 950.
defendants; necessary allegations in complaint, 333, 341.
motion for judgment; what facts must be shown, 552.
must be served with summons, 300.
non-resident may be served by publication, 301.
order of reference to compute amount; contents, 533, 534.
reference to compute amount, 538.
examination of plaintiff must be exhaustive, 538.
reference to compute amount due, 561.
requisites of order of reference, 529.
when purchaser will be released from completing purchase in case of, 685.
heir of owner of equity of redemption a necessary defendant, 167.
mortgage by, 391.
burden to prove; ratification, 391.
disaffirmance and ratification, 390–393.
merely voidable; disaffirmance, 390, 391.
statutory foreclosure, 881.
notice to guardian of taxation of costs on foreclosure, 962.
owner of premises; necessary defendant, 182.
heirs, devisees, or legatees of, necessary defendants, 183.
power of guardian to purchase at foreclosure sale, 630.
purchase money mortgage by; foreclosure, 394, 395.
setting foreclosure sale aside for benefit of, 666, 667.
strict foreclosure against, 931, 932.
subsequent incumbrancer a proper defendant, 211.
guardian a necessary defendant, 211.
undue influence by parent or guardian, 443.
relief on foreclosure, 443.
INFLUENCE, UNDUE.
relief on foreclosure, 443, 444.

INJUNCTION.
in foreclosure; not granted unless prayed for, 347.
or unless facts arise after suit brought, 347.
resemblance to order appointing receiver, 772.
restraining foreclosure until determination of ejectment against mortgagor, 521.
restraining sale; appointment of receiver in case of, 790.
STATUTORY FORECLOSURE.
restraining resident mortgagee from selling at public sale lands without the state, 880.
restraining sale under, 904-906.
INSANE PERSONS. See also DRUNKENNESS; IDIOTS.
committee of subsequent incumbrancer, who is a lunatic, idiot, or habitual drunkard, a necessary defendant, 211.
defendants in foreclosure, 684.
purchaser not released from completing purchase because no committee was appointed, 684, 685.
defendants; service of summons on; when not necessary, 302.
insanity; no hinderance to legal proceedings, 684.
of mortgagor, as defence in foreclosure, 395-397.
owner of premises; necessary defendant, 182.
heirs, devisees, or legatees, necessary defendants, 183.
subsequent incumbrancer, a proper defendant, 211.
committee a necessary defendant, 211
surplus, on sale of estate of; character as realty or personalty, 830.
INSOLVENCY.
as determining right to appointment of receiver. See RECEIVER.
assignee for creditors may set up usury as defence in foreclosure, 414.
takes subject to equities; is trustee; not a purchaser, 418.
takes only title of assignor, 418.
assignment; foreclosure by assignee, 418.
creditors not necessary parties, 418.
bankruptcy assignment by mortgagee, 418.
foreclosure; defences, 418.
of heirs or devisees; remedy of judgment creditors, 845.
as to surplus arising on foreclosure sale, 845.
remedy of mortgagee as to surplus, 863.
of plaintiff in foreclosure, 453.
set-off of by owner of equity of redemption, 453, 458.
INSTALLMENTS.
effect of delay in paying, 315-319.
payment of, terminates foreclosure, 482.
INSURANCE.
allowance in surplus proceedings of premiums paid by mortgagee, 544, 966.
covenant for; default, 881.
statutory foreclosure, 881.
paid by mortgagee subsequent to commencement of foreclosure, 544.
not allowable on computation of amount due, 544.

INSURANCE—*Continued.*
premiums paid by mortgagee, 544.
allowance on reference to compute amount due, 544, 545.
in distribution of surplus, 966.
state superintendent of; foreclosure by successor, 130.
INTEREST.
accumulation, as ground for appointment of receiver, 788.
appointment of receiver at instance of junior incumbrancers, 807.
clause in mortgage, 31.
breach making mortgage due, 31.
effect of, 32.
not a penalty, 32.
damages; failure of title, 459.
default in payment, effect, 31, 40.
where mortgage contains interest clause, 31.
where it does not, 32.
effect of delay in paying installment, 315, 317-319.
estoppel of mortgagor to set up illegal interest as against assignee of mortgage in good faith, 464.
illegal; set-off on foreclosure, 456.
included in computation by referee of amount due, 538, 539.
partial payment to stop; received as deposit; subsequent acceptance, 487.
application as of date made, 487.
payment; proof of, rebuts presumption from adverse possession, 64.
by life tenant; preserves life of mortgage as against remainderman, 491.
limitation of action, 491.
by purchaser of equity of redemption, 491.
effect to prevent running of limitation against mortgagor's liability, 491.
giving note for is not, 484.
inability to find mortgagee is no defence, 492.
prevents or removes bar, 75.
will not prevent or remove bar, as against mortgagor's grantee, 75.
prevents or removes bar, where several interested in equity of redemption, 75.
purchaser not required to pay in case of delay of parties in perfecting title, 690, 691.
stopped by tender of money payable on demand, 336.
unpaid, addition to principal; compound, 318.
USURY. See USURY.
as defence in foreclosure, 411, 412.
question of can not be raised on confirmation of sale, 636.
stipulation for attorney's fee, 953-955.
when purchaser subject to mortgage not estopped to set up, 473, 474.

INTERLOCUTORY PROCEEDINGS.
reference; of issues; failure of a defendant to appear on trial, 558.
to compute amount, 541, 542.
allowance of taxes and assessments, 541, 542.
application for, 560.
building and loan association mortgage, 539.
fines and dues, 539-541.
change of referee, 535.
competency of service and witnesses, 534, 537, 538.
computation on failure to pay taxes and assessments, 543, 544.
computation; statement of items, 538.
allowance for interest, repairs and payment of prior liens, 538, 539.
contents of order; directions as to computation, 532, 533.
case of non answering defendant, 535.
direction to ascertain if premises can be sold in parcels, 533.
county in which may be held; venue, 547, 548.
determination as to how much of premises shall be sold, 589, 590.
sale in parcels, 589, 590.
discretion and authority of referee, as to conduct of proceedings, 547, 548.
entry and service of order prerequisite to action by referee, 536.
extent and scope of examination, 537, 538.
failure to appear at trial after answering, 531.
finding as to how premises should be sold, 546, 547, 549.
general powers and duties of referee, 545, 546.
in case default of, or admission by answer, 528, 529.
infant and absentee defendants, 561.
contents of order, 533, 534
examination of plaintiff must be exhaustive, 538
infant defendants; requisites of order, 529.
insurance; allowance of premiums paid by mortgagee, 544, 545, 966.
judgment upon report, 551 556.
mortgage upon lease-hold interest 544.
allowance of rent; charges paid by mortgagee, 544.
motion papers, 530-531
nature of proceedings, 535, 536
necessity of notice of motion, 529, 530.
oath of referee, 536.
order; not appealable, 533.
appeal from final judgment brings up, 533.
should define duties of referee and limit scope of reference, 535.

INTERLOCUTORY PROCEEDINGS—*Continued.*
reference; to compute amount; order should direct referee to report proofs and evidence taken, 535.
to compute amount; power of the court to order, 558.
referee; power of to determine questions of priority, 547.
authority limited by order; no discretion, 537.
governed by chancery rules and practice, 545.
to be selected by court, 532.
report; contents, 545, 546.
filing; confirmation, 549.
exceptions; new hearing, 549–551.
necessity; sufficiency; contents, 548, 549.
of referee that premises can be sold in parcels, 533.
time and place of making motion, 530.
court calendar, 530.
when part of defendants have not answered, 559, 560.
who may be referee, 531, 532.
who may prosecute order of reference, 536, 537.
withdrawal from referee, 535.
special order of court necessary, 535.
witnesses; testimony need not be signed, 538.
INTERMEDIATE ASSIGNORS. See ASSIGNMENT.
INTERMEDIATE PURCHASER.
assuming mortgage personally liable, 285.
not assuming mortgage, not liable, 286.
ISSUES. See DEFENCES AND ANSWERS; TRIAL.
JOINDER.
of causes of action. See COMPLAINT.
of defendants. See COMPLAINT; PARTIES.
JOINT DEBTORS AND CREDITORS.
discharge by one creditor; validity, 493.
principal liability; not determined on foreclosure, 501.
statutory foreclosure, 883.
joinder of persons jointly interested, 883.
JOINT MORTGAGEES.
any one or more may foreclose, 90.
one dying, survivor may foreclose, 92, 93.
or in severalty, refusing to join as plaintiffs, necessary defendants, 221.
where joint mortgage secures different debts in severalty, all debtors are necessary parties, 91.
JOINT MORTGAGORS.
heirs and personal representatives of, not usually necessary parties, 141.
JOINT TENANTS AND TENANTS IN COMMON.
power to purchase at foreclosure sale, 631.
reference to ascertain surplus, 870.
statement of account of tenant in common, 870, 871.
sale of moiety of lands held by, 597.

JOINT TENANTS AND TENANTS IN COMMON—*Continued.*
TENANT IN COMMON.
mortgage by can be foreclosed only after partition, 140.
must be proceeded against jointly, 141.
one can not sever debt, and pay a moiety, 312.
will not affect rights of co-tenants, 140.
owners of mortgaged premises, are all necessary defendants, 136.
with mortgagor, not necessary defendants, 141.
TENANTS BY THE ENTIRETY.
heirs of one deceased not necessary defendants, 169.
JUDGMENT.
adverse or paramount title ; claimant of, 504.
when concluded, 504.
against mortgagor, becomes inferior to purchase money mortgage, 195, 196.
lien on surplus, 844, 845.
against sheriff, for failure to return execution, 848.
distribution of surplus ; priority, 848, 849.
a lien from time of docketing, 196.
although erroneous, concludes purchaser, if he is a party to the action, 683, 684.
amendment of, not necessary to compel purchaser at foreclosure sale to complete purchase, 675.
application for ; notice, 552.
necessity and sufficiency, 552, 553.
by confession, 938.
allowance of costs on offer made, 938.
as indemnity : lien of on surplus : priority, 843.
mortgage to secure ; consideration : validity, 406.
by default, 554.
against defendants claiming interest, 529.
application for ; what must be shown, 551.
after reference, 551–554.
time ; notice, 561, 562.
conclusiveness, 529.
costs on, 949.
extent of relief granted, 554–556.
or on report, must follow prayer, in fixing order of liability for deficiency, 246.
power to open, 556.
subsequent pleadings and proceedings, 556–557.
relief confined to cause stated in complaint, 327.
when mortgage not set out in complaint, 330.
conclusiveness, against third persons made defendants, 357, 358.
letters of administration irregularly granted, 639.
confession of judgment ; mortgage to secure, 406.
by one member of partnership , priority, 849.
distribution of surplus, 849.
consideration ; validity, 406.

JUDGMENT—*Continued.*
correction to conform to referee's report, 554.
creditor; bound by *lis pendens* in foreclosure, 372, 373.
may apply to have foreclosure sale set aside, 642.
may set up usury as defence in foreclosure, 414.
of owner of life estate, a necessary defendant, 195.
pendente lite not necessary defendant, 196.
subsequent; any defendant having real interest may object to omission, 197.
assignees of, necessary defendants, 203.
having assigned judgment, not a necessary defendant, 200.
if not made defendants, only remedy is redemption, 197.
of owner of premises, necessary defendants, 194.
can not be made plaintiffs, 194.
omitted as a defendant, may redeem directly or by execution, under a sheriff's deed, 199.
redeeming, need not pay costs, 199.
rights not affected if not made defendants, 194.
who has levied execution, remains a necessary defendant until satisfaction, 196.
decree of sale: form and contents, 565.
proceedings thereunder, 568.
defective; if any person having an interest in the premises is not a party, 135.
description; of mortgaged property, 350, 351.
of premises; mistake, 700.
amendment, 701.
direction; as to who may purchase at sale, 630.
order of sale; inverse order of alienation, 609, 611.
quantity of premises; parcels, 589, 590.
discharge of mortgage by judgment on new note given for balance on settlement, 494.
distribution of surplus; priority of liens, 833.
doctrine of *lis pendens*. See LIS PENDENS.
does not affect rights of subsequent incumbrancers not made parties, 190.
dower; when not barred, 506.
effect of, 2.
erroneous or irregular, 709.
does not affect title of purchaser on foreclosure, 709.
relief of purchaser against, 683–684.
execution; lien of on surplus, 847.
priority, 848.
final; appeal from brings up order of reference, and interlocutory decree, 533.
by judge who did not try issues, 554.
for actual amount due, 405.
for debt does not discharge mortgage, 494.

JUDGMENT—*Continued.*
FOR DEFICIENCY. See DEFICIENCY.
for too large an amount; setting aside sale for, 640.
for whole amount; upon non-payment of installment, 739.
in action on note or bond; when bars foreclosure, 387–389.
in case of default; what relief granted, 327.
in case of joinder of senior mortgagee, 322.
in foreclosure of mortgage executed by husband and wife, 349.
lien of; protection of in distributing surplus, 846.
what interests bound by, 845, 846.
lis pendens; subsequent incumbrance, 372, 373.
mistake; correction as against judgment creditors; foreclosure, 439.
mortgage containing defective description of property, 352–354.
motion for; necessity of notice, 551.
requisites; where and when made, 551, 552.
what facts must be shown, 551, 552.
no personal decree prior to final judgment, 723.
not a lien unless proceedings for its recovery completed, 196.
not conclude prior incumbrancers, 381.
not modify decree of sale in partition of same lands, 556.
not reversed for refusal to dismiss foreclosure for small installment, 317.
obtained by fraud; effect of, 16.
of foreclosure and sale; contents, 553.
direction as to how property shall be sold, 553–554.
variation from referee's report; extent of relief granted, 553–556.
of foreclosure; of mortgage pledged or collaterally assigned, 342.
of one note will not bar action on others, 378.
voidable, at instance of infant defendant, for whom a guardian *ad litem* was not appointed, 301.
of sale generally, 563, 564.
of second sale, for subsequent installment due, 600.
after sale of part for former installment, 600–602.
of surrogate's court; preference over legatee's claims in distribution of surplus, 847.
on application to strike out frivolous plea, 562.
on referee's report; form and contents; notice, etc., 551–554.
plaintiff entitled to no contingent personal judgment before final, 555.
prior incumbrancers; when barred by, 507.
priority of second mortgage, 843.
of unrecorded mortgage, 843.
distribution of surplus, 843, 844.
provision as to letting purchaser into possession, 712.
redemption by creditor; costs, 959.
relief to conform to prayer in complaint, 347.
sale under; effect of, 10.
set aside for mistake in description of premises in foreclosure, 440.
should determine rights and liabilities of all the parties, 16.

JUDGMENT—*Continued.*
should direct payment of pledgee's claim, in foreclosure by him, 101.
direct referee to report deficiency, 723.
fix order of liability for deficiency, 244.
require referee to specify amount of deficiency, in report of sale, 244.
specify order of liability for deficiency, 287.
STRICT FORECLOSURE. See STRICT FORECLOSURE.
discretion as to sale of property, etc., 930.
form, contents, etc., 932.
setting aside, opening, etc., 933, 934.
subsequent to prior equitable mortgage, 319 321.
surplus; distribution; order of priority, 847.
priority of executory contract to execute mortgage, 848.
of liens generally, 835.
over dower rights, 847.
satisfaction in order of priority, 846, 847.
tax title holder; when barred, 507.
upon debt secured: pending foreclosure, 314.
upon foreclosure of contemporaneous mortgages, where all mortgagees were not made parties, is defective, 113.
void; purchaser under at foreclosure sale obtains no title, 710.
when only part due at time of filing complaint, 555.
including all due at date of decree, 555.
when senior and junior mortgages foreclosed in one action, 323.
when senior mortgagee made party, 322.
where widow's dower admeasured in premises mortgaged by husband alone, 161.
will not affect owner of equity of redemption not made a party, 148, 149.
JUDICIAL NOTICE.
of county in which lands are situated, 353.
JUDICIAL SALE. See SALE.
JUNIOR INCUMBRANCERS. See SUBSEQUENT INCUMBRANCERS.
JURISDICTION.
EQUITABLE. See also EQUITY, COURTS OF.
to enforce contract to execute mortgage, 321.
of courts of equity, 14.
can not be deprived of jurisdiction by agreement of parties, 17.
effect of commencement in federal court on jurisdiction of state court, 20.
federal courts, 19.
state courts, 16.
circuit courts of Missouri, 19.
city courts, 18.
terms of New York city courts, 18.
county courts, 17.
no power to reform mortgage, 17.
New York supreme court, 16.

JURISDICTION—*Continued.*
of courts of equity; transitory action, 26.
where all the property is situated in another state, 25.
where property situated in two states, 25.
where the parties reside in another state, 26.
no personal service, 26.
JURY.
trial by. See TRIAL.
when allowable, 15, 16.
LACHES.
by owner of property; estopped by silence at sale, 469–470.
in applying to have foreclosure sale set aside, 645–647.
in applying to have sale by advertisement set aside, 904.
in foreclosing, 456.
set-off of loss by depreciation in value, 456.
in objecting to sale, 660.
setting aside sale, 660–662.
of mortgagee; as affecting right to appointment of receiver, 793.
sale not set aside to protect party against consequences of his own laches, 643.
LANDLORD AND TENANT.
conclusiveness of statutory foreclosure on tenant, 913.
costs; right of tenant under recorded lease to have taxed, 962.
fixtures; on lands leased for term of years, 515.
right to as between tenant and mortgagee, 515–517.
interest in surplus moneys of lessee for years, 855.
mortgage; of leasehold interest, 544.
allowance of rent charges paid by mortgagee on reference to compute amount due, 544.
of lease for years; purchaser at foreclosure sale becomes assignee, 697.
possession by tenant; appointment of receiver, 804, 805.
as affecting right to appointment of receiver, 793, 794.
receiver; power to lease premises, 776.
TENANT.
ejected after foreclosure, may sue lessor for damages, if there is no surplus, 186.
in possession under hostile claim, 713.
not summarily dispossessed to give possession to purchaser at foreclosure sale, 713, 714.
may be ejected, when, 186.
necessary defendant, 185.
not made a party; entitled to all crops grown before expiration of term, 185, 186.
right to remove fixtures not prejudiced by foreclosure before end of term, 186.
writ of assistance; to dispossess tenant, 719.
LAW OF PLACE.
governing validity of mortgage as to usury, 412–414.

LEASE. See LANDLORD AND TENANT.
LEGACY. See WILLS.
LEGATEE. See also WILLS.
a necessary defendant, where legacy to be paid from proceeds of premises, 170.
foreign; of bond and mortgage may foreclose, 124.
of infant, lunatic, idiot, or habitual drunkard, owner of premises, necessary defendant, 183.
of money to be paid from proceeds of mortgage, should be made defendant, on foreclosure by executor, 120.
of mortgage may foreclose, 120.
of subsequent incumbrancers, not necessary defendants, 207.
LEX LOCI.
governing validity of mortgage; usury, 412–414.
LIEN.
in favor of plaintiff in foreclosure, right to plead and have established, 322.
lienholders are necessary parties defendant, 135.
of attorney; for fees. See COSTS, 952–959.
on surplus moneys, 857.
protection of, on reference to ascertain surplus, 871.
of mechanics, 835.
consideration of in distribution of surplus, 835.
determination of rights by referee to ascertain surplus, 870.
distribution of surplus; priority, 855, 856.
holder may set up usury as defence in foreclosure, 414.
priority of mortgage; distribution of surplus, 844.
LIFE TENANT.
surplus; distribution, 837, 838.
LIMITATION.
of actions; acknowledgment of debt, 490.
interest; payment by purchaser from mortgagor, 491.
effect to prevent running of limitation against mortgagor's liability, 491.
payment by life tenant, preserves life of mortgage as against remainderman, 491.
new promise must be made by debtor or in his behalf, 74.
may be express or implied, 74.
promise implied by unqualified acknowledgment of debt, 74.
where foreclosure barred by limitation of remedy for the debt, 72.
must be made to the creditor or his agent, 74.
removes bar, 74.
sufficiency to prevent bar of statute, 490.
of actions in equity, act by analogy to rules of law, 68.
of foreclosure actions under New York code, 57.
as a complete bar, 59
as affording only a presumption of payment, 59.

LIMITATION—*Continued.*
of foreclosure actions under New York code; at common law, 57.
can be pleaded by mortgagor's grantee, only, when it could have been pleaded by mortgagor, 76.
debtor's absence can not prevent, 67.
enforcing statutes of, in equity, 58.
partial payment, 490.
sufficiency to prevent bar of statute, 490, 491.
payment by mortgagor after transfer, 491.
effect in keeping debt alive, 491.
prima facie evidence of payment, 59.
purchaser from mortgagor, 490.
bound by mortgagor's previous acknowledgment of debt, 490, 491.
removal of bar, 73.
by new promise, 74.
statute extinguishes mortgage, 482.
time sufficient to raise presumption of payment, 60.
when begins to run, 67.
in favor of mortgagor's grantee, not until some hostile act or declaration, 77.
in mortgagor's favor, 61.
where there is a parol agreement as to time of payment, 51.
when complete, 67, 68.
lapse of time which would bar a recovery of the premises, 68.
not because the debt is barred, 70.
twenty years' uninterrupted possession, 68.
upon limitation of debt, 70.
when not complete upon limitation of debt, 72.
when right to foreclose accrues, 67.
will not run while relation of mortgagor and mortgagee continues, 61.
LIQUIDATED DAMAGES. See DAMAGES.
LIS PENDENS.
affects only proper parties and privies, 374.
amendment of complaint, 378.
new notice, 378.
becomes void or dormant by negligence in prosecuting, 378.
common law doctrine, 153.
contents of notice, 366–368.
continues until final decree, 363.
created by service on one defendant, 362, 363.
definition, 359–361.
description of mortgage, 367, 368.
description of premises, 368.
diligence in prosecution requisite, 363.
duration and extent, 363–365.

LIS PENDENS—*Continued.*
effect of notice ; generally, 371, 372.
effective as to third persons from earliest service, 362.
and from service on any defendant, 363.
upon conveyances subsequently recorded, 373, 374.
upon holders of unrecorded conveyances, 373, 374.
entire accuracy not requisite, 367.
function ; maxim ; *pendente lite nihil innovetur*, 361.
how shown on motion for order of referee to compute amount due, 530, 531.
in action for dissolution of partnership ; inoperative against prior mortgage, 373.
in real actions affects all persons, 364.
when becomes operative, 365.
is as effective against a valid transfer as an injunction, 371.
is constructive notice to subsequent purchasers, 371.
loss or improper entry will not defeat, 371.
misnomer ; effect of, 367.
modern doctrine defined, 361.
must correctly describe property, 377.
New York doctrine ; history of, 365–366.
statutory provisions, 154, 155.
nature and functions, 361, 362.
no extra territorial application, 363.
not affect parties asserting adverse rights to defendant, 363.
not effective until complaint filed, 206, 362.
notice ; cancellation, 379.
defective ; amendment, 377, 378.
in original suit, constructive notice of cross-suits, 363.
not invalidated by defect where parties not prejudiced, 377.
not to tenant of one not a party, 363, 364.
only of contents of summons and complaint, 364.
presumed from appearance, 363.
not operative until service, 362.
nunc pro tunc order, 362.
not affect rights of intervening creditor, 362.
object, to keep subject in controversy until final judgment, 361.
omission to file ; effect, 375.
persons affected by, 375.
omitted or defective ; effect on parties, 156.
operates as notice, 361.
origin of phrase, 359.
proof of filing ; permitted *nunc pro tunc*, 377.
defective affidavit ; may be amended, 377.
defective affidavit will not invalidate judgment, 377.
necessity and sufficiency of, 376, 377.
who may make, 376.
purchasers concluded though not parties, 361.
purely a rule of practice, 362.

LIS PENDENS—*Continued.*
purpose of, 375.
recording and indexing, 370, 371.
renders subsequent transfers invalid, 371.
right to file, not dependent on judicial discretion, 369.
rule founded upon public policy and necessity, 362.
rule necessary to prevent fraudulent transfer, 362.
statement as to place of recording, 367, 368.
statutory notice not effective until filed, 363.
subsequent incumbrancers; who are, 372, 373.
substantial compliance with statute sufficient, 377.
time of filing, 368, 369.
when becomes operative, 362, 363.
what parties bound by, 371, 372.
when defendant must file, 370.
who are subsequent incumbrancers, 372, 373.
who may file and how, 369, 370.
with whom notice to be filed, 365.
writ of error, when effective, 363.
LOAN ASSOCIATIONS.
mortgage; computing amount due; fines and dues, 539–541.
LOAN COMMISSIONERS.
mortgage of; statutory foreclosure, 906–911.
sale by; concurrence; discretionary powers, 626, 627.
LORD BACON.
ordinances. See Lis Pendens, 359–361.
LUNATICS. See Insane Persons.
MALICE.
not a defence against assignee of mortgage, 416, 417.
MARRIED WOMAN. See Dower; Husband and Wife.
MASTER AND SERVANT.
application on mortgage of wages earned by mortgagor, 490.
MATURITY.
of debt, accelerated by neglect to pay installments, 315, 319.
MAXIM.
cessante ratione, cessat quoque lex, 369.
ex dolo malo non oritur actio, 418.
in pari delicto portior est conditio defendentis, 404.
pendente lite nihil innovetur. See Lis Pendens.
MECHANIC'S LIEN.
determining rights on reference to ascertain surplus, 870.
distribution of surplus moneys; priority, 835, 855, 856.
holder may set up usury as defence in foreclosure, 414.
notice must be filed before *lis pendens*, 200.
owner having assigned, not a necessary defendant, 200.
peculiar to American law, 199, 200.
priority of mortgage; distribution of surplus, 844.
subsequent holder of, necessary defendant, 199.
wholly statutory, 199, 200.

MERGER.
not a defence against assignee of mortgage, 416.
takes place, when, 309.
MINORS. See GUARDIAN AND WARD; INFANTS.
MISNOMER.
in *lis pendens*, 367.
MISSOURI
jurisdiction of circuit courts of, 19.
MISTAKE.
as defence; in foreclosure generally, 438, 443.
against assignee; reformation, 416.
assumption of mortgage; parol evidence of mistake, 734.
as to quantity of land, 441–443.
correction in foreclosure, 441–443.
as to title, 440, 441.
correction in foreclosure, 440, 441.
corrected as against whom, 439.
excusable; setting aside foreclosure sale for, 662–664.
in decree; in describing property, 700.
correction by amendment, 700–701.
in deed in foreclosure; embracing premises released, 700.
in describing note or bond in complaint, 330.
in description of premises in mortgage, 699.
correction in favor of purchaser at foreclosure sale, 699, 700.
in docketing judgment, does not affect lien on surplus, 844.
in inserting clause reserving life estate, 871.
correction on reference to ascertain surplus, 871.
in mortgage; description of premises; omission of portion intended to be mortgaged, 701.
protection of purchaser in possession, 701.
in name of mortgagee, need not be alleged in complaint, 329.
in notice of sale under statutory foreclosure. See STATUTORY FORECLOSURE.
in recording mortgage; effect, 398, 399.
judgment and sale set aside for, 440.
may be corrected as against whom, 439.
mortgage on property of another, 700.
remedy of purchaser at foreclosure sale, 700.
of defendant, as to his liability, 660.
setting aside sale for, 660.
of purchaser at foreclosure sale; as to law, 691.
application to be relieved from completing purchase, 691.
relief on foreclosure, 432.
remedies for correcting, 439, 440.
setting aside foreclosure sale for, 652, 656, 657.
after confirmation, 673.
statutory foreclosure, 903.
MONEY PAID.
fines; to loan association; recovery back, 540.

MORTGAGE.
after-acquired title; inures to benefit of mortgagee, 462.
alteration; defence of, 399–401.
a mere security for debt; effect of doctrine, 923.
as security for goods to be furnished, 407.
actual consideration, 407, 408.
assigned without the note or bond, is held at the will and disposal of the bondholder, 111.
assignment; assignee takes subject to equities, 425, 426.
assumption of. See ASSUMPTION.
by infant, for purchase money; foreclosure, 391, 395.
merely voidable; disaffirmance, 390, 391.
by tenant in common, 140.
can be enforced only after partition, 140.
will not affect rights of co-tenants, 140.
consideration; illegal or void; avoids mortgage, 403.
defence to action on note, 408–410.
want of, as a defence, 403–405.
what sufficient, 405–407.
debt payable in installments, condition continuing, 68.
duress; as defence in foreclosure, 444–449.
early ideas regarding; effect, 923.
equitable; deposit of title deeds, 319.
omission of statutory formalities, 321.
to secure purchase money, 319.
execution and record; defective, 397.
defence in foreclosure, 397–399.
extinguished; by payment; discharge; release, etc., 482.
by assignment to purchaser of premises, 309.
fraud; false representations, 428.
relief from, on foreclosure, 428–438.
is a security upon, not a title in, the property, 83.
may be assigned, 124.
by foreign personal representative, for foreclosure, 124.
to mortgagor's wife without affecting its validity, 131.
may cover two separate parcels, 312.
merely a collateral security, 32.
mistake; correction on foreclosure, 438, 443.
negotiability; assignability, 419, 424.
not affected by marriage of a *feme sole* mortgagee to mortgagor, 131.
not extinguished by conveyance of the premises to mortgagee, after assignment of the debt by the latter, 311.
omission of name of mortgagee; delivery, 321.
ownership in dispute, or doubtful, 223.
other claimants desirable defendants, 224.
parol contract to execute; statute of frauds, 320.
purchase money; fraud as a defence on foreclosure, 430, 431, 433, 434
recording, time and mode, 398.
rights as to foreclosure as between senior and junior mortgagees, 322.

MORTGAGE—*Continued.*
to defraud creditors, 404.
mortgagee can not set up want of consideration, 404.
to secure future advances, 407.
consideration on foreclosure, 407.
undue influence as a defence in foreclosure, 443, 444.
usury, as a defence in foreclosure, 411, 412.
MORTGAGEE.
after mortgagor's death, may foreclose against heirs, 307
allowed benefit of assumption of mortgage by purchaser, 276.
theories of law, 276.
can not release part of the premises by joining in a deed with mortgagor, 139, 140.
contemporary, 223.
necessary defendants, 223.
effect of omission of name in mortgage, 321.
election by, that debt become due, 44.
guaranteeing payment, 205.
may be sued by assignee during foreclosure, without consent of court, 305.
has burden to prove that a conveyance to him of the premises was voluntary and fair, 310.
holding two or more mortgages on the same premises, can not foreclose by separate actions at the same time, 114.
in possession, entitled to rents and profits, 801.
appointment of receiver, 801–805.
is a mere lienor until conveyance upon sale, 10.
joint or several, 221.
refusing to join as plaintiffs, necessary defendants, 221.
may compel grantee, assuming mortgage, to perform his covenant, 271.
may foreclose, although administrator of mortgagor's estate, 85.
may purchase premises from mortgagor, 310.
owning contemporaneous mortgages which are equal liens, may unite as co-plaintiffs, 113.
upon refusal, any one or more may foreclose, 113.
possession by may be retained until mortgage is satisfied, 78.
rents and profits; rights to, 784, 785.
under contemporaneous and equal mortgages, may unite as co plaintiffs in action to foreclose, 95.
when a plaintiff, 84, 85.
when owners in severalty, any one or more may foreclose, 94.
MORTGAGOR.
agreeing to pay debt, 249.
liable for deficiency, 249.
all mortgagors are necessary defendants, 136.
always a desirable defendant, 137, 139.
a married woman, with separate estate, necessary defendant, 156.
a necessary defendant, although under contract to sell, 144.
a surety for grantee assuming mortgage, 272.

MORTGAGOR—*Continued.*
can not revive the debt against his grantee, after once barred by limitation, 77.
conveying premises fraudulently, is a necessary defendant in foreclosure, 145.
having conveyed premises, is a necessary party while conveyance unrecorded, 136.
by deed delivered in escrow, a necessary party, 145.
by deed intended only as a collateral security, a necessary defendant, 145.
heirs of; when necessary defendants, 165–167.
holding any equitable interest, a necessary party, 142.
holding tax lien, proper defendant, 212.
holds title and possession until conveyance upon sale, 10.
illiteracy and negligence of, as defence in foreclosure, 401, 402.
in foreclosure; necessary party; allegations against, 332.
insanity of, as a defence in foreclosure, 395–397.
may convey premises to mortgagee, 310.
may cut timber from premises, 308.
may object to omission of wife as a defendant, 161.
objection to be taken by answer or demurrer, 161.
mistake; correction of as against in foreclosure, 438–443.
necessary defendant; in strict foreclosure, 137.
in foreclosure by advertisement, 137.
no longer owning equity of redemption, not necessary, 137.
not tenant at will, so as to preclude his adverse possession, 62.
personal representatives of, necessary defendants in foreclosure by advertisement, in New York, 168.
rents and profits; right to, 744, 745, 777–779, 784, 785.
still owning equity of redemption, a necessary party, 135.
still owning part of the premises, a necessary party, 139
under contract to sell premises, is a necessary defendant, 137.
who has sold equity of redemption, may be made a defendant on his own application, 138.
widow of, a necessary defendant, 159.
wife of, a necessary defendant, 157.
having made grant of dower, still a necessary defendant, 158.
not a necessary defendant where dower rights abolished by statute, 158, 159.

MOTION.
for change of venue, 23.
before answer, 24, 25
for judgment; requisites and where and when made, 551, 552.
notice; necessity and sufficiency of, 552, 553.
for order of reference to compute amount due, 528–531.
notice of proceedings on reference, 528–551.

MUTUAL PROMISES.
consideration for agreement to extend time of payment, 481.

NAME.
misnomer in *lis pendens*, 367.
of mortgagee omitted; effect, 321.
NEGLIGENCE.
as defence to foreclosure, 401, 402.
in objecting to sale and in setting aside sale, 660–663.
sale not set aside to protect party from consequences of his own laches, 643.
surprise due to; sale not set aside for, 656.
NEW HEARING.
on reference, 549–551.
NEW PROMISE. See LIMITATIONS.
NEW YORK.
foreclosure; effect of pendency of, on judgment in action on note or bond, 389.
form, requisites, etc., of complaint, 333.
necessary averment as to prior action at law, 339, 340.
NEW YORK CITY.
custodian of money paid into court, 358.
NON-RESIDENTS.
defendants. See PARTIES.
NORTHAMPTON TABLES. See ANNUITY.
NOTES.
description of in complaint in foreclosure, 330–332.
effect of default in payment of one, 316, 318.
foreclosure, complaint; necessity of naming maker, 332.
imperfect description, 331.
payable on demand, 335.
necessity of alleging demand, 335.
secured by mortgage; assignment, 416.
defences against assignee, 416.
transfer; foreclosures; defences, 420–424.
several secured by same mortgage, averments in complaint to foreclose, 338, 339.
NOTICE.
for trial; to all defendants who have appeared, 559.
judicial; of county in which lands situated, 353.
must be annexed to published summons of order of publication, in New York, 297.
of adjournment of sale; publication, 628, 629.
of appearance by defendant; sufficiency a question for the court, 303.
of assignment; want of not a defence against assignee of mortgage, 416.
of election to foreclose for overdue installment, 319.
of filing of report of sale; necessity, 635.
of mechanic's lien required to be filed before *lis pendens*, 200.
of mistake, 438.
knowledge sufficient to put upon inquiry, 433.

NOTICE—*Continued.*
of motion for judgment; necessity and sufficiency, 551–553.
for order of reference to compute amount due, 529.
necessity of, 529, 530.
of no personal claim should accompany summons, 294.
of object of action should accompany summons when served without complaint, 294.
form of prescribed by New York Code, 294.
of pendency of action, etc. See Lis Pendens.
of sale. See Sale.
of statutory foreclosure; service, etc., 883–897.
OATH.
of referee; to compute amount due, 536.
to take proof of claims to surplus, 866.
OFFER OF JUDGMENT. See Judgment.
OFFICERS.
entitled to receive money paid into court, 358.
fees of, in foreclosure proceedings. See Costs.
holding mortgages in their official capacity, may foreclose, 129.
who may make sale of mortgaged premises, 565–567.
OFFICIAL BOND.
indemnity mortgage; foreclosure; pleading, 355.
OHIO.
duress; doctrine of, 445–446.
OPENING DEFAULT.
See Default; Judgment.
ORDER.
for service of summons by publication; requisites of affidavit to secure, 296.
of publication of summons must be shown by notice annexed to published summons, 297.
of reference to compute amount due, 525–551.
ORDINANCES. Bacon's.
See Lis Pendens, 359–361.
OUTSTANDING TITLE.
defence of on foreclosure, 519–522.
PARAMOUNT TITLE.
subsequently acquired by mortgagor, 507.
effect of foreclosure upon, 507–510.
PARENT AND CHILD. See also Infants; Guardian and Ward.
undue influence upon child; relief on foreclosure, 443.
PAROL CONTRACT.
evidence. See Evidence.
extension of time for paying interest, 318.
generally. See Contracts.
to execute mortgage; validity, 320.
equitable lien, 320.
to extend time of payment, 479.
consideration, 481.

PAROL MORTGAGE.
taken up with proceeds of mortgage void for usury may be enforced, 307.
PARTIAL PAYMENTS. See PAYMENT.
PARTIES. See also ANSWERS AND DEFENCES; COMPLAINT; DEMURRER; JUDGMENT, ETC.
all persons materially interested, should be, 81, 82.
assignee of debt should be made a party to foreclosure by assignor, still holding the mortgage, 113.
of mortgage assigned collaterally, necessary in foreclosure by assignor, 220.
assignor of debt still holding the mortgage should be made a party to foreclosure by assignee, 112.
of mortgage by assignment imperfect in form, necessary, 217.
of mortgage by parol, necessary, 217.
conditional, necessary, 218.
when defence of usury or fraud is urged, desirable, 216.
barred by deed in foreclosure, 695.
CESTUIS QUE TRUST.
railroad bondholders need not be parties, 127, 128.
should usually be made parties to foreclosure by trustee, unless too numerous, 126, 127.
claimants of adverse or paramount title; are not proper, 502, 503.
effect of making defendant, 503–506.
claimants of prior rights under mortgage; when proper, 510, 511.
claiming interests in judgment by default against; conclusiveness, 529
defect of; appearing of record, 682.
objection to, how and by whom made; amendment, 384–386.
purchaser affected with notice of, 682.
release of purchaser from completing purchase; re-imbursement, 681.
setting aside sale for, 647.
DEFENDANT.
action will not be dismissed because subsequent incumbrancers are not made parties, 189.
administrator assigning mortgage to heir as share of estate, not necessary, 215, 216.
of subsequent incumbrancer should be appointed and made defendant before foreclosure, 209.
adverse claimants to premises, not proper, 231.
except in Indiana and Kansas, 233.
allegation as to interests, 344.
all mortgagors, necessary, 136.
all persons signing bond or note secured by mortgage, proper, 251.
annuitant to be paid from proceeds of premises, necessary, 170
any defendant having real interest may object to omission to make subsequent judgment creditor a defendant, 197.

PARTIES—*Continued.*
DEFENDANT.
assignee for benefit of creditors, necessary party, 179.
of person liable for deficiency, proper, 264.
assignee in bankruptcy, a necessary party, 179.
of mortgagor not owning equity of redemption, not necessary party, 138.
of subsequent incumbrancer, necessary party, 203, 210.
pendente lite, not necessary, 181, 204.
assignee of mortgage absolute, not necessary party, 218.
collaterally assigned, refusing to join in its foreclosure, necessary, 202.
assignees of subsequent incumbrances, necessary, 203, 210.
pendente lite, not necessary, 204.
assignor for benefit of creditors is proper party defendant in foreclosure by his assignee, 115.
assignor of mortgage, 89, 90.
and all interest therein; not necessary, 215.
as collateral security, refusing to join in its foreclosure, necessary, 202.
covenanting as to title and against defences, proper, 288.
of mortgage debt, without mortgage, necessary, 217.
of mortgage, guaranteeing payment, a necessary defendant if deficiency judgment is sought, 216.
of subsequent lien as collateral security, necessary, 202.
attaching creditors, necessary, 196, 197.
beneficiaries, refusing to join with trustee as plaintiffs, necessary, 224.
bondholders secured by subsequent mortgage, may interplead, 191.
cestuis que trust; when necessary, 173.
need not be made defendants when too numerous, 175.
not *in esse* or not ascertained, not necessary, 175.
claimants of interest in equity of redemption; right and necessity of answering, 382.
co-defendants; necessary averments against, 332.
complaint; allegation as to title or interest of defendant, 356–358.
contemporary mortgagees, necessary, 223.
corporations owning premises necessary, by corporate name, 184
creditors; need not be parties to foreclosure by trustee for their benefit, 128.
at large of owner; neither necessary nor proper, 196.
DEVISEES.
necessary to foreclosure of mortgage executed by personal representatives to pay debts of estate, 183.
of equity of redemption, necessary, 168.
of infant, lunatic, idiot, or habitual drunkard, owner of premises, necessary defendants, 183.

PARTIES—*Continued.*
DEFENDANT.
DEVISEES.
of persons liable for deficiency, not proper defendants, 262
of persons subsequently liable for deficiency, not proper defendants, 291.
of subsequent incumbrancers, not necessary defendants, 207.
drunkards owning premises, necessary, 182.
foreclosure by junior mortgagee, joinder of senior mortgagee, 322.
general principles, 133, 134, 135, 187.
grantee not assuming mortgage, 382.
grantee; of mortgagor's assignee in bankruptcy, necessary, 147.
of mortgagor, necessary, 145, 146.
not a proper party where foreclosure is by *scire facias*, 147.
guardian; executing mortgage, desirable, 183.
of infant heir of owner, not necessary, 167.
of subsequent incumbrancer, necessary, 211.
heirs, devisees and personal representatives; of assignor of mortgage and all interest therein, not necessary, 215.
devisees or legatees of infant, lunatic, idiot, or habitual drunkard, necessary, 183.
necessary to foreclosure of mortgage executed by personal representatives to pay debts of estate, 183.
of joint mortgagors, not usually necessary parties, 141.
of mortgagor no longer owner of equity of redemption, not necessary, 138.
when necessary, 165, 166, 167, 168.
of persons liable for deficiency, not proper, 262.
subsequently liable for deficiency, not proper, 291.
of tenants by entirety, not necessary, 169.
of wife dying during foreclosure, not necessary, 158.
or owner of equity of redemption, necessary, 165, 166.
owner of equity of redemption, not necessary in foreclosure by advertisement, 166, 167.
holders of subsequent mechanics' liens, necessary, 199.
husband; necessary to foreclosure against wife's separate estate after her death, 165.
of mortgagor of separate estate, not usually necessary, 164
of subsequent incumbrancer, not necessary, 207.
idiots owning premises, necessary, 182.
if property not incumbered, mortgagor alone necessary, 135.
incumbrancers *pendente lite*, not necessary, 205.
infants; necessary allegations of complaint, 311.
owning premises, necessary, 182.
requisites of order of reference, 529.

PARTIES—*Continued.*
DEFENDANT.
in New York, 82.
joinder; of mortgagor and successive grantees assuming mortgage, 350.
of senior mortgagee, 322.
joint mortgagees, personal representatives of deceased joint mortgagee, 94.
joint or several mortgagees, refusing to join as plaintiffs, necessary, 221.
judgment creditors *pendente lite*, not necessary, 196.
having assigned judgment, not necessary, 200.
judgment creditor who has levied execution, remains necessary until judgment satisfied, 196.
of owner, necessary, 194.
of owner of life estate, necessary, 195.
legatee; of money to be paid from proceeds of mortgage should be made defendant on foreclosure by executor, 120.
to be paid from proceeds of premises, necessary, 170.
liable for mortgage debt, 235–238.
at common law, 237.
general principles, 235, 236.
parties originally liable; general principles, 249.
parties subsequently liable; general principles, 265.
statutory, 238.
theory of English and common law practice, 239.
lienholders necessary, 135.
lunatics owning premises, necessary, 182.
service upon; release of purchaser from completing sale, 684, 685.
maker of note, for which another person executes the mortgage as collateral security, may be made a defendant in order to obtain a deficiency judgment against him, 136.
may be persons interested in mortgage who refuse to join as plaintiffs, 103.
may be served by publication, 293.
mesne owners of equity of redemption generally not necessary, 151.
mortgage; covering separate parcels; may be foreclosed against only one, 312.
executed by husband and wife; joinder of wife, 349.
mortgagees and incumbrancers; adjustment of equities between, 517, 518.
mortgagees, owners in severalty, where one forecloses, others not consenting, may be made defendants, 94.
mortgagor; always a desirable defendant, 139.
a married woman with separate estate, necessary, 156.

PARTIES—*Continued.*
DEFENDANT.
mortgagor; having conveyed by deed delivered in escrow, necessary, 145.
having conveyed by deed intended only as collateral security, necessary, 145.
having conveyed premises, necessary while conveyance is unrecorded, 136.
having fraudulently conveyed the premises, necessary, 145.
holding any equitable interest, necessary, 142.
necessary, although under contract to sell, 144.
no longer owning equity of redemption, not necessary, 137.
or his grantee may defend, 381.
still owning equity of redemption, necessary, 135.
still owning part of the premises, necessary, 139.
under contract to sell premises, necessary, 137.
who has sold premises, may apply to be made a party, 138.
necessary averments to affect interests of, 332.
necessary parties; term defined, 133.
non-residents may be served by publication, 295.
occupants of mortgaged premises, necessary defendants, 185.
omission of owner of equity of redemption must be objected to by answer or demurrer, 150.
omission of wife having dower right may be objected to by any defendant, 161.
only those affected by litigation, 503.
owner of equity of redemption always necessary to give validity to sale, 147, 148.
owner of mechanic's lien, having assigned it, not a necessary defendant, 200.
ownership of mortgage doubtful or in dispute, other claimants desirable, 223.
partners of plaintiff refusing to become plaintiffs on foreclosure of mortgage securing debt to partnership, 92.
personal representatives; executing mortgage to pay debts of estate, desirable, 183, 184.
of deceased subsequent incumbrancer, necessary, 208.
of mortgagor necessary in foreclosure by advertisement in New York, 168, 172.
of mortgagor, no longer owner of equity of redemption, not necessary, 137, 138.
of owner of equity of redemption usually not necessary, 170, 171.
but always proper, 171, 172.
of persons liable for deficiency, proper, 258.
of persons subsequently liable for deficiency, proper, 291
of wife dying during foreclosure, not necessary, 158.

PARTIES—*Continued.*
DEFENDANT.
personal representatives should be defendants in foreclosure by legatee of mortgage, 120.
person; having no interest, and against whom there can be no relief, not proper, 260.
having title paramount to the mortgage, not proper, 230.
holding equitable interest in mortgage or contemporary liens, refusing to join as plaintiffs, necessary, 213
signing bond or note, but not mortgage, not necessary, though proper, 252.
pledgee of mortgage, collaterally assigned, necessary on foreclosure by pledgor, 99, 100.
prior incumbrancers, claimed to be junior lienors, proper defendants for litigating questions of priority, 233
made defendants in Maryland, 194 195
may be made defendants to have claim ascertained and paid, 228.
not proper defendants to foreclosure of mechanic's lien, 227.
right of, to answer, 381.
when proper defendants, 225.
when not, 226.
prior mortgagee may foreclose during foreclosure of junior mortgage, 227.
purchaser; at execution sale of equity of redemption; a necessary party, 142, 143
at tax sale a proper defendant, 211.
not affected by a foreclosure to which he is not made a party, 212.
of easement from mortgagor or owner of equity of redemption, necessary, 149.
of premises *pendente lite*, not necessary, 151, 152.
receiver of corporation, necessary, 179, 180.
remaindermen and reversioners, necessary, 177.
defendant *in esse*, necessary, 178.
owner of first vested estate and owners of intermediate estate, sufficient, 177.
right of surety to require persons interested to be joined, 384
senior mortgagee; joinder of, 322.
set-off of debt due mortgagor; junior incumbrancers; cross bill, 451.
should be all parties interested in the equity of redemption, 103
states, counties and cities holding tax liens, proper, 211.
stockholders not usually necessary defendants to foreclosure of corporate mortgage, 184, 185.
stranger claiming adversely; not proper, 503.
subsequent grantee; when proper, 510, 511.

PARTIES—*Continued.*
DEFENDANT.
subsequent incumbrancers; allegation as to interests, 345.
a lunatic, idiot, or habitual drunkard; committee necessary, 211.
a lunatic, idiot, or habitual drunkard, proper, 211.
an infant proper, 211.
being a married woman, does not alter rule making necessary, 207.
heirs, devisees, legatees, and annuitants of, not necessary, 207.
holding any equitable or contingent interest, usually necessary, 202.
may be made defendants on their own application, 189.
necessary, 188.
no longer holding lien, not necessary, 200.
subsequent mortgagees, having been paid in full, not proper, 201
still owning mortgages, necessary, 189.
trustee for numerous bondholders, the latter not necessary defendants, 190, 191.
successor; of assignee in bankruptcy of subsequent incumbrancer, necessary, 211.
of trustee holding subsequent mortgage, necessary, 191.
tax title holder; bar by foreclosure, 507.
tenants and occupants of mortgaged premises, necessary, 185.
tenants in common, owners of mortgaged premises, all necessary, 136.
trustees; holding any interest in premises, necessary, 172.
must be made parties in their representative capacity, 173.
refusing to join with beneficaries as plaintiffs, necessary, 224.
vendee under land contract with mortgagor, necessary, 144.
who may avail themselves of defence of usury, 414, 415.
who may set up want of consideration, 404, 405.
who may plead counter-claim; personal liability, 452–453.
who may show defective execution and record, 397–399.
widow; accepting devise or bequest made in lieu of dower, not necessary, 162.
bar of dower, 343.
of mortgagor or owner of equity of redemption, necessary, 159.
wife; having made grant of dower, still necessary, 158.
not joining in purchase money mortgage, necessary, 160.
but not in Illinois, Indiana, and Michigan, 160.
not necessary where dower rights abolished by statute, 158, 159.
not necessary where rights of husband and wife completely severed by statute, 164.

PARTIES—*Continued.*
DEFENDANT.
wife; of infant, idiot, lunatic, or habitual drunkard, not necessary defendant to foreclosure of mortgage by guardian or committee, where not signed by her. 182, 183.
of mortgagor, necessary. 157.
of owner of equity of redemption, necessary. 157.
of subsequent incumbrancer, not necessary. 207.
eminent domain; mortgagee not made party not bound by payment of compensation to wrong person. 486.
failure to serve; purchaser not compelled to complete purchase, 679.
foreclosure by assignee in bankruptcy, 418.
creditors not necessary parties. 418.
foreclosure by holder of several mortgages covering same premises; joinder, 324.
general principles, 81, 82.
heirs of mortgagee usually not necessary. 118.
infants; release of purchaser from completing sale, 685, 686.
PLAINTIFF.
action should be commenced by person holding largest interest in mortgage, 102.
administrator of deceased mortgagee may foreclose mortgage securing annuity, if the condition was broken during decedent's life-time, 117, 118.
all having interest in the mortgage debt, may be, 83.
annuitant may foreclose mortgage to him for annuity, 103
assignee; in bankruptcy or by general assignment may foreclose, 115.
of debt may foreclose, though he does not actually hold the mortgage, 111.
may foreclose in name of assignor, still holding the mortgage, 113.
of foreign personal representative, may foreclose, 124.
of mortgage without the bond, can not foreclose, 110.
pendente lite, may continue foreclosure, 116.
sole owner, 86.
what assignment enables him to foreclose, 87.
without title to mortgage, can not foreclose, 87.
assignment by mortgagor; who proper plaintiff, 386.
assignor of mortgage can not foreclose, 85, 88.
cestuis que trust may sometimes foreclose, 128.
disability of foreign personal representative to foreclose attaches only to person, not to subject matter, 124.
distributees of mortgagee allowed to foreclose after administration closed, 120.
equitable owner by subrogation may foreclose, 105.
executors; allowed to foreclose mortgage specifically bequeathed, 120, 121.

PARTIES—*Continued.*
PLAINTIFF.
executors; may foreclose when a bequest is to be paid from proceeds of mortgage, 120.
may revive foreclosure, 118.
of trustee allowed to foreclose, 118, 119.
or administrator to whom a mortgage is executed, may foreclose, 121.
foreign personal representatives may not usually foreclose, 122, 123.
may foreclose by advertisement under power of sale, 125, 126.
must obtain letters within the state, to foreclose, 123.
foreign specific legatee of bond and mortgage may foreclose, 124
general rules, 83.
grantor paying mortgage which has been assumed by his grantee, may foreclose, 106.
heirs of mortgagee allowed to revive the action, 120.
can not foreclose, 119, 120.
holder of mortgage, conditioned to pay an annuity, may foreclose, 85.
in New York, 82.
joint mortgagees, 90–94.
any one or more may foreclose, 90.
personal representatives of deceased joint mortgagee may foreclose, 94.
in representative capacity, 91.
joint survivors, where the action is commenced by personal representatives of deceased joint mortgagee, may foreclose, 94.
one dying, survivor may foreclose, 92, 93.
where joint mortgage secures different debts in severalty all are necessary parties, 91.
judgment creditor of owner can not be, 191.
legatee of interest due, may foreclose on default, 103.
of mortgage, may foreclose, 120.
married woman allowed to foreclose mortgage to herself and husband, after his death, 130.
may foreclose against husband, 131.
may foreclose in her own name, 130.
mortgagees, 84, 85.
administrator of mortgagor's estate may foreclose, 85.
owners in severalty; where one is deceased, 95.
any one or more may foreclose, 94.
owning contemporaneous mortgages which are equal liens, may unite as co-plaintiffs, 113.
upon refusal, any one or more may foreclose, 113.
under contemporaneous and equal mortgages, may unite as co-plaintiffs, 95.

PARTIES—*Continued.*
PLAINTIFF.
mortgage; to guardian may be foreclosed by his successor, 129.
to state comptroller may be foreclosed by his successor, 129, 130.
to state superintendent of insurance may be foreclosed by his successor, 130.
to U. S. loan commissioners may be foreclosed by their successors, 130.
must have real interest in the action, 83, 84.
no person can be made plaintiff against his will, 103.
not material which brings the action, 84.
objection to foreclosure by foreign personal representative must be made by demurrer or answer, 125.
one or more *cestuis que trust* may foreclose for all, 128.
one who advances money for payment of mortgage, expecting another mortgage to himself as security, may foreclose, 105.
owner of equitable interest of any kind in mortgage may generally foreclose, 102.
owner of one of several notes secured by a mortgage may foreclose, 96
owner of undivided part of mortgaged premises may foreclose mortgage on other half, 92.
partners, 92.
any one or more may foreclose, 92.
one of them holding mortgage as trustee for the partnership, may foreclose alone, 92.
personal representatives of deceased owner of mortgage may foreclose, 116, 117.
. of executors or administrators, to whom mortgages are executed as such, can not foreclose, 122.
of vendor may foreclose land contract, 119.
persons in official capacity may foreclose mortgages to them as such officers, 129.
pledgee of mortgage collaterally assigned may foreclose, 99, 101.
may be co-plaintiff with pledgor, 99, 100.
real party in interest must be plaintiff, 386.
receiver of insolvent corporation may foreclose, 116.
right of assignee of mortgage to sue in own name, 427.
should be all parties interested in the mortgage, 102, 103.
successor; in office may foreclose mortgage to his predecessor in his official capacity, 129.
of trustee may usually foreclose, 119.
successors of executors or administrators, to whom mortgages are executed as such, may foreclose, 122.

PARTIES—*Continued.*
PLAINTIFF.
surety alone may foreclose indemnifying mortgage, 85.
for mortgage debt may foreclose, 106–109.
where grantee has assumed mortgage, 107, 108.
where he has guaranteed payment, 106.
where junior interest redeems from senior interest, 109.
trustee; to whom mortgages are executed as such, may foreclose, 126.
and *cestuis que trust* should unite in foreclosing mortgage, 129.
may foreclose, 126.
of fund for benefit of creditors may foreclose without making creditors parties, 128.
where executor has invested estate funds in his individual capacity, his personal representatives alone can foreclose, 122.
who may foreclose mortgage payable to mortgagee alone, 419.
plaintiff and defendant; when mortgagor has assigned, 386.
prior lienholders; effect of decree, 506, 507.
unless joined, not affected by foreclosure sale, 698.
purchaser assuming mortgage, proper, 732.
real owner need not be a party to foreclosure by an officer acting in his official capacity, 129.
should be named in complaint, 329.
summons; form, requisites, etc. See SUMMONS.
to foreclosure by advertisement. See STATUTORY FORECLOSURE.
to statutory foreclosure. See STATUTORY FORECLOSURE.
notice to, 883–897.
who may foreclose, 882, 883.
to strict foreclosure. See STRICT FORECLOSURE.
trustee should be made a party to foreclosure by *cestuis que trust*, 128.
when mortgage remains same as at delivery, mortgagee and mortgagor are the only parties, 83.
where several notes are secured by a mortgage, all owners of such notes are necessary parties, 96–99.
who may plead payment, 482.
widow; dower right subsequently accrued, necessary party, 506.
PARTITION.
decree of sale; can not be modified by decree of foreclosure against same land, 556.
necessary before foreclosure of mortgage by a tenant in common, 140.
PARTNERSHIP.
any one or more of firm may foreclose, 92.
dissolution; *lis pendens* not operative against prior mortgage, 373.
estoppel; to set up want of authority in mortgagee to whom alone mortgage was executed, 92.

PARTNERSHIP—*Continued.*
judgment confessed by one partner, 849.
priority in distribution of surplus, 849.
one of firm holding mortgage as trustee for the partnership, may foreclose alone, 92.
partner; of plaintiff, refusing to join in foreclosure of mortgage to partnership, may be made defendant, 92.
PART PERFORMANCE.
of agreement to execute mortgage; statute of frauds, 320.
PATENT.
of public lands to mortgagor; inures to mortgagee, 462.
PAYMENT.
after transfer of note and mortgage before maturity; effect, 483.
assumption of mortgage; denial of liability on, 498, 499.
at maturity; effect, 483.
before maturity; effect, 483.
option; election must be pleaded and proved, 492.
before sale; stays proceedings, 602.
subsequent default, 602.
by assumption of prior mortgage, 486.
defence as against subsequent assignee, 486, 487.
by mortgagor; after conveyance, 490, 491.
after transfer; effect in keeping alive debt, 491.
by third person; agency; ratification, 484
change in form of indebtedness will not operate as, 484.
costs and taxes, 485, 486.
on appeal; application on mortgage, 484.
defence in foreclosure, 482–485.
as against equitable assignee of mortgage, 482.
must be clearly established, 482.
reliance on statement of mortgagee's administrator as to ownership of mortgage, 483.
who may plead, 482.
discharge by joint creditor; validity, 493.
by warranty deed by mortgagee after foreclosure for installment, 494.
equitable; agreement to accept other security, 493, 494.
not effected by recovery of judgment for debt, 494.
procured by fraud; innocent purchasers, 493.
satisfaction; what constitutes and how alleged, 493, 494.
settlement; judgment on new note given for balance, 494.
to give priority to second mortgage, 494.
not a satisfaction as between parties, 494.
effect of neglect to pay installments, 315, 318.
extension of time of, as a defence on foreclosure; consideration 478–481.
extinguishes mortgage, 482.
for purpose of re-mortgaging; satisfaction, 494.
indorsed on mortgage; complaint must set forth, 328.

PAYMENT—*Continued.*
inferred; from circumstances, 492.
from failure to produce bond, 492.
interest; by life tenant; preserves life of mortgage as against remainderman; limitation of actions, 491.
by purchaser of equity of redemption, 491.
prevents running of limitation against mortgagor's liability, 491.
giving of note for, is not, 484.
inability to find mortgagee, 492.
prevents or removes bar, 75.
where several interested in equity of redemption, 75.
will not prevent or remove bar as against mortgagor's grantee, 75.
INTO COURT.
dismissal of complaint upon; foreclosure, 358.
may be made in foreclosure for part of debt, 306.
of money previously tendered, 336.
what officer entitled to receive, 358.
manner of pleading, 491, 492.
mortgage kept alive after; when, 483.
must be a full liquidation of debt, 484.
of condemnation money to mortgagor, 486.
not bar foreclosure, 486.
of installment, with costs, terminates foreclosure, 482.
of mortgage debt, 882.
defence in foreclosure by fraudulent assignee, 419.
extinguishes power of sale, 882.
to foreign personal representative cancels lien, 124, 125.
of outstanding claim; as defence in foreclosure, 522.
of part; prevents or removes bar, 75.
pending foreclosure; effect, 484.
PARTIAL.
application; balance on account, in subsequent transactions, 490
by court; according to equitable rights of all interested, 488.
general payment; upon mortgage instead of open account, 489.
upon secured debts, to release securities, 488.
by creditor; failure of debtor to direct, 455, 488.
by neither party; direction by court, 488.
debt of mortgagee to mortgagor; protection of junior incumbrancers, 517.
how made, 487–490.
implied by attending circumstances, 488.
intention of parties, 490.
of book account indebtedness; rights of junior incumbrancers, 489.
of wages earned by mortgagor, 490.

PAYMENT—*Continued.*
PARTIAL.
application; once made must stand; can not be transferred to subsequent debt, 489.
payment received as deposit; stoppage of interest, 487.
application as of date made, 487.
payments in discharge of duty in which others interested, 489.
not used as consideration for assignment to third person, 489.
proceeds of assigned mortgage; on mortgage instead of open account, 498.
right of debtor to direct, 487.
set-off, 455.
sufficiency to prevent bar by limitation, 490, 491.
whether upon mortgage or open account, 485.
presumption of; from possession by mortgagor of notes and mortgage, 493.
afforded by lapse of time, 59.
FROM ADVERSE POSSESSION.
by several successive owners, 66.
how rebutted; circumstances explaining delay; relationship between parties, 66.
circumstances explaining delay, 65.
alien prevented from suing by war, 65.
plaintiff ignorant of defendant's residence, 65.
part payment or new promise, 64.
silent acquiescence not sufficient, 65.
payment of interest, 64.
may be rebutted by parol evidence, 64
raised in twenty years, 66.
from discharge of record, 493.
rebuttal, 493.
pro tanto; strict foreclosure is when, 924, 925.
proved by parol, 492.
release; of part of premises; defence of, 495, 496.
application of proceeds, 497, 498.
what constitutes, 496.
knowledge of prior conveyance of other part; effect, 496, 497.
renewal note is not, 484.
tender of. See TENDER.
to mortgagee's heirs; no defence against administrator, 484.
what constitutes; requisites and sufficiency, 484, 485.
with funds of third person; for purchase of mortgage for latter, not a satisfaction, 494.
PENDENCY.
of action at law on notes; when bars foreclosure, 386, 387, 389.
of action or foreclosure. See LIS PENDENS.

PENDENTE LITE. See Lis Pendens.
PERSONAL PROPERTY.
fixtures. See Fixtures.
growing crops. See Emblements.
vests in personal representatives, not in heirs, 207.
PERSONAL REPRESENTATIVES. See Executors and Administrators, Etc.
PLACE OF TRIAL. See Trial; Venue.
PLAINTIFFS. See Parties.
PLEADING. See Answers and Defences; Complaint, and the various other pleadings.
in strict foreclosure, 932.
PLEDGE.
of mortgage; as collateral security, 99.
claim of pledgee in surplus, 853.
priority, 853, 854.
foreclosure; complaint, 341, 342.
defences, 426.
pledgor or pledgee may foreclose, 99, 101.
pledgee is a necessary party, 99, 100.
pledgor or pledgee refusing to join in its foreclosure, a necessary defendant, 202.
POSSESSION.
by assignee of mortgagee in possession may be retained until mortgage is satisfied, 801.
by mortgagee; may be retained until mortgage is satisfied, 78.
for twenty years raises the presumption of foreclosure, 77.
of personal property vests in personal representatives, not in heirs, 207.
remains in mortgagor until conveyance upon sale, 10.
POWER OF SALE.
as affecting right to redeem, 314.
effect on jurisdiction of courts of equity, 15.
general discussion of and foreclosure under. See Statutory Foreclosure.
is cumulative remedy, 314.
nature and effect generally, 313.
not impaired by recovery of judgment upon debt, 314.
not preclude foreclosure by action, 313.
PRAYER. See Answer; Complaint.
PRESUMPTION. See also Evidence.
as to state in which lands are situated, 353.
of delivery arising from possession, 390.
not overcome by denial on foreclosure, 390.
Of Payment.
afforded by lapse of time, 59.
from adverse possession by several successive owners, 66.
by mortgagor not conclusive, 63.
raised in twenty years, 66, 68, 70.

PRESUMPTION—*Continued.*
OF PAYMENT.
from adverse possession; rebutted by parol evidence, 64.
rebutted by payment of interest, 64.
circumstances explaining delay, 65, 66.
alien prevented by war, 65.
plaintiff ignorant of defendant's residence, 65.
relationship between parties, 66.
part payment or new promise, 64.
silent acquiescence not sufficient, 65.
not raised by completion of limitation against remedy on the debt, 70.
raised by mortgagor's adverse possession for twenty years may be repelled by proof, 63.
raised by twenty years adverse possession by mortgagor, 61.
time sufficient to raise, 60.
PRINCIPAL AND AGENT.
demand made by agent; agency denied, 476.
possession of note not sufficient proof, 476.
estoppel of mortgagor to deny authority of agent, 462.
fraud of agent of mortgagee; misrepresentation, 430.
relief on foreclosure, 430.
mortgage entrusted to agent to procure loan, 406.
misappropriation; consideration, 406.
parol extension by agent of time to pay interest, 318.
payment by third person; ratification, 484.
purchase at foreclosure sale by agent, 675.
compelling agent to complete purchase, 675.
PRINCIPAL AND SURETY.
defence on foreclosure; mortgage given for indemnity only, 478.
duress; defence available to surety in foreclosure, 444.
foreclosure, 384.
objection by surety to want of service on persons interested, 384.
indemnity mortgage, 356.
complaint in foreclosure, 356.
joint liability, 501.
controversy as to principal liability not determined on foreclosure, 501.
right of surety for debt to object to defect of parties, 384.
surety; for mortgage debt may foreclose, 106-109.
grantor discharged by extension of time without consent to grantee assuming mortgage, 272.
judgment by confession as indemnity, 848.
lien on surplus; priority, 848.
may alone foreclose indemnity mortgage, 85.
may foreclose; where grantee has assumed mortgage, 107, 108.
where he has guaranteed payment, 106.
where junior interest redeems from senior interest, 109.
of mortgage debt; rights as to costs, 940.

PRIOR INCUMBRANCERS.
as parties. See PARTIES.
PRIORITY.
as between different mortgages for same debt, 313.
claims as to; what proper answer in foreclosure, 510, 511.
of equitable mortgage over subsequent judgments, 319–321.
PROFITS.
set-off; against mortgage debt; agreement to apply, 457.
PROOF.
of service. See SUMMONS, SERVICE OF.
PROPERTY.
mortgaged; description of in complaint and decree, 350, 351.
PUBLICATION. See SUMMONS, SERVICE OF.
PUBLIC LANDS.
patent to mortgagor inures to mortgagee, 462.
PUISNE INCUMBRANCER. See SUBSEQUENT INCUMBRANCERS.
PURCHASE MONEY.
mortgage to secure, 319.
by infant; foreclosure, 394, 395.
false representations as defence in foreclosure, 434.
foreclosure of; wife not signing, a necessary defendant, 160.
fraud; as to number of acres, 436, 437.
defence of, in foreclosure, 430, 431, 433, 434.
false representations as to extent and boundaries, 437, 438.
takes precedence over prior judgment against mortgagor, 195, 196.
PURCHASER. See ASSIGNMENT; VENDOR AND PURCHASER.
assuming mortgage. See ASSUMPTION.
at foreclosure sale. See SALE.
RAILROADS.
bonds of; not within the scope of this work, 99.
eminent domain; compensation; payment to wrong person, 486.
foreclosure not barred by, 486.
RATIFICATION.
by vendee, of fraudulent sale of land, 434.
of mortgage by infant, 391–393.
REAL PROPERTY.
fixtures. See FIXTURES.
permanent improvements pass to purchaser on foreclosure, 705, 706.
purchase money mortgage, 319.
vests in heirs or devisees, 207, 208.
RECEIVER.
accounting; who entitled to rents, etc., 815, 816.
additional or second receiver, 799.
appeal; continuance of receivership during pendency, 814, 815.
from order appointing, 766, 767.
not lie to appointment, 800.

RECEIVER—*Continued.*
APPOINTMENT.
after assignment by mortgagor for benefit of creditors, 809.
after decree of foreclosure, 811, 812.
after sale, 812, 813.
against mortgagee out of possession, 806.
subsequent incumbrancers, 806, 807.
appeal from order; time of, 767.
application and contents; what must be shown, 759–761.
demand for appointment not necessary, 760.
ex parte, 758, 759.
notice of, 757, 758.
on what papers, 757.
at instance of subsequent incumbrancers, where first mortgagee out of possession, 806, 807.
before answer, 810, 811.
by court; elegibiiity; qualifications, 769, 770.
order of; appeals, 765, 767.
containing special provisions, 765.
appeal; time of, 767.
application for settlement, 766.
entry; filing, 766, 767.
opposition and proposed amendments, 766.
service of copies, 766.
should fix penalty of bond, 765.
submission of copy to adversary, 765, 766.
form and contents, 765–768
defining powers, 767, 768.
delivery by mortgagor of possession to receiver, 768.
description of property, 767.
direction to state accounts and pay balance into court, 768.
without prejudice to prior incumbrancers, 768.
payment of interest on prior incumbrances, 768.
to be determined by court, 765.
general terms of to be prescribed when granted, 765.
in the alternative, 768.
judge may draw, or allow form submitted by moving party, 765.
proposal of names, 768, 769.
by referee or master, 761–765.
causes or grounds; generally, 781–782.
accumulation of taxes and interest, 788.
bad faith or fraud of mortgagor, 781, 788–790.
danger of loss or injury, 787, 788.
inadequacy of security, 782–784.
injunction restraining sale, 790.

RECEIVER—*Continued.*
APPOINTMENT.
causes or grounds; insolvency of mortgagor, 782–784.
insolvency of mortgagor: New Jersey rule, 784.
insolvency of person liable for deficiency, 781.
insufficiency of premises to pay debt, 781.
prima facia equitable right to property, 781.
rents and profits expressly pledged, 781, 782.
discretion as to appointment, 781.
waste, 788–790.
what must be shown, 748–750.
date of; title vests from, 770, 771.
duration; continuance after final decree, 811.
grounds for refusal, 791–805.
ability to sell premises in parcels, 792.
absence of lien on rents and profits, 791.
adequacy of security, 791.
cross-complaint by defendant, 797.
injury to prior incumbrancer, 791.
laches of mortgagee, 793.
legal title in mortgage, 800, 801.
mortgagee in possession, 801–805.
redemption by subsequent mortgagee, 802–804.
not on application of defendant, 796, 797.
not on application of one defendant against another, 791, 796.
possession of stranger to suit, 793, 794.
property not wasted, 791.
rents and profits already applied to payment of debt, 792.
security given for rents, etc., 791, 792.
set-off against mortgagee, 794.
solvency of mortgagor, 791.
taxes paid, 791.
validity of mortgage impeached, 793.
when rents can not be applied, 795, 796.
where bill is filed to redeem, 794, 795.
whole debt not due, 792.
interests of parties govern, 751.
junior incumbrancer in possession, 808, 809.
jurisdiction of can not be interfered with without leave of the court appointing, 775.
discretion, 781, 782.
doctrine in various states, 754.
must be made by court, 753.
no other court can interfere after appointment, 753.
not by court commissioner, 753.
not by United States court, where one already appointed by state court, 753.

RECEIVER—*Continued.*
APPOINTMENT.
jurisdiction; not interfered with by assignee in bankruptcy, 753.
not pending demurrer or defence, 755.
of chancery, 756, 757.
continuance by code, 756.
of court generally, 752–754.
of federal courts, 754, 755.
pending action, 752.
term of court; vacation, 752, 753.
mode of; on motion or petition, 755, 756.
when and by whom, 752.
mortgagee in possession, 804–805.
redemption by subsequent mortgagee, 802–804.
not appealable, 800.
not appointed if property sufficient to pay debt, etc., 751.
nor if party liable is solvent, 751.
nor if security given to account for rents and profits, 751.
not during time allowed for redemption, 797, 798.
notice of application; necessity, 809.
objections to, 761.
defect of parties, 761.
misjoinder, 761.
pendency of plea to amended bill, 761.
unverified answer; sufficiency, 761.
who may object, 761.
object of, 747–748.
of deceased mortgagor's estate, 785, 786.
on whose application; application of defendant, 796, 797.
junior incumbrancers, 807–809.
party having no interest in premises, 773.
stranger to suit, 809.
various lienholders or mortgagees, 798, 799.
operation and effect, 772, 773.
determines no rights, 772.
extent of receiver's rights, 773.
necessity of demand for delivery of possession, 773.
not divest accrued rights of third persons, 773.
removes property from occupant's possession, 772.
resemblance to injunction, 772.
pending appeal, 789.
possession; interference with, 813.
record, pleadings and evidence to govern, 751.
reference to appoint receiver; considered appointed from date of order of, 764.
duty of referee to approve and file bond, 764.
necessity of confirmation of report to complete appointment, 771.

RECEIVER—*Continued.*
APPOINTMENT.
reference to appoint receiver; order of appointment by referee, 764, 765.
order should require notice to be given, 762.
waiver of notice by appearance, 762.
report; confirmation unnecessary, 764.
can not be excepted to, 762.
duty to file; contents, 764.
exceptions and objections; review, 764, 765.
filing of completes appointment, 764.
necessity; contents, 762.
need not be confirmed, 762.
objections to, 762.
order of appointment on, 763, 764.
setting aside, 762.
residence of referee, 762.
review of report; notice; application, 764, 765.
title vests by relation from date of order, 771.
refusal must be on merits, and not on technical grounds, 751
remedy of parties claiming title paramount, 813, 814.
right of mortgagee, 745.
right to; at whose instance, 748.
rules as to when receiver will or will not be appointed, 750–751
rules of chancery practice to be followed, 762.
second or additional receiver, 799, 800.
sufficiency of evidence to warrant, 750, 751
time of appointment, 809–813.
after decree of foreclosure, 811, 812.
after hearing or rehearing, 811.
after sale, 812–813.
not, as a general rule, before answer, 810, 811.
not before service of summons, 810.
not prior to commencement of action, 809.
not without notice to parties, 809.
when not before final judgment, 810.
when not before hearing, 810, 811.
title vests from time of, 764.
to succeed trustee refusing trust, 811.
BOND.
duty of referee to approve and file, 764.
execution; approval; filing, 771, 772.
necessity, 771.
not approved by clerk in vacation, 752, 753.
penalty should be fixed in order of appointment, 765.
removal for insufficient sureties; appeal, 772.
sureties, 772.
compensation; commissions, 817, 818.
continuance; during pendency of appeal, 814, 815.

RECEIVER—*Continued.*
costs on appointment of, 950.
discharge; notice to parties interested, 818, 819.
when allowed, 813, 818.
duration of office; continuance after final decree, 811.
injunction restraining sale; appointment of receiver in case of, 790.
junior incumbrancers; appointment on application of, 802, 804, 806–809.
in possession; appointment, 808, 809.
liabilities of, 779.
embezzlement; waste, 779.
excess of authority, 779.
neglect or breach of duty, 779.
same as other receiver, 779.
mortgagee in possession; when appointment against, 801–805.
of corporation; a necessary defendant, 179.
may foreclose mortgage, 116.
possession by; nature of, 774, 775.
not agent of party securing appointment, 774.
not interfered with without leave of court appointing, 775.
officer of court, 774.
validity as against attaching creditors, 774.
powers and authority not interfered with, except by superior court, 753.
redemption; not appointed during time allowed for, 797, 798.
removal; causes; notice, etc., 818.
insufficient sureties; appeal, 772.
rents and profits; lien of mortgagee on, as ground for appointment, 784, 785.
right to; power to collect, etc., 777–779.
rights, powers and duties; jurisdiction, 772–777.
confined to jurisdiction of court appointing, 773, 775.
disbursement of money, 775.
disregard of individual interests, 777.
expenditures, 775.
guidance and protection of court, 776.
instruction as to duties, 776, 777.
interference with possession of, 813, 814.
is officer of court, 774.
nature of possession, 774, 775
none, except those conferred by appointment, 773.
none in case of failure to qualify, 774.
not representative of party, 774.
obedience to orders of court, 777.
order gives necessary means for enforcing, 774.
payment of rents into court, 777.
possession as against attaching creditors, 774.
possession not interfered with without authority of court appointing, 775.

RECEIVER—*Continued.*
rights, powers and duties; remedy of parties claiming title paramount, 813, 814.
to be governed by equitable interests of parties, 777.
to lease premises, 776.
to rents and profits, 775–779.
as against mortgagor; power to collect, 777–779.
to satisfy and discharge securities, 776.
to sue and be sued, 776.
second or additional; when appointed, 799, 800.
the office; duration, 746.
nature of; duties generally, 745–748.
title of; when vests, 764, 770, 771.
RECORD.
complaint; allegation as to recording, 329, 332, 343.
discharge; by collateral assignee; when void, 341.
effect; how alleged and proved, 493, 494.
extinguished by, 482.
presumption of payment; rebuttal, 493.
mistake; as to facts contained in; relief on foreclosure 438.
mortgagee not bound to search for subsequent incumbrances and transfers, 622.
of assignment; need not be averred, 337.
of equitable assignment of mortgage; notice, 482.
necessity to protect assignee against payment to mortgagee, 482
of mortgage; defective; defence in foreclosure, 397–399.
in wrong book or register, 397–398.
out of order required by law, 397.
of proofs of statutory foreclosure, 919–921.
on foreclosure by foreign legatee of bond and mortgage, does not show perfect title, 124.
priority; presumption as to; distribution of surplus, 839, 840.
public records; reference to, in foreclosure complaint for description of property, 352.
statutory foreclosure; necessity to record mortgage, 880.
effect of failure, 880.
notice; description of date and place of record, 892.
time and mode of, 398.
time of; as defence in foreclosure, 398.
unrecorded mortgage; priority over subsequent judgment, 843.
RECOUPMENT. See ANSWERS AND DEFENCES; SET-OFF AND COUNTER-CLAIM.
REDEMPTION.
assignment to prevent; fraud, 419.
barred by twenty years' possession by mortgagee, 78.
by omitted judgment creditor may be directly, or by execution, under sheriff's deed, 199.
not required to pay costs, 199.

REDEMPTION—*Continued.*
by subsequent mortgagee; accounting for rents and profits may be had, 191.
from prior mortgagee in possession; appointment of receiver, 802–804.
to gain control of rents and profits as against mortgagee in possession, 804.
costs on, 959.
foreclosure of part of single tract, 313.
if mortgage satisfied, selling price of property is amount required to redeem, 192.
in strict foreclosure; time, etc., 932, 933.
interested party not made a defendant, may redeem, 135.
only remedy of omitted subsequent judgment creditor, 197.
party redeeming must pay amount due on mortgage, 191.
receiver; not appointed during time allowed for, 797, 798.
right must usually be exercised within ten years from maturity of mortgage debt, 191.
right of omitted wife does not accrue till death of husband, 161, 162.
right of owner of equity of redemption terminated by sale and confirmation, 695.
subsequent mortgagee not made a party, may redeem, 191
successor of assignee in bankruptcy of subsequent incumbrancer, not made a party, may redeem, 211.
tender of payment; extinguishes power of sale, 882
time for not expired; effect upon title of purchaser at foreclosure sale, 702, 703.
wife or widow, omitted as a defendant, may redeem, 161.
REDEMPTION, EQUITY OF.
answer by claimants of interests in, 382.
can not be sold on judgment in action at law, 8.
devisees of; necessary defendants, 168.
heirs of owner of; necessary defendants, 165, 166.
mesne owners of, not necessary parties, 151.
personal representatives of owner of; necessary defendants in foreclosure by advertisement in New York, 172.
usually not necessary defendants, 170, 171.
but always proper, 171, 172.
purchaser of; right to set up usury as defence in foreclosure, 415.
right of claimants of interest in, to answer, 382.
where devised, heirs not necessary defendants, 168, 169.
widow of owner of, a necessary defendant, 159.
wife of owner of, a necessary defendant, 157.
having made grant of dower, still a necessary defendant, 158
not a necessary defendant, where dower rights abolished by statute, 158, 159.
REFERENCE.
costs; general discussion of the matters pertaining to. See Costs.
for appointment of receiver, 761–765.

REFERENCE—*Continued.*
in case of infant defendants; requisites of order, 529.
judgment upon report; form and contents, 551–554.
of issues; on failure of defendant to appear on trial, 558.
referee residing in different jurisdiction; place of trial, 22.
to ascertain surplus, 822.
to assert or prove lien junior to mortgage; participation in surplus, 831.
to compute amount due, 528.
after default, or admission by answer, 528, 529.
allowance of taxes and assessments, 541, 542.
application for, 559, 560.
building and loan association mortgage, 539.
fines and dues, 539–541.
change of referee, 535.
competency of witnesses and evidence, 534, 537, 538.
computation; on failure to pay taxes and assessments, 543, 544.
statement of items, 538.
allowance for interest, repairs, and payment of prior liens, 539.
contents of order; directions as to computation, 532, 533.
direction to ascertain if premises can be sold in parcels, 533.
in case of non-answering defendants, 535.
of infant or absentee defendants, 533, 534.
county in which may be held; venue, 547, 548.
determination as to how much of premises shall be sold; parcels, 589–590.
discretion and authority of referee as to conduct of reference, 547, 548.
entry and service of order prerequisite to action by referee, 536.
extent and scope of examination, 537, 538.
failure to appear at trial after answering, 531.
finding as to how premises should be sold, 546, 547, 549.
general powers and duties of referee, 545, 546.
infant and absentee defendants, 561.
contents of order, 533, 534.
examination of plaintiff must be exhaustive, 538.
insurance; allowance of premiums paid by mortgagee, 544, 545.
judgment upon report, 551–556.
mortgage upon leasehold interest, 544.
allowance of rent charges paid by mortgagee, 544.
motion papers, 530–531.
nature of proceedings, 535, 536.
oath of referee, 536.
on second installment; after sale of part of premises to satisfy prior installment, 600–602.

REFERENCE—*Continued.*
to compute amount due; order not appealable, 532, 533.
order; appeal from final judgment brings up, 533.
should define duties of referee and limit scope of reference, 534, 535.
should require referee to report proofs and evidence taken, 535.
power of referee to determine questions as to priority, 547.
power to order, 558.
referee governed by chancery rules and practice, 545.
no discretion; authority limited by order, 537.
to be selected by court, 532.
report; contents, 545, 546.
exceptions and new hearing, 549–551.
filing and confirmation, 549–551.
necessity; sufficiency; contents, 548, 549.
that premises can be sold in parcels, 533.
time and place of making motion; court calendar, 530.
when made *ex parte* and without notice, 529, 530.
when part of defendants have not answered, 559, 560.
who may be referee, 531, 532.
who may prosecute, 536, 537.
withdrawal from referee, 535.
special order of court necessary, 535.
witnesses; testimony need not be signed, 538.
to determine priority of claims in surplus moneys, 863.
to investigate title; on refusal of purchaser to accept, 687.
to sell premises. See SALE.
whole amount not due; sale of parcels, 529.
REFORMATION OF INSTRUMENT.
mistake; as defence against assignee of note and mortgage, 416.
correction of, 439.
REHEARING.
mistake; in describing premises; correction, 440.
of reference, 549–551.
RELEASE.
by attorney; of old mortgage without receiving new, 497.
by payee after transfer of note secured, 495.
can not be given by mortgagee joining in a deed with mortgagor, 139, 140.
extinguishes mortgage; when, 482.
fraudulent; is void, 495.
manner of pleading; description of, 496.
mortgage kept alive to subserve purposes of justice, 495.
of parcels; sale in order of alienation, 621, 622.
of part of premises, 495, 496.
agreement by mortgagee to release; estoppel, 467, 468.
enforcement, 497, 498.
application of proceeds, 497, 498.

RELEASE—*Continued.*
of part of premises; exemption of other portion from payment of mortgage; notice of, 496, 497
purchaser at foreclosure sale acquires no title as to such portion, 700.
what constitutes, 495, 496.
effect of knowledge of prior conveyance of other part, 496, 497.
of prior, by holder of subsequent mortgage, 495.
priority of intervening mortgages, 495.
substitution of new mortgage for old; priority over intermediate incumbrances, 495.
without authority; is void, 495.
REMAINDERMEN AND REVERSIONERS.
necessary defendants, 177.
owner of first vested estate, and owner of intermediate estates, sufficient, 177.
defendant *in esse*, necessary, 178.
REMEDIES.
in favor of mortgagor for fraud, 432, 433.
of mortgagee against grantee assuming mortgage, 271.
of owner of mortgaged premises, omitted as a defendant, 150.
of subsequent judgment creditors, omitted as defendants, 197.
of subsequent mortgagees, omitted as defendants, 191.
of wife, not signing mortgage, omitted as a defendant, 160.
to recover debt secured by mortgage, 314, 315.
REMOVAL OF ACTION. See TRIAL; VENUE.
foreclosure; consolidation, 324.
RENTS AND PROFITS.
belong to purchaser on foreclosure, when, 708, 709.
mortgagee in possession; appointment of receiver, 801–805.
mortgagor; rights to receive, 744, 745, 777–779.
receiver; appointment of. See RECEIVER, 744–819.
right as to between mortgagor and mortgagee, 784, 785.
REPLEVIN.
for emblements, 707.
not lie in favor of purchaser before confirmation of sale, 707.
REPLY.
by mortgagor or his grantee, 381.
counter-claim; invalidity of mortgage, 458.
REPORT.
of referee. See REFERENCE.
of sale. See SALE.
RESALE.
application may be made at any time before confirmation, 635.
costs on, 950, 951.
for abuse of discretion by officer, 628.
general discussion of matters relating to. See SALE, 638–669.

RESCISSION.
of contract to purchase subject to mortgage; notice, 350.
REVERSIONERS. See REMAINDERMEN AND REVERSIONERS.
REVIEW.
bill of; correction of mistake in describing premises, 440.
RULES.
Bacon's Ordinances. See LIS PENDENS, 359–361.
SALE.
adjournment; discretion, 627, 628.
false promise to obtain: setting aside sale, 659.
publication of notice, 628, 629.
under statutory foreclosure, 628, 629.
advantage to debtor, 924.
early discussions, 924.
all proceedings are subject to direction and control of court, 564.
appeal; effect on title of purchaser, 709–711.
BIDS AT.
acceptance confers no title, 671.
assignment of bid; rights of assignee, 689, 690.
failure to deposit; resale, 578, 579.
payment; deposit, 578–579.
scarcity of bidders not a cause for setting aside sale, 653.
by mortgagor or mortgagee. See ASSIGNMENT; ASSUMPTION; VENDOR AND PURCHASER.
by only one United States loan commissioner is void, 104, 909.
by what officer made; employment of auctioneer or deputy. 565–567.
United States loan commissioners; only one acting, 104, 909.
by whom made, 564.
confirmation, 635, 636.
appeal from; for formal irregularities, 686.
at special term of court, 673.
bidder need not accept deed until, 671.
continued possession under deed equivalent to, 671, 674.
cure for irregularities, 673.
defects cured by, 651, 652.
discretion of court, 675.
to permit tender by mortgagor, 675.
to release purchaser, 675.
effect of, 673, 674.
errors cured by, 683.
form and sufficiency; order *nisi*, 672, 673.
Illinois and New York rule; not prerequisite to deed, 671, 672.
jurisdictional defects not cured by, 683.
lapse of time equivalent to, 673, 674.
necessity of; sale incomplete until, 670, 671.
not bar to setting aside sale for accident or mistake, 673.
not cure jurisdictional defect, 673.
notice of application for, 672–674.

SALE—*Continued.*
confirmation; notice of, 635, 636.
not prerequisite to deed, 693, 698.
nor to execution for deficiency, 637.
not unless due notice of sale given, 674.
nor unless requirements of decree complied with, 672, 674.
objections to; correction of referee's report, 672, 673.
order can not be collaterally attacked, 673.
may be appealed from, 673.
prerequisite to enforcement of sale against purchaser, 676.
to judgment for deficiency, 741, 742.
to possession by purchaser, 712.
question of usury not raised on, 636.
relates back to date of sale and renders deed valid, 698.
growing crops, 674.
renders referee's report the act of the court, 673.
right of redemption by the owner of the equity of redemption, cut off, 695.
setting aside sale; discretion of court, 674, 675.
should precede delivery of deed, 693.
but not where time allowed for redemption, 693.
when not prerequisite to execution for deficiency, 725.
costs, fees, etc.; general discussion of matters pertaining to. See COSTS.
crops; growing; pass to purchaser, 706, 707.
death of plaintiff; not affect powers of officer, 566.
decree of; generally, 563, 564.
deed; accrument of right to, 703.
after delivery purchaser can not repudiate contract, 693.
although the sale may afterwards be set aside for irregularity, 693.
bars parties to action, and their grantees, etc., 695.
before confirmation, 693.
confirmation relates back to date of sale, 693.
cuts off rights and interests in equity of redemption, 695.
but not interests paramount to title of mortgagor and mortgagee, 695
delivery prerequisite to title, possession, rents, and profits in purchaser, 694.
effect and force of, 10, 695, 696.
what title passes, 10, 695, 696.
effect of appeal and reversal on title acquired by, 709–711.
effect on title of void and erroneous decrees and proceedings, 709–711.
English doctrine; withholding until confirmation, 693.
estate and interests passed and conveyed, 696–698.
execution and delivery, 698.
not ordered until purchase money paid into court, 698.

SALE—*Continued.*
deed; extinguishment of easement reserved by mortgagor, 702.
form and contents; generally, 699.
description of premises; correction of error, 699, 700.
embracing portion of premises released, 700.
variance in mortgage, decree, and deed, 700.
granting clause; state whose title, etc., affected, 699.
without naming other parties to action, 699.
must name parties who executed mortgage, 699.
holder is *prima facie* legal owner of land described therein, 693.
may be delivered immediately after sale, upon compliance with terms, 692.
may be executed and delivered before confirmation, 698.
mortgage of lease for years; purchaser becomes assignee, 697.
not affect prior liens and incumbrances, 696.
where holders not made parties, 698.
not pass greater interest than authorized by judgment, 697.
although deed included premises mentioned in mortgage, but subsequently released, 697.
not pass title; to lands not described in mortgage, 700.
until delivery, 693.
not ready at time fixed; remedy of purchaser, 698
officer required to execute; when, 698.
on sale by only one United States loan commissioner, conveys no title, 104, 909.
passes title; by delivery, although sale not confirmed, 693.
New York and Illinois rule, 671.
confirmation not required, 672.
of both mortgagor and mortgagee, 696, 697.
to emblements, 706–708.
to entire estate of mortgagor at date of mortgage, 695
to fixtures, 703, 704.
exceptions to rule, 704, 705.
to permanent improvements, 705, 706.
possession; compelling delivery of, 711.
remedies and proceedings, 711–720.
under New York code; order, 714.
rents and profits; rights of purchaser to, 694, 695.
summary process by purchaser to obtain, 712–714.
under New York Code, 720.
writ of assistance, 714–720.
dispossession of holder of paramount title, 719, 720.
granting of, discretionary, 720.
how obtained, 714–717.
remedy when improperly granted, 718, 719.
to dispossess tenant, 719.
when fully executed, 718.
who entitled to, 718.
who may be dispossessed, 717, 718.

SALE—*Continued.*
deed; prerequisite to possession, 702.
prerequisite to vesting of title and right to possession, 703, 708.
purchaser; becomes mortgagor as to vendee in possession, 697.
takes same estate as would have vested in mortgagee, 695.
purchaser's title; relates back to date of mortgage, 701, 702.
as affected by time for redemption, 702, 703.
relates back to date of sale, 703.
remedy and process to put purchaser into possession, 694, 695.
report and confirmation not prerequisite, 693.
should precede delivery, 693.
but not where time allowed for redemption, 693.
right of purchaser to rents and profits, 708, 709.
to possession not affected by conveyance from plaintiff to a defendant of the entire premises, 695.
takes effect immediately on delivery, 698.
title of parties divested by, from time of sale, 698.
when tax title, previously acquired, not cut off, 693.
deficiency; execution for, 637.
confirmation of report not prerequisite, 637.
judgment for, 637.
report should state amount, 636, 637.
See DEFICIENCY, 721–743.
duties of officer making, 567–569.
easement; extinguishment of, 702.
effect of, where owner of equity of redemption not a party, 147, 148.
emblements; pass to purchaser, 706–708.
estoppel of mortgagee by silence at, 469, 470.
execution; upon judgment for mortgage debt, 696.
upon decree; levy not necessary, 569.
what title passes; equities cut off, 696, 697.
fixtures; pass to purchaser, 703, 704.
exceptions to rule, 704, 705.
form and contents of decree, 565.
growing crops; pass to purchaser, 706, 707.
holding open, 629, 630.
improvements; permanent; pass to purchaser, 705, 706.
in New York city; by whom made, 567.
IN PARCELS.
direction in judgment, 554
discretion of officer as to, 569–571, 586–590, 594–596.
only part of mortgage due, 597–599.
order of reference to ascertain if premises can be sold in, 533.
order of sale, dictated by mortgagor or mortgagee, 593, 594.
portion of premises for part of debt due, 599.
failure to pay subsequent installments, 599–602.
protection of subsequent liens and equities, 590.
report of referee that premises can be sold in, 533.
subdivision into lots after execution of mortgage, 596.

SALE—*Continued.*
IN PARCELS.
under New York code, 587–589.
when premises described in one piece, 592, 593.
when sale in parcels a matter of right, 591.
judgment of; contents; variation from referee's report, 553.
extent of relief granted, 553–556.
judicial; of mortgaged premises, in parcels, 614.
order of alienation on subsequent foreclosure, 614.
lease for years; purchaser becomes assignee, 697.
memorandum by purchaser, 633.
moiety; land held by tenants in common, 597.
mortgage to secure goods to be furnished in future, 407.
validity; consideration, 407, 408.
must be at public auction, 624.
by officer appointed or designated by statute, 624.
to highest bidder, 624.
non-compliance with bid; second offer, 568.
notice; sale on Sunday or a holiday, 629.
adjournment, 629.
form and contents, 573.
indefiniteness as to time and place, 660.
setting aside sale, 660.
irregularities, etc., in giving, 639.
setting aside sale, 639.
necessity and sufficiency; contents, 571–573.
publication; of terms and conditions, 579, 580.
proof, 573–575.
of entire property, where only part of mortgage due, 34.
officer; acts those of court, 628.
discretionary powers, 625–627.
duties; as to receiving bids, 624.
ministerial, 567.
payment; kind of money, 569.
personal attendance, 624, 625.
to announce terms, 568.
to attend at time and place, 568.
to offer to highest bidder, receive bids, etc., 568.
to personally direct sale, 624, 625.
to postpone sale, and not sacrifice property, 568.
to report deficiency, 722, 723.
to report largest bid to court, 679.
to require memorandum, 568.
to sell without delay, 568.
to wait a reasonable time for bids, 624.
not agent for plaintiff, 627, 628.
powers and discretion; loan commissioners; concurrence of all, 626, 627.
powers; discretion; can not be delegated, 626.

SALE—*Continued.*
of part of premises for installment due, 600.
subsequent default; petition for second sale, 600–602.
reference on, 600–602.
on foreclosure of contemporaneous mortgages, where all mortgagees were not made parties, is defective, 113.
order of alienation; appellate court can not first decree, 610.
application to court for direction as to, 611, 612.
inverse; application may be made to officer, 611.
instances where rule not applicable, 617, 618.
parcels; assumption of mortgage by subsequent grantee of part, 616.
contribution according to value; valuation, 618, 619.
equitable rights between subsequent grantees and lienors, 612, 613.
date of conveyance, 613–614.
purchaser of part of premises subject to mortgage, 615,616
rights of successive subsequent mortgagees, 614.
New Jersey rule, 614, 615.
rule where mortgage covers homestead and other lands, 622, 623.
where mortgagee holds other securities, 619.
subsequent mortgagees, 619, 620.
where portions alienated have been released, 621,622.
order of; direction of order of alienation, 609–611.
issued without authority, 684.
not relieve purchaser from completing purchase, 684.
staying sale, 582–584.
parcels; conveyed by mortgagor, sold in inverse order of alienation; general rule, 603–606.
discretion of court, 586–590.
inverse order; rule applicable to conveyances by grantees, 607, 608.
rule in Iowa, Kentucky, and Georgia; contribution, and not inverse order, 606, 607.
order of alienation; direction in decree, 609–611.
inverse order, 518, 519, 607, 608.
rule as between general liens and subsequent incumbrances on parcels, 607, 608.
rule not enforced if it would work injustice, 608.
various and successive grantees; equities, 608, 609.
under New York code, 587–589.
parties; having prior liens; not affected unless joined, 698.
passes only title of mortgagor at date of mortgage, 507.
person making, acts as officer of court, 564.
possession of purchaser; compelling delivery, 711.
remedies and proceedings, 711–720.
postponement and adjournment, 627, 628.
presumption of validity, 661.

SALE—*Continued.*
PURCHASER.
acquires no title to portion of premises released, 700.
acquires title of both mortgagor and mortgagee, 696, 697.
affected with notice of defects of parties appearing on record, 682.
assignment of bid, 689.
rights of assignee, 689, 690.
becomes assignee of lease for years, 697.
becomes equitable assignee to extinguish liens of junior incumbrancers not parties, 104.
chargeable with notice of defects and irregularities appearing on record, 682.
confirmation of sale prerequisite to possession in some states, 712.
New York rule, 712.
defective title; can not correct by applying proceeds to incumbrances not held by parties, 687.
delay in perfecting title, 690.
not required to pay interest, 690, 691.
delivery of deed necessary to confer right to possession, 694.
rents and profits, 694, 695.
discharged from completing purchase, 680.
re-imbursement for disbursements, costs, etc., 680.
effect of appeal and reversal upon title of, 709–711.
enforcement against, 676.
acceptance by court and confirmation prerequisite in some states, 676.
application may be made by motion, 676.
compelling completion, 675, 676.
defects of title known at time of sale, 681.
error in decree in describing premises, 700.
amendment, 700, 701.
in what tribunal, 676.
not barred by lapse of time or death of parties, 676.
not if title defective, 678–680.
if court had no jurisdiction, 679.
if doubtful, 688.
if interest not same represented in terms of sale, 679.
if liable to litigation, 678.
if merely equitable, 678.
if necessary defendant not served, 679.
if outstanding dower right exists, 680.
if party not served, 687.
if proceedings void, 679.
if subsequent incumbrancer not made party, 687.
if taxes, incumbrances, etc., not paid off, 679.
if there are prior incumbrancers, 680.
if title not marketable, 678, 688, 689.
if without jurisdiction, 687.

SALE—*Continued.*
PURCHASER.
enforcement against; not in case of subsequent resale and approval, 679, 680.
not in case title defective, 678, 687.
unless corrected or cured, 678, 679, 687.
in case exposes to litigation, 688.
when title doubtful, 678.
where proceedings void, 687.
enforcement against agent bidding in own name, 675.
entitled to fixtures, 703, 704.
exceptions to rule, 704, 705.
entitled to marketable title, 678, 688.
excused from completing purchase; defect of parties, 681.
for defects of title not known at date of sale, 680, 681.
for partial failure of title, 689.
re-imbursement, 680, 681.
failure to complete purchase; resale, 678.
order to show cause, 678.
is mortgagor as to vendee of mortgagor in possession, 697.
is *quasi* party; subject to jurisdiction of court, 675.
liability ceases upon resale and approval, 679, 680.
may cut off subsequent incumbrancers not made parties, by strict foreclosure, 193.
may require accounting of rents, taxes, and disbursements for improvements, on redemption by omitted judgment creditor, 199.
misdescription of mortgaged premises; correction, 699, 700.
mortgagor not precluded from acquiring outstanding or paramount title against, 682.
mortgagor not required to protect title of, where mortgage contains no covenant of warranty, 682.
neglect to complete purchase, 677.
chargeable with taxes, 677.
resale; costs and expenses, 676, 677.
may be ordered, 676.
relief from deficiency if terms different, 677.
terms and conditions, 677.
no right to possession until delivery of deed, 708.
not acquire title as against prior lienholders not made parties, 698.
to lands not described in mortgage, 700.
although described in complaint and judgment, 700.
not compelled to accept doubtful title, 678.
or mere equitable estate, 678.
or title which may expose him to suit, 678.
no title if decree is void, 709, 710.
or until expiration of legal time for redemption, 702.

SALE—*Continued.*
PURCHASER.
not maintain possessory action until time for redemption expired, 702.
omission from mortgage of portion intended to be covered, 701.
purchaser protected in possession, 701.
order to complete sale; attachment, 647, 648.
partial failure of title; protection in possession, 701.
possession; action at law not necessary, 713.
compelling delivery of; remedies and proceedings, 711–720.
dispossession of party obtaining possession *pendente lite*, 714.
not delivered as against person in possession under legal proceedings under claim of right, 718.
nor against person not a party, 713.
power of court to deliver, 713.
remedies under New York code, 714.
writ of assistance, 714.
right to, upon compliance with terms of sale, 713.
summary process, 712–714.
under New York code, 720.
tenant in possession under hostile claim, not dispossessed, 713, 714.
writ of assistance, 714–720.
dispossession of holder of paramount title, 719, 720.
granting of, discretionary, 720.
how obtained, 714–717.
remedy, when improperly granted, 718, 719.
to dispossess tenant, 719.
when fully executed, 718.
who entitled to, 718.
who may be dispossessed, 717, 718.
purchase by mortgagee, 631–633.
refusal to complete purchase, 687.
reference to investigate title, 687.
resale; costs and expenses, 686.
release from completing purchase, 683.
application for must be made within reasonable time, 691.
for jurisdictional defects; after confirmation, 683.
for mistaken notion of law, 691.
irregularities prior to judgment, 683, 684.
not after confirmation, for errors in judgment or decree, 683.
remedy in case of irregularity, 683.
not because of insane defendants; service, 684, 685.
not because order of sale was issued without authority, 684.
not for mere formal irregularities, 686, 687.

SALE—*Continued.*
PURCHASER.
release from completing purchase; not question validity of mortgage, 683, 684.
partial failure of title, 689.
title different from that announced, 689.
where deed does not state whose title, etc., affected, 699.
where infants are defendants, 685.
remedy; in case of defective title, 682, 683.
and process to obtain possession, 694, 695.
for formal irregularities; appeal, 686.
to compel completion of sale, where deed not ready at time fixed, 698.
where mortgage executed by mistake, on property of another, 700.
right to have sale completed, 690, 691.
not affected by appeal from order refusing resale, 691.
right to insist upon compliance with terms, 690, 691.
right to rents and profits, 708, 709.
sale during wrong term of court does not operate as assignment of debt to, 687.
surrender of possession to, waives formal irregularities, 686
takes only actual estate covered, although mortgage purports to cover greater estate, 682.
permanent improvements, 705, 706.
risk of defects of title, existing prior to date of mortgage, 682.
same estate as would have vested in mortgagee, 695.
title of mortgagor, 502, 695.
and of mortgagee at date of mortgage, 681, 682, 695
title to emblements, 706–708.
title; co-extensive with description in mortgage, bill and decree, 701.
as affected by time for redemption, 702, 703
not absolute until accrument of right to deed 703.
not affected by irregularity in proceedings, 709.
nor by defect in judgment, 709.
relates back to date of delivery of mortgage, 701, 702.
when chargeable with interest on purchase money, 691.
when excused from completing purchase, 678–680.
when presumed to know condition of title, 681–683
when takes title free from easement reserved by mortgagor, 702.
who may purchase, 630, 631.
plaintiff; setting aside sale, 649.
redemption; right cut off by sale and confirmation, 635.
reference; to compute amount due, 546, 547.
finding as to how premises should be sold, 546.
to investigate title on refusal of purchaser to accept, 687.

SALE—*Continued.*
reference; to sell, should be required by decree to report amount of deficiency, 244.
rents and profits; between sale and delivery of possession, 694.
purchaser not entitled to until delivery of deed, 694.
right of purchaser to, 708, 709.
REPORT.
becomes act of court by confirmation, 673.
confirmation, 635, 636, 670–675.
defects cured by, 651, 652.
contents; what must be shown, 634.
failure to make at next term, 639.
setting aside sale, 639.
necessity; exceptions, 633, 634.
necessity of notice of filing, 635.
notice of motion for confirmation, 635, 636
not prerequisite to deed, 693.
should precede delivery of deed, 693.
but not where time allowed for redemption, 693.
should state amount of deficiency, 636, 637.
substituted or supplemental report; notice, 637.
SETTING ASIDE SALE, AND RESALE.
accident; surprise, 656, 657.
advance on resale; opening biddings, 649–651.
after confirmation; for accident or mistake, 673.
all facts connected with sale and equitable interests of parties considered on application, 648.
allowance or disallowance discretionary, 640, 641, 645, 646.
appeal from order refusing resale, 667–669.
does not affect right of purchaser to have sale completed, 691.
application; addressed to court's discretion; when, 638, 639.
may be made at any time before confirmation, 635.
must be made within reasonable time, 661.
assignor of mortgage, with guaranty of payment, not notified of time and place, no ground for, 640.
at whose instance, 641–643.
because of purchase by plaintiff, 649.
bidder's liability ceases upon resale and approval, 679, 680.
charging purchaser with costs and expenses of resale, 686.
costs on resale, 950, 951.
destroys title of purchaser and his grantees, 665.
discretion of court, 640, 641, 674.
appeal from, 667–669.
disobedience of instructions by officer, 660.
disregard by officer of written request from plaintiff, 651.
effect upon purchaser, 664–666.
equities of all parties to be considered, 639.
excusable mistakes, 662–664.

SALE—*Continued.*
SETTING ASIDE, AND RESALE.
failure of mortgagor to appear, 651.
failure of mortgagor to have sale set aside before expiration of time allowed for redemption, 693.
technical objections waived, 693.
failure to sell in separate parcels, 648, 649, 652.
false statements; generally, 658, 659.
preventing bids, 658, 659.
for abuse of discretion by officer, 623.
for accident or mistake, 652.
for benefit of infants, 666, 667.
for defect of parties, 647.
for failure to make report at next term after sale, 639.
for fraud, unfairness, etc., 643, 651.
for irregularities, unfairness, etc., 647.
in giving notice, 639.
for lack of bidders, 647.
for non-compliance with terms, 641, 647.
for sale of parcels in lump, 647.
for what reasons granted or denied, 647–649.
fraud; appeal from order, 668, 669.
inducement to buy certificate of foreclosure, 662.
misconduct, 657, 658.
general discussion of matters pertaining to, 638–669.
good reason must be shown, 638.
grounds for, 651, 652.
how accomplished; proper proceedings; application, notice, etc., 643–645.
illness of mortgagor, 659.
inadequacy of consideration, 651, 654, 660, 662, 663, 666.
relief of infants, 666, 667.
indemnity of purchaser for improvements, 665.
irregularities, 651, 652.
is matter of favor, and not of right, 640.
is question of practice, 641.
judgment for too large amount, 640.
letters of administration irregularly granted, 639.
misleading statements and representations, 659, 660.
as to day of sale, 651.
by officer, 659, 660.
mistake; as to day of sale, 663, 664.
in description of premises, 440.
of defendant, as to his liability, 660.
necessity of notice of motion, 643.
neglect of purchaser to comply with terms, 676.
neglect to complete purchase, 676.
order to show cause, 678.
negligence in objecting; acquiescence, 660–662.

SALE—*Continued.*
SETTING ASIDE, AND RESALE.
non-attendance of bidders, 651.
not after statutory period for redemption, 643, 661, 662.
not because mortgage, by mistake, covers property of another, 700.
nor for irregularity, where parties interested are not prejudiced, 639.
nor for want of knowledge by party of time and place, 648.
nor to protect party against consequences of his own negligence or laches, 643.
nor when equities are in favor of purchaser, 648.
nor when fairly made and free from fraud, 638, 648.
notice indefinite as to time and place, 660.
of motion, 641.
objections waived by delay, 661, 662.
order granting or denying, not appealable, 640.
parties must move promptly, 641.
prevention of fair competition in bidding, 651.
proceedings on resale, 669.
promise to have sale adjourned, 659.
purchaser; restored to former position, 665.
to account for rents and profits, 665, 666.
re-imbursement; of former purchaser upon resale, 680.
of purchaser, 665.
sacrifice of property, 651.
sale at improper time, 651.
sale of parcels together, 659.
scarcity of bidders, 653, 654.
statements preventing bidding, 659, 660.
summary application in original suit, 643.
terms and conditions of resale, 664, 677.
different from those authorized, or usual, 652.
imposed upon party applying, 664, 677.
time of application for, 645–647.
statutory foreclosure; adjournment, 628, 629.
stay of, by payment; subsequent default, 602.
summary process; to put purchaser into possession, 712–714.
under New York code, 720.
sum paid for premises conclusively determines their value as between the parties to the suit, 248.
surplus arising on. See SURPLUS.
tax title holder; when not affected by, 696.
tenant; dispossession by writ of assistance, 719.
terms and conditions, 577–579.
announcement, 578.
bids and acceptance, 578.
credit; time, 580–582.

SALE—*Continued.*
terms and conditions; different from those authorized; remedy, 690.
publication of, 579, 580.
time; at hour advertised, 576, 577.
protection of debtor; postponement, 582–584.
title becomes absolute, 502.
to satisfy senior and junior mortgage foreclosed in one action, 323.
under decree; effect of, 10.
effect of appeal after, 10.
when may be made; statutory period; hour of day, 576.
where made; place, 576–577.
writ of assistance; to put purchaser in possession, 714–720.
SCHOOL-FUND MORTGAGE.
foreclosure; complaint; description of premises, 353.
SEAL.
detachment after desposit for record; effect, 399.
SERVICE. See SUMMONS.
SERVICES.
rendered; set-off; foreclosure, 454.
SET-OFF AND COUNTER-CLAIM.
advances; mortgage to secure; failure to make, 460, 461.
against assignee of mortgage, 453, 454.
against mortgagee in possession, 794.
right of mortgagor to appointment of receiver, 794.
agreement to apply profits on mortgage debt, 457.
allowable on foreclosure, 450–461.
affirmative relief by, if desired, must be demanded in answer, 459.
as defence against fraudulent assignee of mortgage, 417, 418.
can not be an independent claim, 454.
counter-claim arising on contract, 452.
damages, 459–461.
breach of covenant to release portions sold by mortgagor, 461.
excess of price paid, 459.
failure of title, 459.
failure to make advances, 460.
for fraud; concealment, 459–461.
not recover interest, 459.
debt due mortgagor, 450.
delay in foreclosing; loss; depreciation in value, 456.
fraud; in action for purchase money, 433.
recoupment of damages on foreclosure, 433.
illegal interest; usury, 456.
in action on note; invalidity of foreclosure proceedings on another note of same series, 457.
insolvency of plaintiff, 458.
claim in favor of owner of equity of redemption, 458.
invalidity of mortgage; reply, 458.

SET-OFF AND COUNTER-CLAIM—*Continued.*
mistake as to quantity of land, 442.
correction; foreclosure, 442–443.
must be based upon legal obligation; not upon equitable or supposed right, 458.
must be debt due and payable, 455, 456.
must be in favor of defendant and against plaintiff, 454.
must be pleaded, 459, 461.
must tend to diminish or defeat recovery, 452, 454.
not of unliquidated damages, 455.
of debt due at date of filing complaint, 456.
of partial payment; application, 455.
of road tax; when permissible; necessary averments, 455, 456.
of services rendered to be applied on mortgage, 454.
outstanding claim; payment of 522.
over payment by mortgagor, 451.
payment; need not be pleaded as, 491, 492.
requisites; what proper, 454–461.
several foreclosures; election in which to plead set-off, 456.
various set-offs in foreclosure, 450–461.
who may plead or set up personal liability, 452, 453.
SETTING ASIDE SALE. See SALE, 638–669.
SHERIFF.
failure to return execution, 848.
judgment against, 848.
priority; distribution of surplus, 848, 849.
SPECIFIC PERFORMANCE.
of agreement to release part of premises, 497.
STATE COMPTROLLER.
a proper defendant to foreclosure against land on which unpaid state taxes are due, 212.
successor may foreclose, 129, 130.
STATE SUPERINTENDENT OF INSURANCE.
successor may foreclose, 130.
STATUTE OF FRAUDS.
foreclosure sale; memorandum, 633.
parol agreement to execute mortgage, part performance, 320.
STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.
STATUTES.
against usury, construed strictly, 412.
limiting foreclosure to time for recovery of debt, 79.
making *cestuis que trust* necessary defendants, 176.
must be strictly followed, 7.
provision in mortgage contravening, 7.
usury; *lex loci*, 413.
STATUTORY FORECLOSURE; ADVERTISEMENT.
a creature of the statute, 879.
adjournment of sale, 628, 629.
as a remedy, 6.

STATUTORY FORECLOSURE; ADVERTISEMENT—*Continued.*
assignment of mortgage; quit-claim of part of premises to assignee, 882.
extinguishment of right to foreclose, 882.
passes power of sale, 882.
by real party in interest, 882.
can not, in New York, be maintained against deceased mortgagor, unless personal representatives have been appointed, 172.
costs and disbursements on, 959-961.
damages; unliquidated; mortgage to secure, 881.
can not be foreclosed by, 881.
debt partly collected; pending suit, 881.
deed; necessity, 921, 922.
quit claim; to part of premises; to assignee of mortgage, 882.
extinguishment of right to foreclose, 882.
defective foreclosure; omissions; irregularities, 914, 915.
defect of parties, 914.
failure to serve proper party, 914
setting aside; foreclosure *de novo*, 915.
distribution of surplus by surrogate, 860, 861.
execution; in suit for debt, 881.
return unsatisfied prerequisite to foreclosure by advertisement, 881.
general nature, 879.
habitual drunkard; mortgage upon property of, 881.
can not be foreclosed by, 881.
heirs of owner of equity of redemption, not necessary defendants, 166, 167.
infant; mortgage executed by, can not be foreclosed by, 881.
injunction; restraining sale; when granted, 904-906
amount due determinable only by judicial finding, 905.
claim of larger amount than due, 904.
if sale inequitable, 904.
mortgage usurious, 904.
not if conducted according to statute, 905.
not on account of disagreements between junior incumbrancers, 905.
to enable appeal to be taken, 905.
to restrain resident mortgagee of lands without the state from selling at public sale, 880, 906.
wrongfully granted; damages, 905.
insurance; covenant for; breach, 881.
is exclusively a creature of statute, 879.
judgment creditors must be made defendants, 195.
loan commissioners; mortgage to; sale, 906, 907.
conduct of sale, 104, 910, 911.
deed to purchaser, 910, 911.
illegal sale; action for redemption, 910

STATUTORY FORECLOSURE; ADVERTISEMENT—*Continued.*
loan commissioners; mortgage to; nature and form of foreclosure proceedings, 906, 907.
notice of sale, 908.
posting notice, 909.
publication, 908.
purchaser presumed to know authority of commissioners, 910.
terms of sale, 909.
validity of sale, 104, 909, 910.
mortgagor or successor, a necessary defendant, 137.
notice; contents, 892–897.
date and place of record of mortgage, 892, 893.
date of sale, 896, 897.
defective; objections; time and manner of making, 897.
delivery of copy to county clerk; duty of clerk, 885, 886.
description of mortgage, 893, 894.
description of property, 892, 893.
must be subscribed, 886.
names of parties, 892–894.
necessity, 883.
place of sale, 894.
posting, 885.
postponement of sale; publication, etc., 897, 898.
publication, 883–897.
change of name of publishing paper, 884.
consolidation of paper, 884.
defective publication; avoids proceedings, 884.
republication, 884.
general information not requisite, 884
Saturday edition; printed Friday, 884.
validity and sufficiency, 884, 885.
purpose of sale, 892, 893.
right or authority to foreclose, 893.
service; by mail; proof, 891, 892.
how made, 890, 891.
upon whom, 886–890.
assignee of mortgagor, 887–889.
assignee of subsequent incumbrance, 887–889.
mortgagor or representatives, 886, 887.
only those directed by statute, 886.
subsequent grantees and incumbrancers, 886–890.
wife or widow of mortgagor, 886, 889, 890.
statement of prior incumbrances, 896.
subscription; signature, 893, 896, 897.
sum due, 892, 894–896.
terms of sale, 900, 901.
of mortgage executed by infant, 881.
owner of equity of redemption always a necessary defendant, where deed is recorded, 149.

STATUTORY FORECLOSURE; ADVERTISEMENT—*Continued.*
payment; extinguishes power of sale, 882.
extinguishes right to foreclose, 882.
pending suit for debt; discontinuance prerequisite, 881.
personal representatives of mortgagor necessary defendants, in New York, 168, 172.
postponement of sale; notice; publication, etc., 897, 898.
prior foreclosure by action; decree of second sale for subsequent default, 881.
proofs of proceedings; affidavits, 915-921.
amendment, 918, 919.
code provisions generally, 915, 916.
common law proofs; publication, 917.
conclusiveness, 917.
effect; contradictory; controverting, 920, 921.
construction; certainty, 917.
contents, generally, 917, 918.
necessity of proofs, 916.
recording; filing, 919-921.
sufficiency of proofs, 916, 917.
terms of sale omitted; oral evidence, 917.
provisions of statute must be strictly complied with, 879, 880.
record; necessity; effect of neglect, 880.
sale; deed unnecessary, 921, 922.
by whom conducted, 899, 901.
effect; persons concluded, 911-913.
all parties bound as to all questions, 912, 913.
code provisions, 911, 912.
effect as to omitted parties, 913.
rights of tenants, 913.
injunction restraining, 904-905
in parcels, 899, 900.
notice; publication; proof of; affidavits, 915-921.
amendment, 918, 919.
code provisions generally, 915, 916.
common law proofs; publication, 917.
conclusiveness, 917.
controverting, 920, 921.
effect; contradicting, 920, 921.
construction; certainty, 917.
contents generally, 917 918.
necessity of affidavits, 916.
recording; filing, 919-921.
sufficiency of proofs, 916, 917.
terms of sale omitted; oral evidence, 917.
place, 898, 899.
postponement; notice, etc., 897, 898.
public or private, 898, 899.
purchaser; remedies to obtain possession, 922.

STATUTORY FORECLOSURE; ADVERTISEMENT—*Continued.*
sale; purchaser; summary proceedings, 922.
setting aside; foreclosure *de novo*, 915.
grounds for, 903, 904.
terms, 900, 901.
title of purchaser; what passes, 914.
under loan commissioner's mortgage, 906–911.
who may purchase; mortgagee, 901–903.
statutes; have no extra-territorial force, 880.
inapplicable to mortgages on property in other states, 880, 906
injunction to restrain sale, 906.
stipulation for, 879, 880.
subsequent incumbrancers not affected, unless made defendants, 190
tender; extinguishes power of sale, 882.
under power of sale, a matter of contract, not of jurisdiction, 125, 126.
unliquidated damages; mortgage to secure, 881.
what constitutes, 5.
what mortgages may be foreclosed, 881.
who may foreclose, 882–883
assignee of mortgage, 882.
holder of mortgage to secure notes held by different parties, 883.
personal representatives, 882.
persons jointly interested; joinder, 883.
real parties in interest, 882.
STAY OF PROCEEDINGS.
by payment; subsequent default, 602.
pending appeal; irregular undertaking; setting aside sale, 663.
upon payment, pending foreclosure, of overdue installment, 317.
vacated on day of sale, 628.
attendance of party procuring, 628.
of action on note pending foreclosure, 389.
of foreclosure; pending action at law, 340.
until termination of ejectment against mortgagor, 521.
STIPULATION.
as to default in paying installments, 315, 316
for attorney's fee; usury. See Costs, 953–955.
STOCKHOLDERS. See Corporations.
STRICT FORECLOSURE.
abolishment of, by New York code, 929-930.
against whom allowed, 928, 929.
judgment creditor, 929.
subsequent mortgagee, 929.
wife of mortgagor, 929.
a severe remedy, 925.
controlled strictly by legal principles, 6.
costs in, 942.
court of equity will not refuse; when, 928.
decree; title vests in heirs, not in representatives, 931.
effect of, 924.

STRICT FORECLOSURE—*Continued.*
Illinois doctrine, 928.
infants; action and decree against, 931–932.
in what states allowed, 925, 926.
judgment; form, contents, etc., 932.
setting aside; opening, etc., 933, 934.
jurisdiction; to decree in another state, 930.
maintainable in another state, 930.
mortgagor or successor, necessary defendant, 187.
nature of, 5, 6, 923.
New York doctrine, 929.
no judgment for deficiency allowed in, 925.
not allowed where there are other creditors, purchasers, or incumbrancers, 929.
only remedy, when, 929.
origin of remedy, 923.
parties to, 930, 931.
who may maintain, 931.
who necessary defendants, 930, 931.
payment *pro tanto*, 925.
pleadings in; form and sufficiency, 932.
purchaser at sale may cut off subsequent incumbrancers not made parties by, 193.
redemption; time, etc., 932, 933.
setting aside and opening, 933, 934.
under New York Code of Civil Procedure, 6.
when allowed, 925, 929.
when not allowed; Illinois doctrine, 928.
when extinguishes debt, 924.
when permitted, 6.
where estate of deceased insolvent, 928.
WHO MAY FORECLOSE.
in Indiana, 928.
purchaser under foreclosure sale, 929.
SUBROGATION. See ASSUMPTION.
by one advancing money to pay valid first mortgage, taking second usurious mortgage as security, 412.
equitable; theory of subrogation; allowing mortgagee benefit of assumption of mortgage by purchaser, 276.
taxes; paid by mortgagee; subrogation to rights of state, 512.
SUBSEQUENT INCUMBRANCERS.
action will not be dismissed because they are not made parties, 189.
a lunatic, idiot, or habitual drunkard, a proper defendant, 211.
committee, a necessary defendant, 211.
a necessary defendant being married woman, does not alter rule, 207.
an infant, guardian generally a necessary defendant, 211.
assignee in bankruptcy, or by voluntary assignment, a necessary defendant, 210.
assignees of, necessary defendants, 203.

SUBSEQUENT INCUMBRANCERS—*Continued.*
assignees *pendente lite*, not necessary defendants, 204.
assuming mortgage; not personally liable to prior mortgagee, 279.
deceased; personal representatives necessary defendants, 208.
foreclosure; complaint; allegation as to interests, 345.
heirs, devisees, legatees, and annuitants of, not necessary defendants, 207.
holding any equitable or contingent interest in lien, usually necessary defendants, 202.
husband of, not a necessary defendant, 207.
infant, a proper defendant, 211
may be made defendants on their own application, 189.
may set up usury as defence in foreclosure, 414
mistake; correction as against in foreclosure, 439.
mortgagee; assignee; necessary defendant, 202, 203.
assignee *pendente lite*, not necessary defendant, 204.
being married woman, does not alter rule, 207
having assigned mortgage, and all interest therein, not necessary, 215.
having been paid in full, not proper defendant, 201.
not made a party, should redeem, 191
owning and foreclosing prior mortgage, must set forth claim upon junior mortgage, 193
redeeming; may compel accounting for rents and profits, 191
still owning mortgage, necessary defendant 189.
trustee for numerous bondholders, the latter not necessary defendants, 190, 191.
when they may foreclose their own mortgage, instead of redeeming, 192.
wife of, not a necessary defendant, 207.
necessary defendants, 188.
no longer holding liens, not necessary defendants, 200.
not barred where not made parties 12, 190.
may be cut off by strict foreclosure conducted by purchaser at sale, 193.
wife of, not a necessary defendant, 207.
SUBSEQUENT JUDGMENT CREDITORS. See JUDGMENT CREDITORS.
SUCCESSOR.
in office; may foreclose mortgage to his predecessor, in his official capacity, 129
of assignee in bankruptcy of subsequent incumbrancer, a necessary defendant, 211.
of executors or administrators may foreclose mortgage made to such executors and administrators as such, 122.
of guardian, may foreclose, 129.
of state comptroller, may foreclose, 129, 130.
of state superintendent of insurance, may foreclose, 130.
of trustee holding subsequent mortgage, a necessary defendant, 191.
of United States loan commissioners, may foreclose, 130.

SUMMARY PROCEEDINGS.
by purchaser at foreclosure sale, to obtain possession, 712–714.
at statutory foreclosure sale, 922.
putting purchaser into possession; under New York code, 720.

SUMMONS.
form of; prescribed by New York code, 293.
requisites of, 292.
SERVICE.
begins action in New York, 292.
by publication; effect of change of name of paper, 297.
how made, in New York, 295.
order for publication must be shown by notice annexed, 297.
proof of; how made, 297.
requisites of affidavit to secure order for, 296.
when part of defendants are non-residents or absentees, 295.
defective; how and by whom taken advantage of, 384.
must generally be made upon guardian or committee of incompetent person, 211.
on defendant lunatics and incompetents; when not necessary, 302.
on guardian of infant defendant under fourteen years, necessary, 300.
on infant defendants, necessary, 300.
on married woman; when necessary, 298.
on widow, necessary, 164.
on wife, under early practice, 162.
under present practice, 163.
must be personal, in New York, 163.
publication; allowable when part of defendants are non-residents or absentees, 295.
effect of change of name of paper, 297.
how made, in New York, 295.
order must be shown by notice annexed, 297.
proof of; how made, 297.
requisites of affidavit to secure order for, 296.
summons may be served by, on unknown owners, 298.
shown on motion for reference to compute amount due, 530, 531.
upon infant or incompetent person, should be made with great care, 183.
upon unknown owners, may be by publication, 298.

SUPERINTENDENT OF INSURANCE.
successor may foreclose, 130.

SUPERVISORS. See BOARDS OF SUPERVISORS.

SURETY. See PRINCIPAL AND SURETY.

SURPLUS.
action to enforce claim to, 862, 863.
advertisement; foreclosure by; distribution in surrogate's court, 860, 861.
application; by whom made, 863, 864.
form and contents, 863, 864.
litigating questions of priority on, 864.
must show *prima facie* right, 864.
notice of; necessity, 863, 864.
notice; who entitled to, 864.
how served, 864.
presenting proof of claims, 866, 867.
what must be shown, 865.
certificate and proof of deposit of surplus, 865.
assignment; of mortgage, as collateral security, 853.
claim of assignee; priority, 853, 854.
attorney's lien for costs, 857.
character; as realty or personalty; property belonging to infant, 830.
whether personal or real property, 827–829.
conversion under will, 829.
Massachusetts doctrine, 829, 830.
confession of judgment; as indemnity; priority, 848.
definition; what constitutes, 821.
DISTRIBUTION.
adjustment of equities between subsequent incumbrancers, 832.
action to enforce claim to, 862, 863.
by supreme court, 861, 862.
by surrogate's court, 859–861.
on foreclosure by advertisement, 860, 861.
claims; must be liens on mortgaged premises, 834, 835.
costs and disbursements in proceedings, 962–966.
equitable; liens on two funds, 835.
special and general liens, 835.
foreclosure against executors, 847.
priority between judgment creditors and legatees, 847
general directions, 821.
interest of life tenant, 837, 838.
investment for persons entitled, 823.
judgment for deficiency against executors, etc., 863.
remedy of mortgagee, 863.
lien of judgment against mortgagor, 844, 845.
of moneys not applied for; investment, 857, 858.
on foreclosure by assignee of mortgage as collateral, 341, 342.
order of, 866.
appeal from, 877.
not granted until expiration of time for filing exceptions, 874.
order of priority, 839

SURPLUS—*Continued.*
DISTRIBUTION.
payment into court, 824–827.
foreclosure by advertisement, 827.
payment; into supreme court, 861, 862.
into surrogate's court, 826, 827, 859, 860.
of liens in order of priority, 833.
priority; as affected by agreement, 839.
as between judgment creditors, 845.
as between judgment lien and executory contract to execute mortgage, 847, 848.
as between mortgage and mechanic's lien, 844.
as between second mortgage and junior judgments, 843, 844.
as between several mortgages securing same debt; parcels, 842.
as between unrecorded mortgage and subsequent judgment, 843.
as between vendees under deeds, 856, 857.
attorney's fees, 857.
burden of proof to show, 840.
claim of pledgee or collateral assignee, 853, 854.
dower rights, 850–852.
investment; gross sum, 852, 853.
equal mortgages, 840.
execution and mortgage liens, 847, 848.
homestead rights, 853.
interest of tenant for years, 855.
judgment; against sheriff for failure to return execution, 848, 849.
by confession as indemnity, 848.
confessed by member of partnership, 849.
satisfaction, 846, 847.
litigating questions as to, on application for reference, 864.
mechanic's lien, 855, 856.
of judgments over dower rights, 847.
of liens; determination of, 833, 834.
provision for wife and children, 849, 850.
purchase by mortgagee of part of premises, 854, 855.
purchaser at judicial sale subject to incumbrances, 842.
mistake in indexing, 842.
record presume to determine, 839.
rights of *cestuis que trust*, 856, 857.
of senior mortgagee over junior, 841.
what interests bound by judgment liens, 845, 846.
protection; of equitable rights of third parties, 846.
of other claims and incumbrancers, 831, 832.
provisions of code, 823, 824.

SURPLUS—*Continued.*
DISTRIBUTION.
rights of incumbrancers *pendente lite*, 838.
rights of prior incumbrancers not parties, 838.
rules of New York supreme court, 822.
statutory and court rules; object, 824.
subsequent incumbrancers; equitable priorities, 839, 840.
to what officers payable, 822.
to wrong person; order of restoration, 863.
when not paid into court, 826.
where mortgagor deceased, 836, 837.
who entitled to participate in, 831.
dower; ascertainment of interests; annuity tables, 853.
investment; payment of gross sum in lieu of, 852, 853.
priority of judgment liens, 847.
right to; priority, 850–852
ejected tenant entitled to damages therefrom, 186.
execution; lien of; priority, 847, 848.
homestead; rights of in: distribution; priority, 853.
inferior liens and interests transferred to, 831.
investment, 823.
of dower interest in, 852, 853.
of moneys not applied for, 857, 858.
judgment; against sheriff for failure to return execution, 848, 849
by confession; as indemnity, 848.
priority, 848.
confessed by member of partnership, 849.
priority, 849.
lien on, 844, 845.
priority, 848, 849.
executory contract to execute mortgage, 847, 848.
satisfaction, 846.
what interests bound by lien of, 845, 846.
life tenancy; interest in surplus, 837, 838.
married woman; provision for in distribution of, 849, 850.
mechanics' liens; priority, 855, 856.
New York code; provisions for disposition, 823, 824.
notice of application for. See APPLICATION; NOTICE.
partnership; judgment confessed by one member of, 849.
priority, 849.
payment: into court, 822, 827, 836, 837.
into supreme court; distribution, 861, 862.
into surrogate's court; distribution by surrogate, 859–861.
plaintiff having other liens, may share in, 322, 323
pledge; of mortgagee; claim of pledgee; priority, 853, 854.
prior incumbrancers; rights of when not parties, 838.
distribution, 838
suffering default, 345.
priority of liens; order and determination of, 833, 834.

SURPLUS—*Continued.*
REFERENCE.
account of tenants in common, 870.
appearance by claimant neglecting to file notice of claim, 872, 873.
application for, 863, 864.
ascertaining to whom residue belongs, 872.
attorney's claim on judgment for fees, 871.
how protected, 871.
by whom referee appointed, 864.
claimant neglecting to file notice, can not maintain independent proceeding pending such reference, 873.
conclusiveness of decision, 869.
conduct of, 868.
decides direct issues, 865.
determination of all questions affecting claims, 869.
determination of questions of usury, 868, 869.
duty to ascertain and report as to whole surplus, 872.
equitable adjustment of claims, 869.
equitable assignment of right to surplus, 871.
extent of referee's inquiry, 872.
hearing evidence, 869.
inquiry into validity of conveyances, etc., 863.
is not a collateral action, 865.
is special proceeding, 865.
judgment lien; irregularities, 871.
mechanics' liens, 870.
mistake; clause reserving life estate, 871.
nature of proceedings, 868.
neglect to appeal from order, 866.
oath of referee, 866.
object of, 868.
only perfected liens can be litigated, 870.
order of, 866.
power of court to appoint referee, 865, 866.
powers and duties of referee, generally, 868.
powers of referee; jurisdiction, 868–870.
presentation, proof, and examination of claims, 866, 867.
referee must ascertain and report facts as directed, 873, 874.
report; confirmation, 876.
confirmation; failure to except to, 875.
contents, 873, 874.
exceptions; hearing; papers and testimony, 875, 876.
time and notice of filing, 874, 875.
time of filing and serving, 874.
filing and confirmation, 873, 874.
modification, setting aside, etc.; new order, 875, 876.
must be of facts as directed, 873, 874.
opening, setting aside, etc.; new order, 876, 877.

SURPLUS—*Continued.*
REFERENCE.
report; order of distribution; appeal from, 877.
should show due notice to parties, 874.
to be made as to entire surplus, 872.
as to who entitled to residue, 872.
to include signed testimony, 873.
what parties appeared, 874.
testimony to be signed and filed, 873.
to ascertain amount, 822.
to assert or prove lien junior to mortgage, 831.
to determine priority of claims, 863.
what claims may be litigated, 870–872.
what issues may be disposed of, 868.
restoration; wrong distribution, 863.
rights as between claimants of interest in equity of redemption, 382.
rules; for disposition; statutory and court, 822–824.
subsequent incumbrancers can not litigate between themselves, 824.
equitable priorities between, 839, 840.
tenancy for years; interest of lessee; priority, 855.
trust; rights of beneficiaries; distribution, 856, 857.
SURPRISE.
setting aside foreclosure sale for, 656, 657.
SURROGATE.
distribution of surplus moneys by, 859–861.
TAXATION OF COSTS. See COSTS.
TAXES.
accumulation; as affecting right to appointment of receiver, 791.
as ground for appointment of receiver, 788
allowable; in surplus proceedings. See COSTS, 965, 966.
on reference to compute amount due, 539.
application on mortgage, 484.
complaint must set out amount unpaid, 347.
defence of tax title; right to litigate validity, 521.
failure by mortgagor to pay; effect of, 42.
gravel road; set-off of on foreclosure, 455, 456.
not paid off as decreed, 679.
purchaser not required to complete purchase, 679.
payment by mortgagee, 541.
allowance on reference to compute amount due, 541, 542.
claim for not enforcible in independent action or proceeding, 542.
subrogation to rights of state, 542.
payment on foreclosure, 485, 486.
purchaser; neglecting to complete purchase, chargeable with, 677.
not affected by *lis pendens*, 374.
reference; to compute amount due, 543.
computation on failure to pay taxes and assessments, 543, 544.

TAXES—*Continued.*
sale; bar of purchaser by foreclosure of mortgage previously executed, 507.
purchaser a proper defendant, 211.
not affected by foreclosure to which he is not made a party, 212.
tax title; estoppel of mortgagee to set up against mortgagor, 506.
in mortgagor, no defence on foreclosure, 501.
stipulation for payment of; complaint must set forth amount, etc., paid, 328.
tax title holder; when not affected by foreclosure and sale, 696.
writ of assistance to dispossess, 717.
TENANT FOR LIFE.
surplus; distribution, 837, 838.
TENANTS. See JOINT TENANTS AND TENANTS IN COMMON; LANDLORD AND TENANT.
TENANTS IN COMMON. See JOINT TENANTS AND TENANTS IN COMMON.
TENDER.
can not be made after foreclosure commenced, 306.
extinguishes power of sale, 882.
of costs after action brought; effect, 948, 949.
of debt; at maturity; effect, 483.
payable on demand; effect of, 336.
of whole debt; option to make payments before maturity, 492.
on joinder in foreclosure of matured and unmatured mortgages, 323.
strict foreclosure; opening decree for informality, 934.
THREATS. See DURESS.
TIMBER.
mortgagor may cut from premises, 308.
TIME.
of payment; extension of, as defence in foreclosure, 478.
consideration, 480–481.
not stated, reasonable time intended, 355, 356.
to repay purchase money, not fixed, reasonable time intended, 319.
TITLE.
adverse and paramount; can not be litigated on foreclosure, 500, 501.
after-acquired; inures to mortgagee's benefit, 465, 466.
claimants of adverse or paramount, 503.
effect of making parties, 503–506.
defect in or want of; defence on foreclosure, 524, 525.
defective; no defence to contract assuming mortgage, while grantee is in quiet possession, 275, 276.
as defence against assignee of mortgage, 416.
no defence in foreclosure, 501, 502.
effect of foreclosure and sale on, 10.
estoppel of mortgagor to deny, 461, 463.

TITLE—*Continued.*
failure; counter-claim; interest, 459, 460.
defence on foreclosure, 524–527.
in favor of purchaser subject to mortgage, 435.
foreclosure; only questions affecting equity of redemption determinable upon, 502.
mistake as to, 440, 441.
correction; foreclosure, 440, 441.
outstanding; defence on foreclosure, 519–522.
paramount; subsequently acquired by mortgagor; effect of foreclosure upon, 507–510.
to personal property, vests in personal representatives, not in heirs, 207.
want of; in mortgagor; defence on foreclosure, 526, 527.
when vests in mortgagee, 10.
TITLE DEEDS.
deposit of; equitable mortgage, 319.
TRIAL.
adjournment; change of venue not authorized, 557, 558.
computation of amount due; power to order reference, 558, 562.
conducted same as other actions, 557.
default; bill confessed, 561.
application for judgment; time of applying, 561, 562.
placing cause on calendar, 561, 562.
failure of defendant to appear; inquest or reference of issues, 558.
failure to appear; not equivalent to failure to answer, 558.
frivolous plea; application to strike out, 562.
issue joined; manner of trying, hearing, and determining, 558.
issues; must be disposed of, 558.
mode of; general rules, 557–559.
notice of cause for; all defendants who have appeared must be notified, 388, 559.
only at special term, in county where premises situated, 557.
reference; computation of amount due; general discussion of subject, see REFERENCE.
directing when some of defendants are infants or absentees, 561.
power of court to order, 558.
when by court, and when by jury, 557.
when only part of defendants have answered, 559, 560.
TRUST.
beneficiaries; foreclosing mortgage, should make trustee a party, 128.
may foreclose, 128.
necessary defendants, 173.
need not be made defendants when too numerous, 175.
not *in esse*, or not ascertained, need not be made defendants, when, 175.
one or more may foreclose for all, 128.
railroad bondholders need not be made parties to foreclosure, 127, 128.

TRUST—*Continued.*
beneficiaries; refusing to join with trustee as plaintiffs, necessary defendants, 224.
should unite with trustee in foreclosing mortgage, 129.
should usually be made parties to foreclosure by trustee, unless too numerous, 126, 127.
deed of; executed prior to mortgage, 505.
can not be questioned on foreclosure, 505.
for creditors; creditors may set up usury as defence in foreclosure, 415.
not litigated on foreclosure; ejectment proper action, 505.
surplus; distribution and priority, 856.
rights of beneficiaries, 856, 857.
trustee; appointment of receiver as against trustee of mortgagor's estate, 786.
complaint; allegations by or against trustee, 334.
estoppel of mortgagor in foreclosure to set up trusteeship in himself, 463.
executor of, allowed to foreclose, 118, 119.
holding any interest in premises, necessary defendants, 172.
must be made parties in their representative capacity, 173.
may foreclose, 126.
of fund for benefit of creditors, may foreclose without making creditors parties, 128.
power of sale; costs on foreclosure by trustee, 960.
power of, to purchase at foreclosure sale, 630, 631.
refusal of, to act; appointment of receiver, 811.
refusing to join with beneficiaries as plaintiffs, necessary defendant, 224.
should be made a party to foreclosure by *cestuis que trust*, 128.
should unite with *cestuis que trust* to foreclose mortgage, 129.
successor of, holding subsequent mortgage, a necessary defendant, 191.
should usually foreclose, 119.
to whom mortgages are executed as such, may foreclose, 126.
undue influence; relief on foreclosure, 443, 444.
UNDIVIDED PREMISES.
mortgaged interest may be foreclosed, 312.
one of two joint mortgagors can not sever debt and pay a moiety, 312.
UNDUE INFLUENCE.
relief on foreclosure, 443, 444.
UNITED STATES LOAN COMMISSIONERS.
deed by both, in pursuance of sale held by one only, conveys no title, 104, 909.
successors may foreclose, 130.
UNKNOWN HEIRS. See UNKNOWN OWNERS, 298.
UNKNOWN OWNERS.
may be served by publication, 298.

UNLIQUIDATED DAMAGES. See DAMAGES.
USURY.
as defence in foreclosure, 411, 412.
how alleged and proved, 412–414.
to protect homestead, 414.
to whom available, 414, 415.
estoppel of mortgagor to set up, as against assignee of mortgage in good faith, 464.
injunction to restrain statutory foreclosure in case of, 904.
inquiry into, on reference to ascertain surplus, 868, 869.
law of place, 412–414.
no defence to contract assuming mortgage, 275.
questions of; not raised on confirmation of sale, 636.
set off on foreclosure, 456.
statutes construed strictly, 412.
stipulation for attorney's fee, 953–955.
valid mortgage made part of new usurious mortgage, 412
when purchaser subject to mortgage, not estopped to set up, 473, 474.
VARIANCE.
between allegation and proof of usury, 412, 413.
in description of note or bond, 330, 331, 334.
in description of premises, 353, 354.
VENDOR AND PURCHASER. See also ASSIGNMENT.
answer by vendee not assuming mortgage, 582.
assumption of mortgage. See ASSUMPTION.
defect in, or failure of title, as defence on foreclosure, 524–527.
defence of payment by assumption of prior mortgage against subsequent assignee of purchase money mortgage, 486, 487.
equitable mortgage; deposit of title deeds, 319.
false representations; as to extent and boundaries of land, 437, 438.
as defence in foreclosure, 437, 438
by purchaser assuming mortgage, 435, 436.
by vendor; defence in foreclosure of purchase money mortgage, 434, 438.
fraud; as to number of acres; defence in foreclosure, 436, 437.
innocent purchasers; relieved by satisfaction procured by, 493.
mistake; as defence in foreclosure, 438–443.
correction as against subsequent vendee; foreclosure, 439.
purchase money mortgage; fraud; relief, 319, 430, 431, 433, 434.
defence on foreclosure, 319, 430, 431, 433, 434.
purchaser; from mortgagor, may set up usury as defence in foreclosure, 415.
from both mortgagor and mortgagee, takes whole title, 309.
intermediate; having assumed mortgage, personally liable, 285.
not having assumed mortgage, not liable, 286.
not liable for mortgage debt, unless he actually assumes it, 274.

VENDOR AND PURCHASER—*Continued.*
purchaser of mortgaged premises, not liable for deficiency, 266.
otherwise in New Jersey, 268.
the rule in New York, 269.
purchaser; subject to mortgage; complaint; decree for deficiency, 349, 350.
denial of assumption, 498, 499.
estoppel against, 471–474.
purchaser; under land contract with mortgagor, a necessary defendant, 144.
VENUE.
action brought in improper county, 23.
change of, 23.
inconvenience of witnesses no obstacle, 24.
motion for, 23.
before answer, 24, 25.
not authorized by provisions as to adjournment, 557, 558.
when made, 24.
debt payable in one county; land in another, 22.
provision of New York code, 21, 22.
in New York, where land within the state, 21.
place of holding reference to compute amount due, 547, 548.
where the land lies out of the state, 25.
VERDICT
omission to set out note and bond cured by, 332.
VOLUNTARY APPEARANCE. See APPEARANCE.
WAIVER
of forfeiture, by extension of time for payment of installment, 318.
WASTE
as affecting right of appointment of receiver, 791.
as ground for appointment of receiver, 788–790.
WIDOW. See also DOWER; HUSBAND AND WIFE; HOMESTEAD.
dower; admeasured; in premises mortgaged by husband alone, 161.
when barred by foreclosure, 345.
must be served with summons, 163, 164.
not a necessary defendant, where she accepts a devise or bequest made in lieu of dower, 161.
of mortgagor, or owner of equity of redemption, a necessary defendant, 159.
omitted as a defendant; can not maintain ejectment, 162.
may redeem, 161.
who did not sign mortgage, not a proper defendant, 159.
WIFE. See DOWER; HUSBAND AND WIFE; HOMESTEAD; WIDOW.
WILL.
costs on foreclosure, right of devisees to have taxed, 967.
devisees; may set up usury as defence in foreclosure, 414.
of persons liable for deficiency, must be sued therefor separately from foreclosure, 262, 263.

WILL—*Continued.*
equitable conversion; as affecting character of surplus, 829.
legacies; distribution of surplus; priority of judgment liens, 847.
parties; devisees. See PARTIES.
surplus; judgment for deficiency against executors, etc., 863.
action against heirs or devisees, 863.
WISCONSIN.
foreclosure in; necessity of averring proceedings at law, 340.
WITNESSES.
evidence on reference to compute amount due, 537, 538.
on reference; to ascertain surplus; signing testimony, 873.
to compute amount due; testimony need not be signed, 538
husband and wife competent for each other, 534.
WORDS AND PHRASES. See DEFINITIONS.
WRIT OF ASSISTANCE.
to put purchaser at foreclosure sale into possession, 694, 695, 714–720.
WRIT OF ENTRY.
nature and use of, 5.
WRIT OF ERROR.
lis pendens, when effective, 363.